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COMMISSION STAFF WORKING DOCUMENT

on the Application of the EU Charter of Fundamental Rights in 2018

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**

2018 Annual Report on the Application of the EU Charter of Fundamental Rights

{ COM(2019) 257 final }

Introduction

After the entry into force of the **EU Charter of Fundamental Rights**¹ in December 2009, the European Commission adopted a **strategy for implementing it in an effective way**.² One of the strategy's objectives is to ensure that the EU is beyond reproach in upholding fundamental rights, in particular when it legislates. The Commission also committed itself to drawing up annual reports to keep the public informed and measure progress with implementing the Charter. These are intended to provide a factual basis for ongoing informed dialogue between all EU institutions and Member States.

This report, for 2018, informs the public about situations in which they can rely on the Charter and about the role of played by the European Union in the field of fundamental rights. In covering the full range of Charter provisions each year, the Commission's reports aim to track where progress is being made, where further efforts are still necessary, and where new concerns are emerging.

The report contains an account of action taken by the EU institutions, along with analysis of letters and petitions from the general public and questions from the European Parliament. It also covers key developments in 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 an 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 at both national level (by Member States' constitutional systems) and EU level (by the Charter).

The Charter applies to all action taken by the EU institutions (including the European Parliament and the Council), which must comply with 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 systems of fundamental rights, but complements them. The factor linking an alleged violation of the Charter with EU law depends on the situation concerned. For example, a connecting factor exists where:

- national legislation transposes an EU directive;
- a public authority applies EU law; or
- a national court applies or interprets EU law.

If a national authority (administration or court) violates fundamental rights set out in the Charter when implementing EU law, the Commission can start an infringement procedure against the Member State in question and may take the matter to the **CJEU**. The Commission is not a judicial body or a court of appeal against the

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

² http://ec.europa.eu/justice/news/intro/doc/com_2010_573_en.pdf

decisions of national courts. Nor does it, as a matter of principle, examine the merits of an individual case, unless this is relevant to its task of ensuring that the Member States apply EU law correctly. In particular, if it detects a wider problem – one that is structural in nature – it can contact the national authorities to find a solution, and it may open an infringement procedure and ultimately take a Member State to the CJEU. The objective of 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 any action by the EU institutions violates their fundamental rights as enshrined in the Charter, they can, subject to certain conditions, bring their case before the CJEU, which has the power to annul the action concerned.

Matters outside the scope of EU law

The Commission cannot pursue complaints concerning matters beyond the scope of EU law. This does not necessarily mean that no fundamental rights have been violated. If a situation is not covered by 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 upheld by national courts, including, in many countries, constitutional courts. Complaints made in this context should thus be addressed at national level.

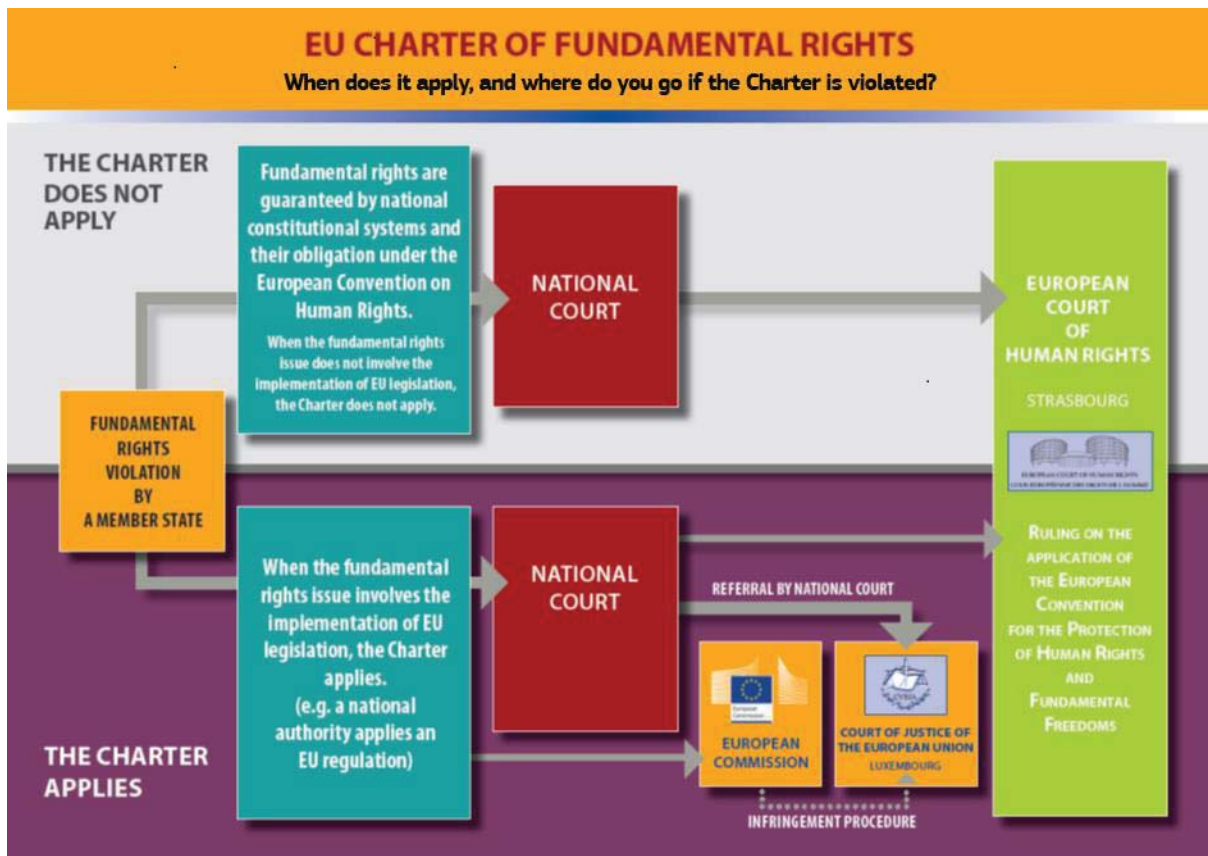
Where the Charter is not applicable in certain situations within a Member State, individuals seeking to respond to a Member State's violation of a right guaranteed under the **European Convention on Human Rights (ECHR)** may thus:

- have recourse to **national remedies**; and, once such remedies have been exhausted,
- bring an action before the European Court of Human Rights (ECtHR) in Strasbourg for a violation of a right guaranteed by the **European Convention on Human Rights (ECHR)**.

All Member States are bound by the commitments they have made under the ECHR, independently of their obligations under EU law. The ECtHR has designed an admissibility checklist to help potential applicants work out for themselves whether there may be any obstacles to its examining their complaints.³

The interpretation of those Charter rights which correspond to rights guaranteed under the ECHR must be consistent with the way the ECtHR interprets ECHR rights.

³ <http://www.echr.coe.int/ECHR/EN/Header/Applicants/Apply+to+the+Court/Checklist/>



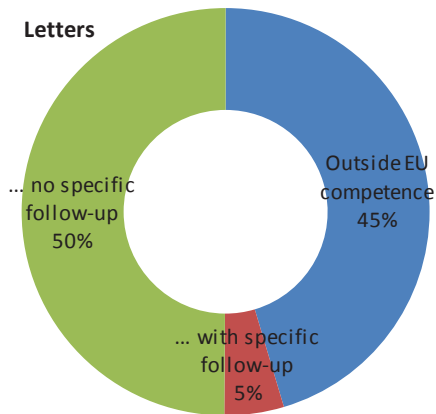
EU accession to the European Convention of Human Rights

The Treaty of Lisbon imposed an obligation on the EU to accede to the ECHR. EU **accession to the Convention** remains a priority for the Commission. It will make EU law more effective and improve the coherence of fundamental rights protection in Europe. However, the CJEU's opinion of December 2014, by which the Court declared the 2013 draft Accession Agreement incompatible with the Treaties, raised a number of significant and complex questions. As a result, a number of points in the draft Accession Agreement will have to be renegotiated. In its capacity as EU negotiator, the Commission continues to consult the relevant Council working party on solutions to address the various objections raised by the Court. The Commission is making a serious effort to carry the accession process further and is currently exploring solutions to certain outstanding issues.

Overview of letters and questions to the Commission on fundamental rights

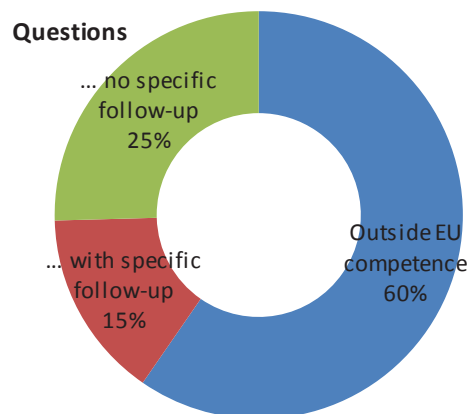
In 2018, the Commission received 2946 letters from the public and 582 questions from the European Parliament on fundamental rights issues. Of the 531 petitions it received from the European Parliament, 90 concerned fundamental rights.⁴

⁴ See also the section on Article 44 below.

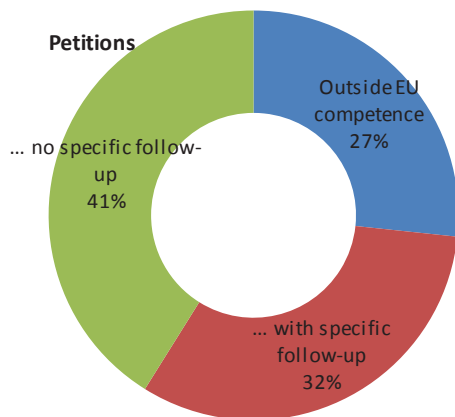


Among the letters from the public, 1609 concerned issues within the EU's competence.

In a number of cases, the Commission asked the Member States concerned to provide information or explained the applicable EU rules to the complainant. In other cases, the complaints should have been addressed to the national authorities or the ECtHR. Where possible, complainants were redirected to other bodies (e.g. national data protection authorities) for more information.



Among the questions from the European Parliament, 236 concerned issues within the EU's competence.

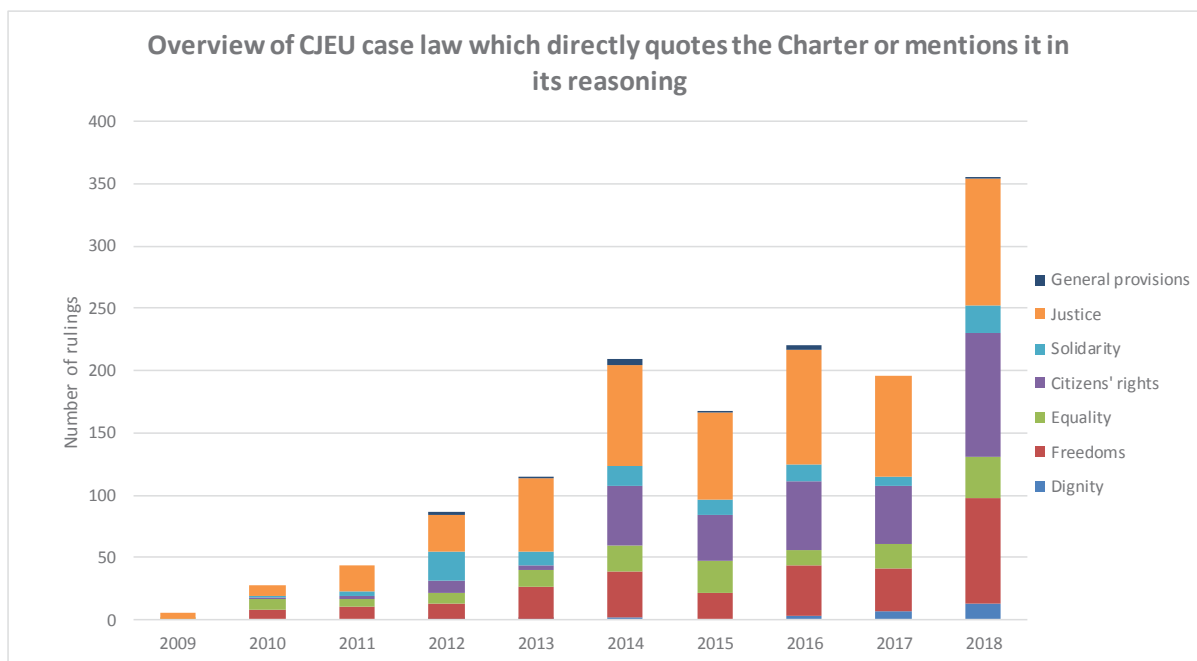


Among the 90 petitions relating to fundamental rights, 66 concerned issues within EU competence.

In a number of cases, the Commission contacted the Member States to obtain clarification about alleged violations. The replies explained or clarified the relevant policies and ongoing initiatives.

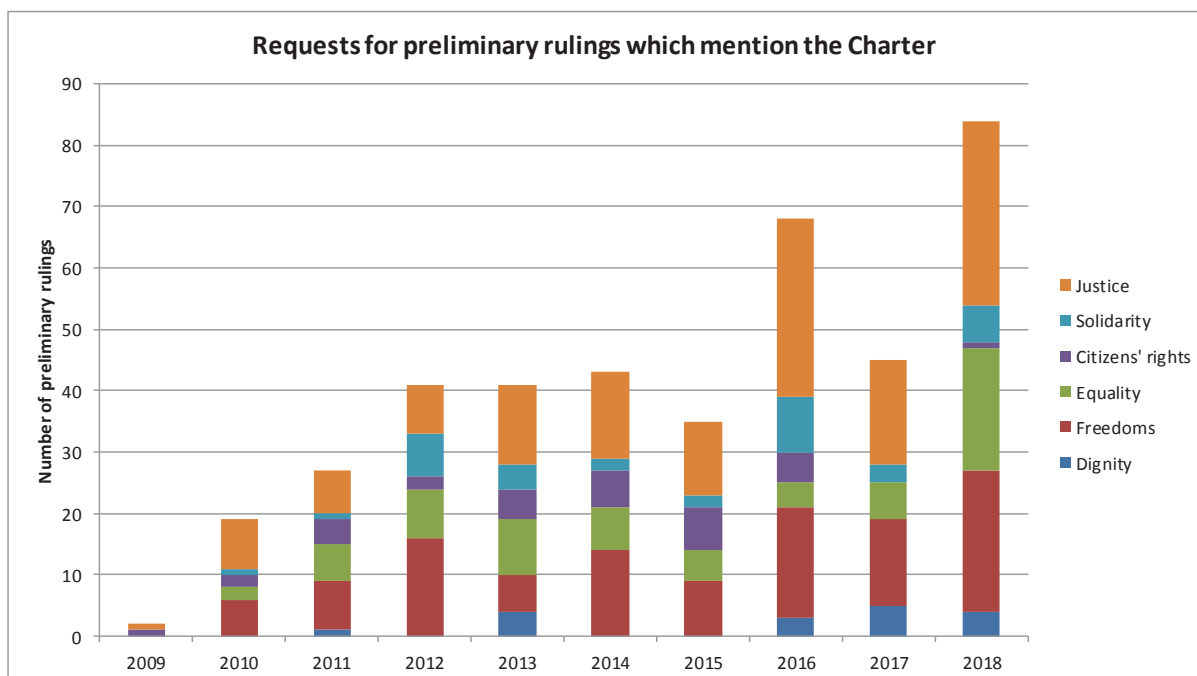
Overview of CJEU (Court of Justice, General Court and Civil Service Tribunal) decisions referring to the Charter

The EU courts have increasingly referred to the Charter in their decisions. The number of decisions quoting the Charter in their reasoning rose from 27 in 2010 to 195 in 2017 and 356 in 2018 (see Appendix I for an overview of all relevant rulings). The Charter articles referred to prominently in cases before the EU courts were those on the right to an effective remedy and to a fair trial, the right to good administration, equality before the law and the right to property.



Source: European Commission

When addressing questions to the CJEU (requests for preliminary rulings), national courts often refer to the Charter. Of those requests submitted by judges in 2018, **84 contained a reference to the Charter**, as compared with 44 in 2017 and 19 in 2010 (See Appendix II for an overview).

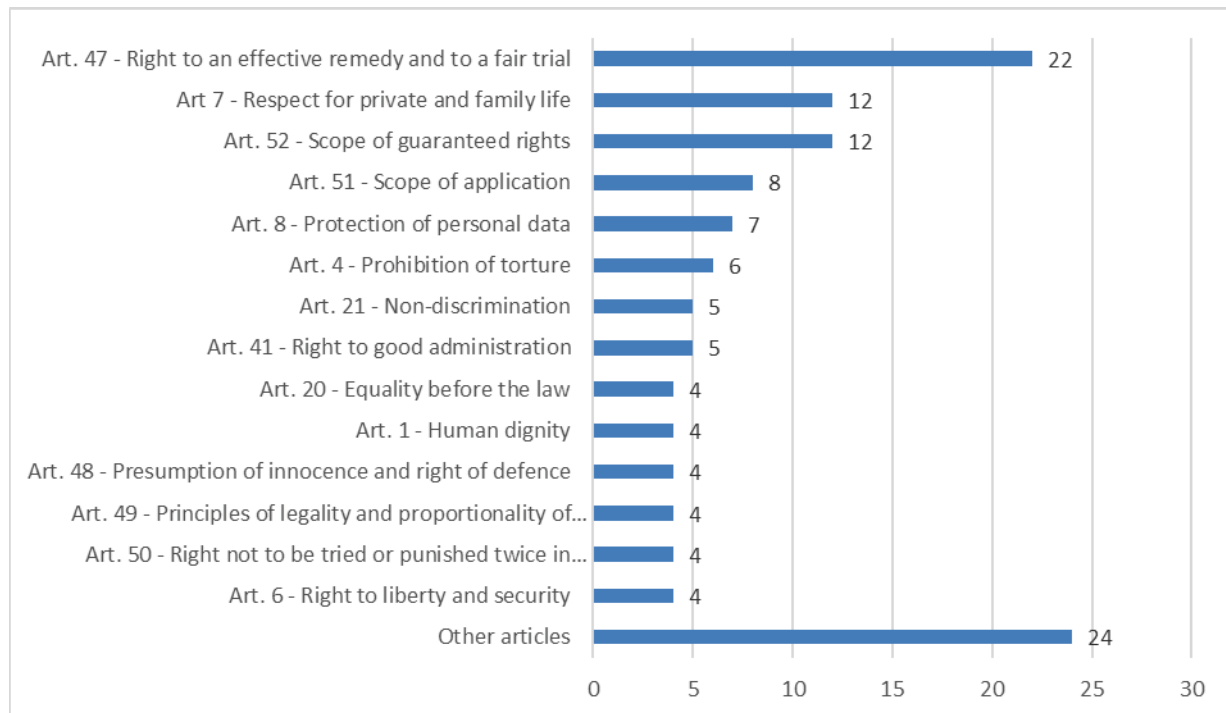


Source: European Commission

References to Charter rights in national court decisions

As regards decisions handed down by **national courts in 2018**, the Charter provisions referred to most concerned the right to an effective remedy, the respect for private and family life, and the scope of guaranteed rights.

National courts: Number of references to Charter articles in selected high court decisions, 2018

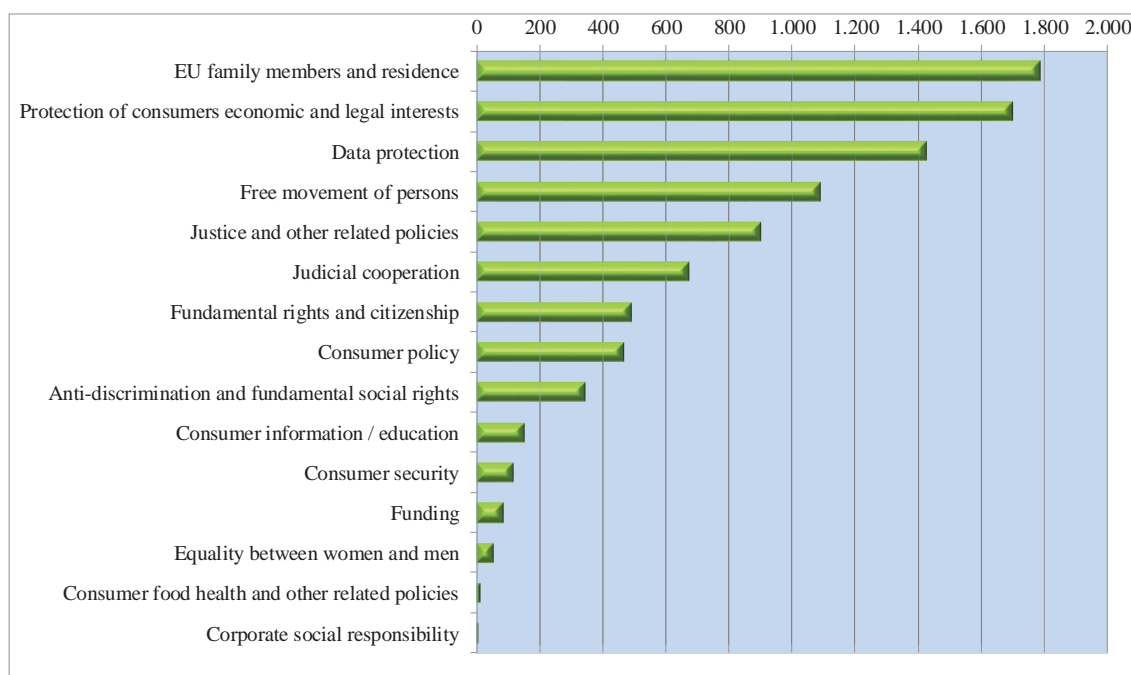


Source: European Union Agency for Fundamental Rights (FRA), 2018

N.B.: based on 72 court decisions analysed by FRA. These were issued in 28 Member States in 2018. Up to three decisions were reported per Member State. No court decisions were reported for Malta. The category 'Other articles' includes articles that were referred to in fewer than four analysed court decisions. More than one article can be referred to in one court decision.

Overview of enquiries to Europe Direct Contact Centres

The data collected by the Europe Direct Contact Centre (EDCC) confirm an even greater degree of interest among citizens on justice, citizenship and fundamental rights compared to 2017. In 2018, the EDCC replied to 9 722 enquiries from citizens (in 2017: 7 761). Most concerned topics were the status of family members of EU citizens and their right of residence (18.4%), the protection of consumers economic and legal interests (17.5%), data protection (14.7%) and free movement of persons (11.2%).



Source: European Commission

Methodology and structure of the staff working document

The staff working document attached to the annual report treats the Charter as a legally binding source of law while also giving a broader account of the various ways in which, in 2018, the Charter was invoked and contributed to progress on respecting and promoting fundamental rights in a number of areas. The working document therefore refers to the Charter as a legally binding instrument and/or a policy objective, depending on the areas concerned. The accounts given in the report's various chapters vary in both breadth and depth, depending on the progress made in specific policy areas, such as migration, asylum, the digital single market and the European Energy Union. These reflect the 10 priority policy areas identified by President Juncker in his opening statement to the European Parliament in 2014.⁵

Some chapters thus show how certain legislative measures interact with fundamental rights by promoting them or by striking the right balance in complying with them. References to the relevant CJEU case law are included. Other chapters may concentrate on policy rather than legislative measures. To illustrate the Charter's growing impact, the staff working document (SWD) (in the margins of the page where relevant) includes national court decisions referring to the Charter, irrespective of whether EU law was applicable or not in those national cases.

Some measures and cases may relate to different articles of the Charter. For instance, a measure and/or case may be explained in some detail in one chapter (the heading of one article), but it can also be referred to in another.

⁵ President Juncker's political guidelines, A new start for Europe: my agenda for jobs, growth, fairness and democratic change – political guidelines for the next European Commission (15 July 2014); https://ec.europa.eu/commission/publications/president-junckers-political-guidelines_en

The structure of the SWD reflects the Charter's six headings: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights and Justice. Each of the SWD's six chapters contains the following information on the application of the Charter, where available and relevant:

- legislation:
 - examples of EU institutions' legislation (proposed or adopted) promoting Charter rights; and
 - examples of how the EU institutions and the Member States ensured compliance with and applied the Charter in 2018 within other legislation (proposed or adopted);
- policy:
 - examples of how the EU institutions and the Member States ensured compliance with and applied the Charter in 2016 within policy areas, e.g. through recommendations, guidelines and good practice;
- case law:
 - relevant CJEU jurisprudence; and
 - national courts' case law referring to the Charter (within or outside the scope of EU law);
- application by Member States:
 - follow-up: infringement procedures initiated by the Commission against Member States for failure (correctly) to implement relevant legislation;
- questions and petitions from the European Parliament and letters from the general public received in 2018 focusing on major issues to do with fundamental rights; and
- data gathered by the EU Agency for Fundamental Rights in 2018.

Title I

Dignity

Human dignity, the basis of all fundamental rights, must be fully respected by all EU institutions. One of 2018's major concerns was the protection of this fundamental right. The need to ensure effective protection for human dignity guided the Commission in many legislative proposals during the year, including: future funding instruments in the areas of migration, border management and security; ethics guidelines on artificial intelligence; and proposals for a regulation establishing the Asylum and Migration Fund.

The Commission continued to implement measures and appropriate instruments to eradicate female genital mutilation.

On 13 June 2018, the heads of ten EU agencies signed a joint statement of commitment to work jointly against trafficking in human beings.

As regards the fundamental right protected in Article 4 of the Charter (prohibition of torture and inhuman or degrading treatment or punishment), the Court of Justice of the EU (in case ML6) ruled that the executing judicial authority cannot rule out a real risk that the person for whom a European arrest warrant has been issued in order to carry out a custodial sentence will be subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter (merely because that person has a legal remedy in the issuing Member State permitting him to challenge the conditions of his detention).

Article 1 — Human dignity

Human dignity, protected under Article 1 of the Charter, is the basis of all fundamental rights. It guarantees the right of human beings to be protected from being treated as mere objects by the state or by their fellow citizens. It is both a right in and of itself, and an essential part of all other rights. Human dignity must thus be respected even when other rights are restricted. All rights and freedoms that derive from dignity, such as the right to life and the prohibition of torture and slavery, add specific protection against infringements of dignity. They must equally be upheld in order to protect other rights and freedoms enshrined in the Charter, such as freedom of expression and freedom of association. None of the rights laid down in the Charter may be used in a way that is detrimental to the dignity of another person.

Legislation and policy

In the draft **Artificial Intelligence (AI) Ethics Guidelines** issued on 18 December 2018 by the Commission's High-Level Expert Group on Artificial Intelligence (AI HLEG)⁷, the High-Level Group stated that any approach to AI ethics

⁶ Judgment of 25 July 2018 in case C-220/18 *PPU*, *ML*

⁷ <https://ec.europa.eu/digital-single-market/en/news/draft-ethics-guidelines-trustworthy-ai>

must be based on the fundamental rights defined in the EU Treaties and the Charter of Fundamental Rights. These fundamental rights are a basis for identifying ethical principles and specifying how concrete ethical values can be operationalised in the context of AI. The High-Level Group identified human dignity, equality and non-discrimination as central concepts in their deliberations.

On 12 and 13 June 2018, the Commission adopted legislative proposals⁸ for **future funding instruments under the next Multiannual Financial Framework. The areas concerned were migration, border management and security.** The proposed funding instruments build on existing funding instruments. The centrality of fundamental rights is enshrined in Article 3 of each of the proposals, which stipulates that each specific fund will contribute to the Regulation's objectives, in full compliance with EU commitments on fundamental rights.

Furthermore, the following point to the need to implement the funds in full compliance with the rights and principles enshrined in the Charter of Fundamental Rights of the European Union : recital (5) of the proposal for a Regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund; recital (15) of the proposal for a Regulation of the European Parliament and of the Council establishing, as part of the Integrated Border Management Fund, the instrument for financial support for border management and visa; and recital (9) of the proposal for a Regulation of the European Parliament and of the Council establishing the Internal Security Fund.

More specifically, action taken with the support of the Asylum and Migration Fund should take full account of the fundamental rights of migrants, refugees and asylum seekers. It should, in particular, ensure full respect of the right to human dignity, and the right to asylum⁹ of those in need of international protection and protection in the event of removal, expulsion or extradition¹⁰, including the application of principle of *non-refoulement* to those who do meet the conditions for the right to stay. The proposal to establish the Asylum and Migration Fund pays special attention to protection for vulnerable people, in particular children and unaccompanied minors. In addition, as stated in Article 3 of the proposal, all actions funded by the Internal Security Fund should be implemented with full respect for fundamental rights and human dignity. Specifically, they should comply with the provisions of the Charter.

The rules on the part of the Funds implemented under shared management are set out in the Commission proposal for the **Common Provisions Regulation**¹¹, which provides for further provisions on compliance with the

⁸ Proposal for a Regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund (AMF), COM/2018/471 final, 12.06.2018:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1540390612505&uri=CELEX%3A52018PC0471>;

Proposal for a Regulation of the European Parliament and of the Council establishing, as part of the Integrated Border Management Fund, the instrument for financial support for border management and visa (BMVI), COM/2018/473 final, 12.06.2018:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1540390917212&uri=CELEX%3A52018PC0473>;

Proposal for a Regulation of the European Parliament and of the Council establishing the Internal Security Fund (ISF), COM/2018/472 final, 13.06.2018:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1540391576418&uri=CELEX%3A52018PC0472>

⁹ See Article 18.

¹⁰ See Article 19.

¹¹ Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal

Charter. In particular, the proposal requires the Charter to be taken into account at the project selection stage and a mechanism to be established to verify whether the actions are compliant with the Charter.

Similarly, the Commission proposal for the Common Agricultural Policy (CAP)^[1] states that Member States must design the interventions in their CAP Strategic Plans in accordance with the Charter of Fundamental Rights and with the general principles of Union law.

In the area of migration, the need to ensure effective protection for human dignity guided the Commission in concluding status agreements with Serbia, Albania, the former Yugoslav Republic of Macedonia¹², Montenegro and Bosnia-Herzegovina in 2018¹³. These agreements provide for the deployment of European Border and Coast Guard teams with executive powers on the territory of these non-EU countries. They also state that the teams must respect fundamental rights and freedoms when performing their tasks. These include human dignity and other relevant rights, such as the right to respect for private life and personal data¹⁴. The status agreements also provide for a complaints mechanism to deal with alleged breaches of fundamental rights.

NATIONAL CASE LAW BOX

In a case dealing with the application of Directive 2013/33/EU (Reception Directive), the Supreme Court of the Republic of **Slovenia**¹⁵ ruled that Article 78 of the International Protection Act violated Article 1 (Human dignity) of the Charter, insofar as it prescribes that the rights to which a person seeking international protection is entitled cease when the transfer decision becomes enforceable and not with the actual transfer to another member state.

Article 2 — Right to life

Article 2 of the Charter states that everyone has the right to life and no one should be condemned to the death penalty or executed. The European Court of Human Rights has ruled since 1989 that exposure to the pervasive and growing fear of execution — the ‘death row phenomenon’ — violated the European Convention on Human Rights. The ECtHR has also held that carrying out the death penalty could be considered inhuman and degrading and therefore contrary to Article 3 of the European Convention on Human Rights¹⁶. Preventing loss of lives is also one of the main challenges facing the EU in managing irregular migration.

Security Fund and the Border Management and Visa Instrument, COM/2018/375 final - 2018/0196 (COD), 29.05.2018,

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A375%3AFIN>

^[1] COM(2018)392, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A392%3AFIN>

¹² Now called ‘the Republic of North Macedonia’

¹³ Until now only the agreement with Albania has been published: OJ L4666/3, 18.02.2019

¹⁴ See Articles 7 and 8.

¹⁵ Slovenia, Supreme Court, case I Up 10/2018, 4 April 2018.

¹⁶ ECtHR, judgment of 2 March 2010 in case of *Al-Saadoon & Mufdhi v. the United Kingdom*, application no 61498/08.

Article 3 — Right to the integrity of the person

The right to physical and mental integrity protects people from infringements by public authorities and requires authorities to promote such protection, e.g. through specific legislation. In medicine and biology, in particular, the free and informed consent of the person concerned and the prohibition of eugenic practices, of making the human body and its parts a source of financial gain and of the reproductive cloning of human beings must be respected.

Legislation

Progress was made on the EU's accession to the Council of Europe's **Istanbul Convention** on preventing and combating violence against women and domestic violence¹⁷, following the EU's signing of the Convention in June 2017. The Commission and the Member States have laid down in a code of conduct the practical arrangements enabling the EU and the Member States to jointly fulfil their legal obligations under the Convention.

The Convention has been signed by all Member States. Three of them (Greece, Croatia and Luxembourg) concluded the ratification process in 2018, bringing the total number of EU countries having ratified the Convention to 20.¹⁸ The Commission is working with the Council of Europe to encourage an informed debate in the remaining Member States, with a view to enabling the Convention to be ratified swiftly.

Policy

The Commission continued its awareness-raising campaign to end violence against women, '*No.Non.Nein. #Say No Stop VAW*', producing and disseminating a variety of social media and communication materials.¹⁹ It wound up the campaign in December 2018 with a high-level event that both looked back at what had been achieved and considered the next steps to be taken at national, European and international level to eliminate gender-based violence.

November 2018 marked the five-year anniversary of the 2013 communication 'Towards the elimination of female genital mutilation'²⁰. Female genital mutilation (FGM) is practised for cultural, religious and/or social reasons, and eliminating it calls for a range of action: data collection, prevention, protection of girls at risk, prosecution of perpetrators and provision of services for victims. The Commission will continue to implement the measures set out in the Communication, use appropriate instruments to eradicate FGM, and build on this experience to tackle other harmful practices.

¹⁷ Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, signed in Istanbul on 11 May 2011, <https://rm.coe.int/168008482e>

¹⁸ BE, DK, DE, EE, EL, ES, FR, HR, IT, CY, LU, MT, NL, AT, PL, PT, RO, SI, FI, SE.

¹⁹ <http://ec.europa.eu/justice/saynostopvaw/>

²⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2013:0833:FIN>

Article 4 — Prohibition of torture and inhuman or degrading treatment or punishment

Article 4 of the Charter prohibits torture and inhuman or degrading treatment or punishment. Complying with Article 4 requires authorities to be particularly vigilant where border controls, immigration and asylum are concerned.

Legislation and policy

In the context of the **Alliance for Torture-Free Trade**²¹ the Union continued efforts to ban or control worldwide trade in products used for torture and capital punishment. Launched in September 2017 in the margins of the United Nations General Assembly, the Alliance is an initiative of the EU, Argentina and Mongolia. Almost 60 countries from all over the world have signed up to it so far with more countries expected to join in the future. In previous years, the Union has taken legislative steps to reinforce the ban on trade in products used for torture and capital punishment²².

On 24 September 2018, ministers from the countries in the Alliance gathered in New York for their first ministerial meeting, one year after the launch in 2017. Following on from an experts meeting in Brussels in June 2018 on sharing know-how and resources with those countries that want to introduce tough export controls, the ministerial meeting helped to maintain international momentum to stop the trade in instruments used for torture and carrying out the death penalty. In particular, ministers discussed how to work towards a binding United Nations convention.

Case law

In case *ML*²³, the CJEU ruled that the executing judicial authority cannot rule out a real risk that the person for whom a European arrest warrant has been issued for the purpose of carrying out a custodial sentence will be subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter, merely because that person has, in the issuing Member State, a legal remedy permitting him or her to challenge the conditions of his or her detention, although the existence of such a remedy may be taken into account by the executing judicial authority when deciding whether to surrender the person concerned. The executing judicial authority is required to assess only the conditions of detention in the prisons in which, according to the information available to it, the person concerned is likely to be detained, even if only on a temporary or transitional basis. The executing judicial authority must assess, to that end, solely the actual and precise conditions of detention of the person concerned that are relevant for determining whether that person will be exposed to a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter. Finally, the executing judicial authority may take into account information provided by authorities of the issuing Member State other than the issuing judicial authority,

²¹ <http://www.torturefreetrade.org/>

²² Regulation (EU) 2016/2134 of the European Parliament and of the Council of 23 November 2016 amending Council Regulation (EC) N° 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, OJ L 338, 13.12.2016, p.1.

²³ Judgment of 25 July 2018 in case C-220/18 *PPU, ML*

such as, in particular, an assurance that the individual concerned will not be subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

Article 5 — Prohibition of slavery and forced labour

Slavery violates human dignity. Article 5(3) of the Charter prohibits trafficking in human beings. Slavery and forced labour are also forms of exploitation covered by the definition of trafficking in human beings in Article 2 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (the ‘Anti-Trafficking Directive’)²⁴.

Policy

The Commission implemented actions set forth in its 2017 communication stepping up EU action to address trafficking in human beings.: On 13 June 2018, 10 heads of EU agencies signed a joint statement of commitment to work jointly against trafficking in human beings.²⁵ This joint statement is part of a coordination effort by the EU Anti-Trafficking Coordinator/European Commission to tackle human trafficking and acknowledge it as a grave violation of fundamental rights, which is explicitly prohibited by Article 5(3) of the Charter,

After the 2017 Commission Communication on the follow-up to the EU Strategy towards the eradication of trafficking in human beings and identifying further concrete action²⁶, the European Gender Equality Institute, in cooperation with the Commission, developed a report on ‘**Gender-specific measures in anti-trafficking actions**’. This gives Member States practical, gender-specific guidance on how to implement the provisions of the European Union legislative act addressing trafficking in human beings, in particular the Anti-Trafficking Directive and the Victims’ Rights Directive²⁷.

On 3 December 2018, the Commission adopted its **second report**²⁸ with an accompanying staff working document. This takes stock of measures since 2015, highlights the main trends in human trafficking and outlines the remaining challenges associated with banning human trafficking that the EU and Member States must address

²⁴ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101, 15.4.2011, p. 1).

²⁵ Joint Statement of commitment to working together against trafficking in human beings (signed by CEPOL, EASO, ECBGA, EIGE, Europol, Eurojust, EMCDDA, eu-Lisa, Eurofound, FRA): https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu_agencies_joint_statement_of_commitment_to_working_together_to_add_ress_thb_.pdf

²⁶ Communication from the Commission to the European Parliament and the Council reporting on the follow-up to the EU Strategy towards the Eradication of trafficking in human beings and identifying further concrete actions, COM/2017/0728 final

²⁷ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012, p. 57

²⁸ Second report on the progress made in the fight against trafficking in human beings (2018), as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, COM(2018) 777 final, 3.12.2018, : https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20181204_com-2018-777-report_en.pdf

as a priority with regard to the Anti-Trafficking Directive. To continue widening the knowledge base and improving understanding of this complex phenomenon, the second progress report was complemented by EU-wide statistics on human trafficking²⁹.

To disseminate knowledge about human trafficking by providing the conceptual clarity needed for practical policies, operational action and funding allocations, the Commission has developed the document 'Key concepts in a nutshell'³⁰ on the prohibition of human trafficking.

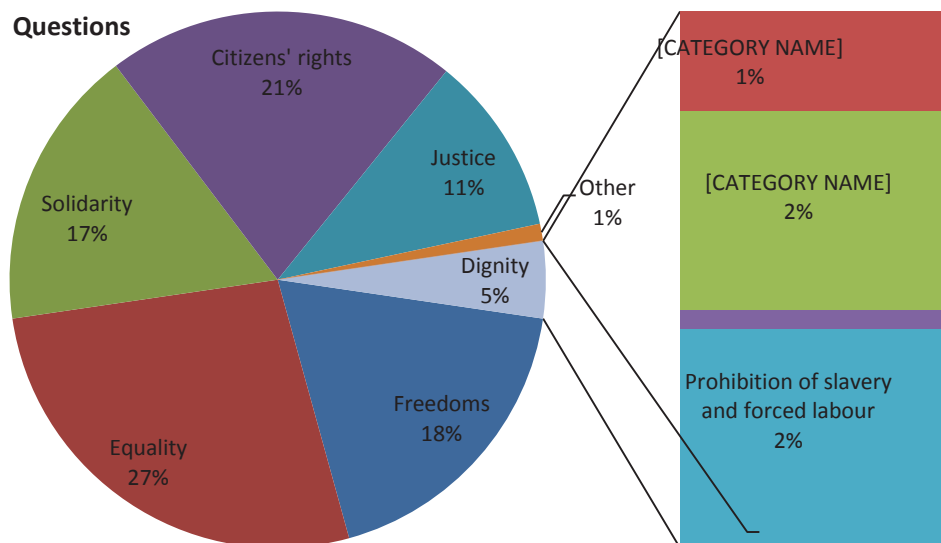
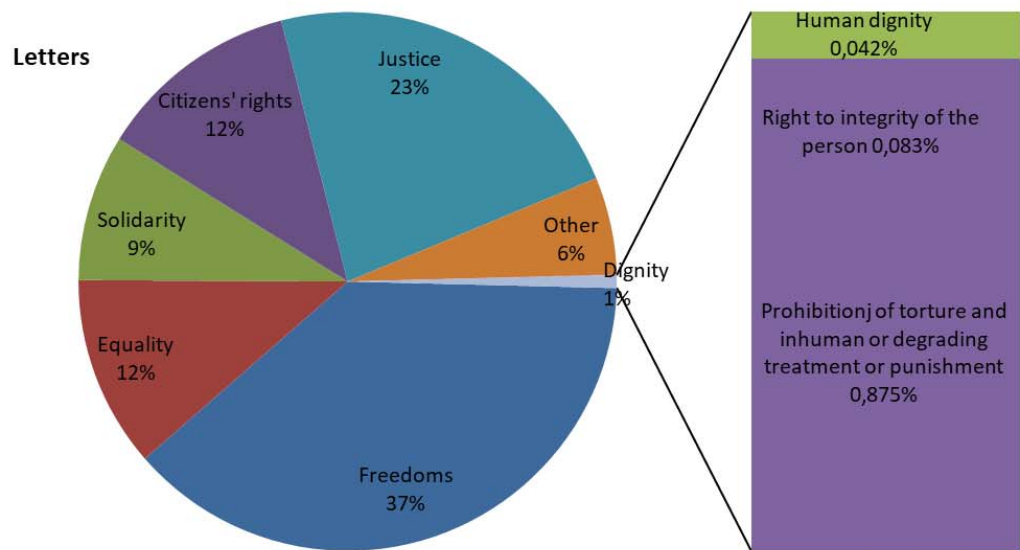
Application by Member States

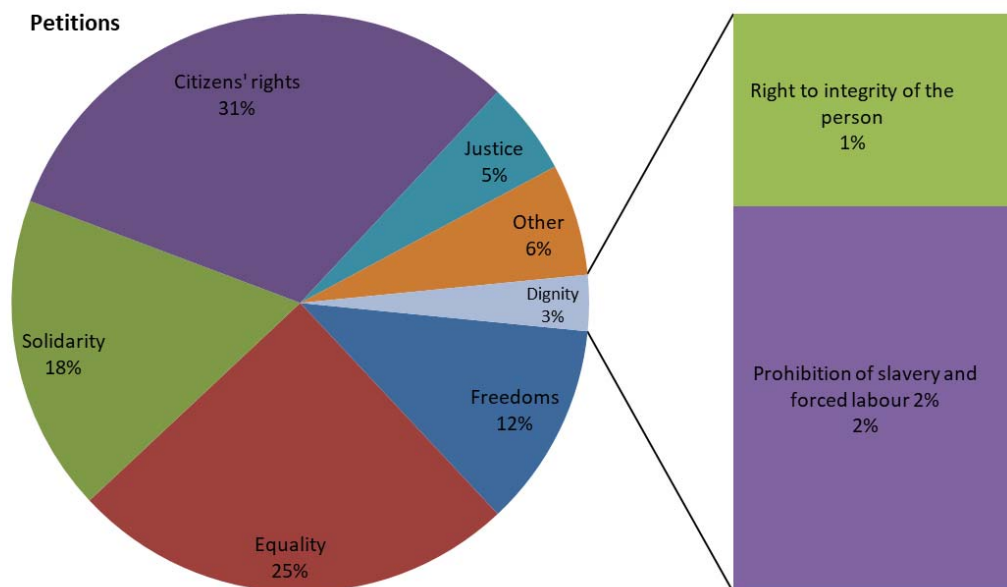
In the context of EU cohesion policy, Poland was approached by Commission departments in connection with a possible violation of the prohibition on slavery and forced labour in a project co-financed by European Structural and Investment (ESI) Funds. In particular, the national authorities were asked to investigate the alleged employment of North Korean forced workers in Poland, after the press had accused several companies of this, including some companies that had received co-financing from ESI funds. The Commission was informed that the Polish National Labour Inspectorate had identified no cases of employment, illegal or otherwise, of North Korean citizens within other companies receiving EU funds.

In late 2015 and 2016, several reports emerged on cases of alleged abuses and forced labour of migrant fishers in the EU fishing industry. Following these reports, the Member State concerned took various measures to rectify the situation, including setting up a new recruitment scheme for non-EEA workers. Despite these efforts, various international and national public and private bodies, including the Council of Europe, have continued to find shortcomings in the protection of migrant workers in the fisheries sector. The relevant Commission departments held a meeting with the authorities of the country concerned to examine the various aspects of the scheme from different points of view, including that of human trafficking. In 2018, a trade union organisation started a court case at national level against the government, claiming the scheme does not protect workers from exploitation and human trafficking.

²⁹ Data collection on trafficking in human beings in the EU (2018), : https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20181204_data-collection-study.pdf

³⁰ https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/key_concepts_in_a_nutshell.pdf





Title II

Frederoms

2018 was a crucial year as regards the right protected under Article 8 of the Charter: the new legislation on **data protection** strengthens the protection of the individual's right to personal data protection, reflecting the nature of data protection as a fundamental right for the EU, and guarantees the free flow of personal data within the EU. New legislation, which includes the **General Data Protection Regulation**, became applicable on 25 May 2018, and the **Data Protection Directive for Police and Criminal Justice Authorities** was to be transposed by 6 May 2018. Moreover, the Regulation on the protection of personal data by EU institutions, bodies, offices and agencies and on the free movement of such data was adopted on 23 October and became applicable on 11 December 2018.

On 1 March 2018, the Commission issued a Recommendation on **measures to effectively tackle illegal content online**: the main principle envisaged is that illegal content online should be tackled with proper and robust safeguards, to ensure protection of the various fundamental rights of all parties concerned. The Commission also proposed a **Regulation on preventing the dissemination of terrorist content online**. It establishes a harmonised legal framework clarifying the respective responsibilities of Member States and hosting service providers in detecting and removing terrorist content online.

On 26 April 2018, the Commission adopted its **Communication on tackling online disinformation: a European Approach**.

The EU is aware of challenges to **media freedom and pluralism in the Member States** and has continued to take measures to boost media freedom and pluralism across the EU.

The **Regulation on the European Solidarity Corps** was adopted in October 2018. It supports the engagement of young people and organisations in solidarity activities and contributes to boosting cohesion and solidarity in Europe, supporting communities and responding to social challenges.

In September 2018, the Commission put forward an amendment to the proposal for a **Regulation establishing a European Union Agency for Asylum** and adopted a new proposal on the **European Border and Coast Guard** aiming to improve border management at EU level and to ensure that all Member States facing migratory challenges receive adequate support.

On 19 June 2018, the Court of Justice of the European Union handed down its judgment on the **Gnandi case**. The Belgian Council of State asked whether it was possible to issue a return decision, within the meaning of the Return Directive, before the legal remedies against a rejection of an asylum decision had been exhausted and the asylum procedure concluded. The CJEU reiterated that the Return Directive must be implemented in a way that respects fundamental rights and legal principles, in particular those enshrined in the Charter of Fundamental Rights of the European Union.

Article 6 — Right to liberty and security

Article 6 of the Charter guarantees the rights of all to liberty and security of person. These rights correspond to those guaranteed in Article 5 of the ECHR. They mean, in particular, that a person's liberty can be limited only under strict legal conditions.

Article 7 — Respect for private and family life

Article 7 of the Charter guarantees the right of all to respect of their private and family life, and their home and communications.

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

Legislation

On 17 April 2018, the Commission adopted a **proposal on the use of financial and other information for the combating of serious crimes**³¹. Once adopted by the co-legislators, this initiative will provide competent authorities with access to bank account and financial information and will further strengthen cooperation between Financial Intelligence Units. As regards the right to privacy under Article 7 of the Charter, the initiative will have a significant impact, given the number of people that would be affected. However, interference will be relatively limited in terms of gravity, as the accessible and searchable data from the centralised bank account registries do not cover financial transactions or the balance of the accounts. The information covered (e.g. the owner's name, date of birth, bank account number) is limited to what is strictly necessary to identify the banks where the subject of an investigation holds bank accounts. This instrument will also affect the right to the protection of personal data³², which is closely linked to respect for private and family life.

Case law

In *Coman and Others*³³, the Court has confirmed that the term 'spouse' in the provisions of EU law on free movement and residence of EU citizens refers to a person joined to another person by the bonds of marriage. It is gender-neutral and may therefore cover the same-sex spouse of an EU citizen. In particular, the Court pointed out that the rights guaranteed by Article 7 of the Charter have the same meaning and the same scope as those guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court referred to the case law of the European Court of Human Rights, concluding that the relationship of a homosexual couple may fall within the concept of 'private life' and that of 'family life' in the same way as the relationship of a heterosexual couple in the same situation.

In *Deha Altiner*³⁴, the Court confirmed its previous case law on the concept of 'returning nationals', i.e. the right of EU citizens to be accompanied or joined by a family member who is not an EU national when returning to their home Member State after having exercised free movement rights in another Member State. It confirmed that EU citizens must genuinely have exercised the right of free movement in another Member State, and must have started a family or consolidated their family life there, before they can invoke similar rights of entry and residence for family members. The Court further clarified how much time can elapse between the return of the EU citizen and the time when the non-EU family member joins the EU citizen in his or her home Member State, and how Member States may deal with delays.

³¹ Proposal for a Directive of the European Parliament and of the Council laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences and repealing Council Decision 2000/642/JHA, COM(2018)213 final, 17.4.2018.

³² See Article 8.

³³ Judgment of 5 June 2018, in Case C-673/16, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*.

³⁴ Judgment of 27 June 2018, in Case C-230/17, *Erdem Deha Altiner and Isabel Hanna Ravn v Udlændingestyrelsen*.

Article 8 — Protection of personal data

The fundamental right of all to the protection of personal data is explicitly stated in Article 8 of the Charter and also enshrined in Article 16 of the Treaty on the Functioning of the EU (TFEU). According to this right, personal data must be processed fairly, for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law.

Legislation

2018 was a crucial year for the protection of personal data in the EU. The new legislation on data protection, which includes the **General Data Protection Regulation (GDPR)**³⁵, became applicable on 25 May 2018, and the **Data Protection Directive for Police and Criminal Justice Authorities**³⁶ was to be transposed by 6 May 2018. Furthermore, the **Regulation on the protection of personal data by EU institutions, bodies, offices and agencies and on the free movement of such data**³⁷ was adopted on 23 October and became applicable on 11 December 2018.

The new legislation strengthens the protection of the individual's right to personal data protection, reflecting the nature of data protection as a fundamental right for the EU, and guarantees the free flow of personal data within the EU. Among other things, the GDPR beefs up the monitoring and enforcement of the application of the data protection rules by data protection supervisory authorities, introduces cooperation and consistency mechanisms to ensure the GDPR is applied consistently, and establishes the **European Data Protection Board (EDPB)**, a new EU body with legal personality and with its own secretariat. The Commission supported the transition of the Article 29 Working Party³⁸ towards the EDPB, including the transfer of the secretariat, which, under the previous legislation, had been the responsibility of Commission departments. The Commission participates in EDPB meetings and activities.

The EDPB took several initiatives for new documents allowing for the common interpretation and enforcement of the new data protection legislation. The documents it adopted included the final version of the Guidelines on derogations applicable to international transfers³⁹, the Guidelines on the territorial scope of the GDPR⁴⁰, and the

³⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.

³⁶ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89.

³⁷ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, p. 39.

³⁸ The body that brings together the data protection authorities of the Member States, named after Article 29 of Directive 95/46/EC, which established it.

³⁹ https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-22018-derogations-article-49-under-regulation_en

Guidelines on accreditation⁴¹; it took account of comments made in the course of public consultations on the draft versions of those documents, and of a number of opinions and statements. Finally, the EDPB adopted its first Opinion on the adequacy decision, related in this case to Japan. All EDPB activities are outlined on its website⁴².

The Commission worked with Member States to promote consistency and limit fragmentation in the application of the GDPR, taking into account the scope for specification which the new legislation allows them, and started monitoring the Regulation's application in EU countries. It also launched an online practical guidance tool that includes questions and answers aimed at individuals, businesses and public administrations and ran an information campaign targeting businesses and the public. The Commission continued engaging actively with stakeholders, especially through the multi-stakeholder group on the implementation of the GDPR and awareness of the new rules. It co-financed awareness-raising initiatives undertaken by different stakeholders and by data protection authorities at national level. The first projects funded through the grants were implemented in 2018.

Following the adoption of the GDPR, the Commission adopted a **Decision laying down internal rules concerning the processing of personal data by OLAF**⁴³. This responds to the requirements of Article 25 of the new Regulation, providing for the necessity of an additional legal basis to restrict data subjects' rights, and thus adapts OLAF's well-established practice in handling data subjects' rights to the new legal framework. The Decision ensures compliance with the fundamental right to protection of personal data as set out in Article 8 of the Charter, while enabling OLAF to secure the confidentiality of its investigations and to ensure the protection of the rights and freedoms of the people concerned, witnesses and informants. It sets out the conditions under which OLAF informs data subjects of any activity involving processing of their personal data and handles their rights of access, rectification, erasure, restriction of processing and communication of a personal data breach. The involvement of OLAF's Data Protection Officer (or, where relevant, of the data protection officers of the Commission or of the executive agency concerned) throughout the procedure ensures an independent review of the restrictions applied.

In addition, the codification of OLAF's established practices and procedures in the Decision guarantees a high level of legal certainty for all data subjects, thereby complying with the 'quality of law' requirements developed by the European Court of Human Rights.

On 25 April 2018, the Commission adopted the third **data package proposal**⁴⁴. The core of this was the review (recast) of the Public Sector Information Directive, the purpose of which was to increase the amount of

⁴⁰ https://edpb.europa.eu/our-work-tools/public-consultations/2018/guidelines-32018-territorial-scope-gdpr-article-3_it

⁴¹ https://edpb.europa.eu/our-work-tools/public-consultations/2018/edpb-guidelines-42018-accreditation-certification-bodies_en

⁴² https://edpb.europa.eu/news/news_en

⁴³ Commission Decision (EU) 2018/1962 of 11 December 2018 laying down internal rules concerning the processing of personal data by the European Anti-Fraud Office (OLAF) in relation to the provision of information to data subjects and the restriction of certain of their rights in accordance with Article 25 of Regulation (EU) 2018/1725 of the European Parliament and of the Council, OJ L 315, 12.12.2018, p. 41.

⁴⁴ <https://ec.europa.eu/digital-single-market/en/policies/building-european-data-economy>

government data available for reuse in Europe⁴⁵. The proposal pursues the objectives set out in the digital single market strategy⁴⁶. The proposed directive would have a positive impact on the freedom to conduct a business⁴⁷, helping to create a common European 'data space' by increasing the amount of public sector data available for reuse, ensuring fair competition and easy access to markets on the basis of public sector information, and boosting cross-border innovation based on data. In such a common European data area, data can flow freely across borders and sectors, in accordance with the principles of free movement (freedom of establishment and free movement of services), while respecting fundamental rights and principles, as recognised by the Charter, including the right to receive and impart information and ideas without interference by any public authority and regardless of frontiers⁴⁸. The proposal is in line with the data protection legislation in force, namely the GDPR, and the revised ePrivacy rules⁴⁹. The recast proposal fully respects fundamental rights and abides by the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union, including the right to privacy⁵⁰ and the protection of personal data. Additionally, the right to property⁵¹ is guaranteed by the fact that the directive does not affect the intellectual property rights of third parties or the existence or ownership of intellectual property rights of public sector bodies. The inclusion of people with disabilities⁵² is guaranteed by the provision that, where possible and appropriate, public sector bodies should take into account the possibilities for the reuse of documents by and for people with disabilities by providing the information in accessible formats.

The **Regulation on a framework for the free flow of non-personal data in the European Union**⁵³ was adopted on 14 November 2018 and will start to apply from 28 May 2019. The Regulation provides for the free flow of non-personal data within the EU and promotes the fundamental free movement principles (in particular, freedom of establishment and freedom of movement of services)⁵⁴. It does not affect the existing legal framework for personal data protection, which is to be applied when processing datasets comprising both personal and non-personal data. The Commission will draw up a guidance document for businesses and Member States on the how the Regulation and the GDPR interact in practice.

In the context of the common agricultural policy, the **proposal for a Regulation on the financing, management and monitoring of the common agricultural policy**⁵⁵ recognises the need to publish information about the identity of the beneficiaries, the amount awarded and the fund from which it comes, plus the purpose and nature of the type of intervention or measure concerned. Such information should be published in such a way as to

⁴⁵ Proposal for a Directive of the European Parliament and of the Council on the re-use of public sector information (recast), COM(2018) 234 final, 25.04.2018,

<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1546952357571&uri=CELEX:52018PC0234>

⁴⁶ https://ec.europa.eu/commission/priorities/digital-single-market_en

⁴⁷ See Article 16.

⁴⁸ See Article 11.

⁴⁹ Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC, COM(2017) 10 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0010>

⁵⁰ See Article 7.

⁵¹ See Article 17.

⁵² See Article 26.

⁵³ Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union (EU) 2018/1807, OJ L 303/59 28.11.2018, p. 59.

⁵⁴ See Article 16.

⁵⁵ Proposal for a Regulation of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No 1306/2013 COM(2018)393 final, 1.06.2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A393%3AFIN>

minimise interference with the beneficiaries' right to respect for their private life⁵⁶ and their right to protection of their personal data.

In the taxation field, the Commission adopted a proposal for a directive amending Directive 2006/112/EC and Council Regulation amending Regulation (EU) No 904/2010 as regards **mandatory transmission and exchange of VAT-relevant payment data**⁵⁷. In the fight against VAT fraud, only the data necessary to achieve the objective of combating e-commerce VAT fraud will be processed by the tax authorities' anti-fraud experts, in line with the GDPR and Article 8 of the Charter of Fundamental Rights. More precisely, the only data that will be processed are those that enable the tax authorities to (i) identify the suppliers, (ii) check the number of transactions and their monetary value, and (iii) verify the origin of the payments. Data on consumers are not included in the present initiative, apart from data on the Member States of origin of the payments (i.e. the Member State where the consumers are located). Proportionality is also ensured by setting thresholds below which payment service providers are not required to send payment data to the tax authorities, the aim being to exclude payments that are probably not associated with economic activities.

In the area of fisheries, three instruments were adopted in 2018, in full compliance with EU rules on the protection of personal data.

The Commission Implementing **Decision establishing specific control and inspection programmes for certain fisheries**⁵⁸ prescribes a general storage limitation period of 10 years for personal data processed and exchanged by the European Fisheries Control Agency and Member States when implementing the control and inspection programmes. The personal data necessary to allow an infringement, inspection, or judicial or administrative proceedings to be followed up may be stored for a maximum of 20 years. Balancing the EU's interests in performing scientific research and providing scientific advice with regard to the CFP, personal data necessary for that purpose may be stored for a longer period, in line with Article 89 of the GDPR.

The Commission's **proposal for a Regulation as regards fisheries control**⁵⁹ updates the provisions on data protection including those purpose limitation and explicit storage limitation, to ensure that personal data collected are kept for no longer than necessary. Moreover, data to which the Commission and designated bodies are to be given access by Member States according to the new Article 110(1) and (2) may, in principle, ongoing be stored for no longer than 5 years. Only data necessary to allow the follow-up of a complaint, infringement, inspection, verification or audit, or ongoing judicial or administrative proceedings, can be retained for a maximum of 10 years. If any data referred to in Article 110(1) and (2) are to be kept for a longer period, they must be

⁵⁶ See Article 7.

⁵⁷ Proposal for a Directive amending Directive 2006/112/EC and Council Regulation amending Regulation (EU) No 904/2010 as regards mandatory transmission and exchange of VAT-relevant payment data, COM(2018) 813 final, 12.12.2018.

⁵⁸ Commission Implementing Decision (EU) 2018/1986 of 13 December 2018 establishing specific control and inspection programmes for certain fisheries and repealing Implementing Decisions 2012/807/EU, 2013/328/EU, 2013/305/EU and 2014/156/EU, OJ L 317, 14.12.2018, p. 29.

⁵⁹ Commission Proposal of 30 May 2018 for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1224/2009, amending Council Regulations (EC) No 768/2005, (EC) No 1967/2006, (EC) No 1005/2008, and Regulation (EU) No 2016/1139 of the European Parliament and if the Council as regards fisheries control, COM(2018) 368 final, 30.05.2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0368>.

anonymised. Furthermore, the Commission commits to preventing unauthorised processing of or access to data, ensuring verification of data and monitoring the effectiveness of security measures put in place to that end. This includes adopting a security plan, a business continuity plan and a disaster recovery plan. Article 112(8) stipulates that Member States are to take equivalent measures.

To ensure transparency in the use of public funds, the Commission issued a **proposal for the European Maritime and Fisheries Fund Regulation**⁶⁰ and a **proposal for a Common Provisions Regulation**⁶¹ requiring Member States to publish on a public website various kinds of information on operations funded under the European Maritime and Fisheries Fund. This information must not include names, surnames or vessel registration information, unless this is allowed by the national data protection legislation. Moreover, data which would enable conclusions to be drawn about a person's income must be removed from the website at most 2 years after their initial publication.

In the field of migration, three **Regulations strengthening the Schengen Information System**⁶² were adopted and entered into force on 27 December 2018. They will come into force in stages, until they completely replace the present legal framework by the end of 2021. Data protection rules and principles have been beefed up and brought into line with the new EU data protection framework. In line with Article 8 of the Charter, the new Regulations include additional safeguards to limit the processing of data to what is strictly necessary and operationally required. Stringent alert deletion rules were added to ensure that alerts are kept only as long as is strictly necessary to achieve the purposes for which they were entered. The new Regulations introduce an obligation to carry out a proportionality assessment if the retention period of an alert is extended.

In 2018 a **European Travel Information and Authorisation System (ETIAS)** was adopted and the new Regulation⁶³ entered into force on 9 October 2018. It will become applicable in several steps, until the entry into operation of the new IT system. The Regulation ensures full respect of fundamental rights and will contribute to protect people's right to life and contains all appropriate safeguards, ensuring that ETIAS is developed in line with the highest standards of data protection, in particular regarding data access, which is strictly limited.

⁶⁰ Proposal for a Regulation of the European Parliament and of the Council on the European Maritime and Fisheries Fund and repealing Regulation (EU) No 508/2014 of the European Parliament and of the Council, COM(2018)390 final, 12.6.2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A390%3AFIN>.

⁶¹ Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument, COM(2018)375 final, 29.5.2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A375%3AFIN>

⁶² Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals, OJ L 312, 7.12.2018, p. 1; Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006, OJ L 312, 7.12.2018, p. 14; Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU, OJ L 312, 7.12.2018, p. 56.

⁶³ Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226 (OJ L 236, 19.9.2018, p.1)

On 16 May 2018, the Commission adopted a **proposal to amend the legal bases of the Visa Information System (VIS) and other related instruments to do with visas and borders**⁶⁴, to improve internal security and close information gaps at external borders, while continuing to comply fully with fundamental rights. The impact assessment⁶⁵ accompanying the proposal looked in particular into the impact the proposed measures would have on the right to data protection. A wide range of stakeholders were involved in the consultations leading to the adoption of the proposal. FRA⁶⁶ and the European Data Protection Supervisor⁶⁷ published their opinions on the proposal, offering further recommendations on how to better safeguard Charter-enshrined rights in the proposed Regulation. The main aspect of the proposal which has a significant impact on the right to data protection is the expansion of the scope of the VIS by adding long-stay visas and residence permits to the system to ensure that the authorities have the information they need, when they need it, and with full respect for fundamental rights. In this respect, the proposal is driven by the *privacy by design* principle. Additionally, it sets up a mechanism of checks against available EU and Interpol databases using the interoperability platform. Finally, it provides for storing copies of the visa applicant's travel document in the VIS and proposes lowering the fingerprinting age for applicants from 12 to 6, accompanied by stronger rights for the child, and other safeguards ensuring that the child's best interests are a primary consideration in all procedures related to processing in the VIS.

In 2018, the co-legislators discussed the Commission's **proposals to establish a framework for interoperability between EU information systems**⁶⁸. Discussions took particular account of the opinions of the European Data Protection Supervisor and the EU Agency for Fundamental Rights. Building on the Commission's proposals, the aim of these discussions was to ensure that the initiative would boost security in Europe and protect people's right to life⁶⁹, while also including appropriate safeguards to protect the right to the protection of personal data and abide by the principle of proportionality⁷⁰. The interoperability regulations are expected to be adopted in

⁶⁴ Proposal for a Regulation from the European Parliament and of the Council amending Regulation (EC) No 767/2008, Regulation (EC) No 810/2009, Regulation (EU) 2017/2226, Regulation (EU) 2016/399, Regulation XX/2018 [Interoperability Regulation], and Decision 2004/512/EC and repealing Council Decision 2008/633/JHA, COM(2018) 302 final, 16.5.2018.

⁶⁵ SWD(2018) 195.

⁶⁶ FRA Opinion 2/2018 (The revised Visa Information System and its fundamental rights implications - Opinion of the European Union Agency for Fundamental Rights), 30.8.2018, <https://fra.europa.eu/en/opinion/2018/visa-system>.

⁶⁷ EDPS Opinion 9/2018 on the Proposal for a new Regulation on the Visa Information System; 13.12.2018, <https://edps.europa.eu/data-protection/our-work/publications/opinions/upgrading-visa-information-system-%E2%80%98vis%E2%80%99-en>.

⁶⁸ Proposal for a Regulation of the European Parliament and of the Council on establishing a framework for interoperability between EU information systems (borders and visa) and amending Council Decision 2004/512/EC, Regulation (EC) No 767/2008, Council Decision 2008/633/JHA, Regulation (EU) 2016/399 and Regulation (EU) 2017/2226, COM(2017) 793 final, 12.12.2017, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20171212_Proposal_regulation_on_establishing_framework_for_interoperability_between_eu_information_systems_borders_and_visa_en.pdf

and Proposal for a Regulation of the European Parliament and of the Council on establishing a framework for interoperability between EU information systems (police and judicial cooperation, asylum and migration), COM(2017) 794 final, <https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-794-F1-EN-MAIN-PART-1.PDF>.

⁶⁹ See Article 2.

⁷⁰ See Article 52(1).

2019. In 2018, the Commission adopted consequential technical amendments⁷¹ to amend the legal basis of the EU information systems which would be affected by interoperability, to bring them into line with the interoperability components. These amendments will not alter the balance already ensured by each of the existing central systems as regards their positive impact on fundamental rights.

On 17 April 2018, the Commission adopted a **proposal for a Regulation on the marketing and use of explosives precursors**⁷², to close loopholes in the current legal framework and update it in the light of recent developments. The proposal is designed to minimise interference with the right to the protection of personal data by establishing clear rules setting limits to the processing and collection of data, and, in the event of verification of sales, a maximum retention period of one year.

According to the **proposal mentioned above**⁷³ **on using financial and other information to combat serious crimes**⁷⁴, as bank account information and other types of financial information constitute or can constitute personal data, and access to these data in accordance with this legislative initiative constitutes processing of personal data, the proposal ensures that all provisions in the Data Protection Police Directive apply. Moreover, the proposal specifies the purposes for which personal data may legitimately be processed and requires a list of designated competent authorities entitled to request information. Information will be shared on a case-by-case basis only, meaning only where relevant to a specific case for the purpose of combating one or more specified serious criminal offences on an exhaustive list. The proposal also contains specific provisions on logging, records of information requests, restrictions on rights and the processing of particular categories of personal data ('sensitive data'). Europol will also be granted indirect access to information held in the national centralised bank account registries and data retrieval systems and offered the option of sharing data with Financial Intelligence Units in order to carry out its duties (supporting and strengthening action by Member States to prevent, detect, investigate and prosecute specific offences within its competence), in accordance with its mandate. All the safeguards provided for by Chapters VI and VII of Regulation (EU) 2016/794 (the Europol Regulation) apply.

Negotiations for an **Agreement for the transfer and use of Passenger Name Record (PNR)** data between the EU and Canada started on 20 June 2018⁷⁵. According to the negotiating directives adopted by the Council, the Agreement should contain all the safeguards required for it to be compatible with relevant articles of the Charter, and particularly the right to data protection.

⁷¹ Amended Proposal for a Regulation of the European Parliament and of the Council on establishing a framework for interoperability between EU information systems (police and judicial cooperation, asylum and migration) and amending [Regulation (EU) 2018/XX [the Eurodac Regulation],] Regulation (EU) 2018/XX [the Regulation on SIS in the field of law enforcement], Regulation (EU) 2018/XX [the ECRIS-TCN Regulation] and Regulation (EU) 2018/XX [the eu-LISA Regulation], COM(2018) 480 final, 13.06.2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0480>.

⁷² Proposal for a Regulation of the European Parliament and of the Council on the marketing and use of explosives precursors, amending Annex XVII to Regulation (EC) No 1907/2006 and repealing Regulation (EU) No 98/2013 on the marketing and use of explosives precursors, COM(2018)209 final, 17.4.2018.

⁷³ See under Article 7.

⁷⁴ Proposal for a Directive of the European Parliament and of the Council laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences and repealing Council Decision 2000/642/JHA, COM(2018)213 final, 17.4.2018

⁷⁵ The Council gave the Commission a negotiation mandate on 7 December 2017. Canada adopted its negotiating mandate at the end of May 2018.

On 4 June 2018, the Council authorised the opening of negotiations with a view to reaching agreements between the European Union and Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia and Turkey respectively on the exchange of personal data between the European Union Agency for Law Enforcement Cooperation (Europol) and, respectively, the Algerian, Egyptian, Israeli, Jordanian, Lebanese, Moroccan, Tunisian, Turkish competent authorities for fighting serious crime and terrorism.

In line with Regulation 2016/794 on the European Union Agency for Law Enforcement Cooperation (Europol), in particular Article 25 thereof, the purpose of these international agreements is to provide a legal basis for the transfer of personal data between Europol and the competent authorities in the non-EU country concerned, adducing adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals.

Policy

The protection of personal data has been central to several policies on the digital environment. In particular, the Commission's commitment to guaranteeing data protection and privacy in the context of **cloud computing services** by applying data protection law continued in 2018. The Commission has been working with industry on developing codes of conduct for cloud service providers concerning personal data protection. **Three codes of conduct relevant to European cloud service providers** are currently in preparation (the Cloud Select Industry Group Code of Conduct, managed by a non-profit organisation (Scope Europe); the Cloud Infrastructure Service Provider Code of Conduct; and the Cloud Security Alliance Code of Conduct).

The codes have been discussed with national data protection authorities, and the first two were also submitted to the Article 29 Working Party, which made suggestions for improvements. The Commission is monitoring the development of these codes of conduct in efforts to ensure that they comply with EU data protection legislation (in particular the GDPR, which explicitly recognises and encourages codes of conduct, in the interests of providing guidance and clarity to providers and users alike). It also wants to ensure that the codes of conduct are discussed with the national data protection authorities before they are submitted to the European Data Protection Board for approval.

Since 2011⁷⁶, the Commission has been supporting Member States in developing and raising awareness of the European Reference Networks among healthcare providers and centres of expertise, in particular in the area of rare diseases⁷⁷. These networks, established in 2014, facilitate discussion among healthcare providers across Europe of complex or rare diseases and conditions requiring highly specialised treatment⁷⁸.

⁷⁶ Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, *OJ L 88*, 4.4.2011, p. 45.

⁷⁷ Commission Delegated Decision 2014/286/EU of 10 March 2014 setting out criteria and conditions that European Reference Networks and healthcare providers wishing to join a European Reference Network must fulfil. Text with EEA relevance, *OJ L 147*, 17.5.2014, p.71 and Commission Implementing Decision 2014/287/EU of 10 March 2014 setting out criteria for establishing and evaluating European Reference Networks and their Members and for facilitating the exchange of information and expertise on establishing and evaluating such Networks Text with EEA relevance *OJ L 147*, 17.5.2014, p. 79.

⁷⁸ https://ec.europa.eu/health/ern_en

In 2018, the Commission continued its cooperation with the European Reference Networks through its continued work on developing IT tools in line with the applicable legislation on the protection of personal data. These included the Clinical Patient Management System (for virtual medical consultations) and the Networks Collaborative Platform (for internal communication within the European Reference Networks community).

In line with the legislation on the protection of personal data, and to ensure continuity of care across borders, the Commission developed IT systems enabling 'ePrescriptions' and 'pPatient summaries' to be exchanged between health practitioners, with full protection for patients' health data⁷⁹.

Case law

The request for a preliminary ruling in *Ministerio Fiscal*⁸⁰ relates to Spanish law enforcement authorities' access to personal data (surnames, forenames and, if necessary, addresses) in the context of investigations into the theft of a mobile telephone. The Court's view was that access to identification data within the scope of the Directive on Privacy and Electronic Communications⁸¹ could not be defined as 'serious' interference with the fundamental rights of the persons whose data was involved, as those data did not allow precise conclusions to be drawn about their private lives. It concluded that, within those limits, the interference that access to the data in question entails may thus be justified by the objective of preventing, investigating, detecting and prosecuting 'criminal offences' generally; it is not necessary for those offences to be defined as 'serious'. This judgment complements the Court's decision in *Tele2 Sverige*, in which it held that serious interference can be justified in that field only by the objective of fighting crime which must also be defined as 'serious'. If interference is not serious, on the other hand, access may be justified by the objective of preventing, investigating, detecting and prosecuting 'criminal offences' generally.

In *Wirtschaftsakademie Schleswig-Holstein*⁸², the Court provided for the interpretation of the definition of 'joint controller' under Directive 95/46 on Data Protection (applicable at the time of the contested conduct). In the case at stake, an academic institution was running a Facebook fan page. The Court recalled first that Facebook denied neither its role as 'controller' within the meaning of data protection legislation, nor its responsibility for the processing of personal data. At the same time, it ruled that the administrator of the fan page (the academic institution at stake) was also a 'controller' and must assume its responsibility for the protection of personal data, as it took part in determining the purposes and means of processing the personal data of the visitors to its fan page. Finally, the Court found that the German Data Protection Authority had power over Facebook Ireland to ensure compliance with rules on the protection of personal data in German territory.

⁷⁹ https://ec.europa.eu/health/ehealth/electronic_crossborder_healthservices_en

⁸⁰ Judgment of 2 October 2018 in Case C-207/16, *Ministerio Fiscal*.

⁸¹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11).

⁸² Judgment of 5 June 2018 in case C-210/16, *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH*.

In *Jehovan todistajat*⁸³, the Court was requested to provide clarifications of the material scope of the data protection law - namely, 'the household activity exception' – and of the definitions of 'filing system', 'controller', and 'joint controller'. The case concerned data collected by the Jehovah's Witnesses religious community in the context of door-to-door preaching. The Court considered that such preaching is not covered by the 'household activity' exception. It also ruled that the concept of a 'filing system' covers sets of personal data such as those collected by the Jehovah's Witnesses. The activity in question must thus comply with EU data protection legislation. Finally, the Court favoured a broad interpretation of the definitions of 'controller' and 'joint controller', as the aim of the data protection legislation is to ensure a high level of protection of people's fundamental rights and freedoms. It concluded that a religious community is a controller - jointly with its members who engage in preaching – of the processing of personal data carried out by the latter in the context of door-to-door preaching.

NATIONAL CASE LAW BOX

In Finland⁸⁴, the immigration service rejected an asylum application based on persecution on grounds of sexual orientation, after holding that the applicant's testimony, supported by the recording of sexual acts, was not credible. The Supreme Administrative Court noted that the applicant's own testimony is the primary source of evidence when assessing the credibility of a claim related to sexual orientation. It cannot require applicants to provide photographs or video recordings of intimate acts in support of their claim, as such evidence would infringe the right to human dignity (Article 1 of the Charter) and the right to private life (Article 7 of the Charter). However, the Supreme Administrative Court refused to prohibit the evaluation of such evidence, as the principle of free evaluation governs Finnish administrative law.

Article 9 — Right to marry and right to found a family

Article 9 of the Charter is based on Article 12 of the European Convention on Human Rights, which states that:

'Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right.'

The wording has been updated to cover cases in which national legislation recognises arrangements other than marriage for founding a family. Article 9 neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the Convention, but its scope may be wider when national legislation allows.

Article 10 — Freedom of thought, conscience and religion

The right guaranteed in Article 10 (1) of the Charter corresponds to the right guaranteed in Article 9 of the European Convention on Human Rights. It includes freedom to change religion or belief and freedom, either alone

⁸³ Judgment of 10 July 2018 in case C-25/17, *Tietosuoja-valtuutettu Jehovan todistajat*.

⁸⁴ Finland, Supreme Administrative Court, [case 3891/4/17](#), 13 April 2018.

or in community with others and in public or private, to manifest religion or belief, in worship, teaching, practice and observance. Article 10 (2) recognises the right to conscientious objection, in line with national laws.

Policy

In 2018 the Fundamental Rights Agency published the second survey on Jewish people's experiences of hate crime, discrimination and antisemitism in the European Union⁸⁵. The survey covered 12 EU countries and reached almost 16,500 individuals who identify as Jewish. It follows up on the agency's first survey, conducted in seven countries in 2012. The findings point to rising levels of antisemitism. About 90% of respondents feel that antisemitism is growing in their country. Around 90% also feel it is particularly problematic online, while about 70% cite public spaces, the media and politics as common sources of antisemitism. Almost 30% have been harassed, with those being visibly Jewish most affected. Antisemitism appears to be so deeply rooted in society that regular harassment has become part of their normal everyday life. Almost 80% do not report serious incidents to the police or any other body. Often this is because they feel nothing will change. Over a third avoid taking part in Jewish events or visiting Jewish sites because they fear for their safety and feel insecure. The same proportion have even considered emigrating. Such results underline the need for Member States to take urgent and immediate action. In doing so they need to work closely together with a broad range of stakeholders, particularly Jewish communities and civil society organisations, to roll out more effective measures to prevent and fight antisemitism.

Case law

In 2018, the CJEU handed down two important judgments in the area of non-discrimination in employment, in two cases where ethos-based organisations treated workers differently based on their religion⁸⁶. In *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* and in *IR* the Court clarified for the first time the interpretation of Article 4(2) of the Directive 2000/78/EC⁸⁷, which provides for an exception to the non-discrimination principle on the grounds of religion where the employer is a church or another ethos-based organisation.

The Court explicitly referred to Articles 10, 21 and 47 of the Charter. It found that, while the Directive aims to protect the fundamental right of workers not to be discriminated against on grounds of religion, it also aims to take account of the right of autonomy of churches and other ethos-based organisations, as recognised under Article 10 of the Charter. The Court interpreted Article 4(2) of the Directive, in conjunction with Article 47 of the Charter, as meaning that employment-related decisions of an ethos-based organisation must be subject to effective judicial review, to ensure that the criteria set out in the directive are satisfied in each particular case.

⁸⁵ Experiences and perceptions of antisemitism/ Second survey on discrimination and hate crime against Jews in the EU <https://fra.europa.eu/en/publication/2018/2nd-survey-discrimination-hate-crime-against-jews>

⁸⁶ Judgments of 17.04.2018 in case C-414/16, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* and of 11.09.2018 in case C-68/17, *IR*.

⁸⁷ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16

The Court also stated that both Articles 21(1) and 47 of the Charter are sufficient in themselves and do not need to be made any more specific by provisions in EU or national law to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law. It concluded that in situations where it is not possible to interpret national legal provisions in conformity with EU law, national courts must ensure within their jurisdiction the judicial protection for individuals flowing from Articles 21 and 47 of the Charter, and guarantee the full effectiveness of those articles by disapplying, if need be, any contrary provision of national law.

On the issue of ritual slaughter, the CJEU ruled on a preliminary ruling requested by a Belgian court on whether Article 4(4) of Regulation on the protection of animals at the time of killing⁸⁸ is compatible with the freedom of religion enshrined in Article 10 of the Charter. Article 4(4) contains an exception for animals subject to particular methods of slaughter prescribed by religious rites (without stunning the animals), provided that the slaughter takes place in a slaughterhouse. The referring court asked whether Article 4(4) was contrary to Article 10 of the Charter, insofar as it requires religious slaughtering to take place only in a slaughterhouse, even if there is insufficient capacity in the Flemish Region to meet demand for ritually slaughtered meat on the occasion of the Islamic Festival of Sacrifice. The referring court also requested guidance on whether converting temporary slaughter establishments into approved slaughterhouses could be allowed under Regulation 1099/2009.

In *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW and Others*⁸⁹, the Court held, first of all, that ritual slaughter falls within the definition of a 'religious rite' within the meaning of the Regulation and is thus covered by the freedom of religion guaranteed by the Charter. The Court then held that the obligation, under Regulation 1099/2009, to carry out ritual slaughter in an approved slaughterhouse simply aims, from a technical point of view, to organise and manage the freedom to carry out slaughter without prior stunning for religious purposes. Such a technical framework is not in itself of such a nature as to restrict the right to freedom of religion of practising Muslims. The Court considered that an occasional problem of lack of slaughter capacity in one region of a Member State, related to the increase in demand for ritual slaughter in the space of several days on the occasion of the Feast of Sacrifice, is the result of a combination of domestic circumstances which were not liable to affect the validity of Regulation 1099/2009. In view of the above elements, the Court concluded that its examination has not disclosed any factor liable to affect the validity of the regulation with regard to the freedom of religion guaranteed by the Charter.

NATIONAL CASE LAW BOX

The Supreme Court of **Denmark**⁹⁰ had to deal with a case brought by a religious organisation against the Ministry of Health for refusal to authorise the importing of ayahuasca wine, containing a psychedelic drug. The claimant considered this prohibition to be a violation of Article 10 (Freedom of thought, conscience and religion) of the Charter. However, the court held that the mere fact that EU citizens who exercised their freedom of movement were affected by this prohibition is not sufficient to determine that the issue falls within the scope of EU law.

⁸⁸ Council Regulation (EC) No 1099/2009 on the protection of animals at the time of killing (OJ L 303 18.11.2009, p. 1).

⁸⁹ Judgment of 29 May 2018 in case C-426/16, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW and Others v Vlaams Gewest*

⁹⁰ Denmark, Supreme Court, case 81/2017, 26 June 2018.

Article 11 — Freedom of expression and information

The right to freedom of expression is guaranteed by Article 11(1) of the Charter and includes the freedom to hold opinions and to receive and share information and ideas without interference by public authorities and regardless of frontiers. Article 11(2) ensures respect for freedom and pluralism of the media. In line with Article 52(3) of the Charter, the EU's approach to ensuring this right is inspired by the case law of the European Court of Human Rights.

Legislation

Following extensive stakeholder consultations, including several workshops, the Commission issued a **Recommendation on measures to effectively tackle illegal content online**⁹¹ on 1 March 2018. The Recommendation built on the earlier Communication on 'tackling illegal content online, towards enhanced responsibility of online platforms'⁹², adopted on 28 September 2017. The main principles set out in the Recommendation require that illegal online content to be tackled with proper and robust safeguards, to ensure protection of the various fundamental rights of all parties concerned.

Following up to this Recommendation, on 12 September 2018 the Commission proposed a **Regulation on preventing the dissemination of terrorist content online**⁹³. The new rules provide for robust safeguards to ensure that measures to remove terrorist propaganda are necessary, appropriate and proportionate within a democratic society and do not lead to the removal of material that is protected by freedom of expression and information. Safeguards designed to ensure full respect for fundamental rights such as freedom of expression and information in a democratic society, include in addition to options for judicial redress guaranteed by the right to an effective remedy as enshrined in Article 19 TEU and Article 47 of the Charter of Fundamental Rights of the EU, human oversight and verification in case automated detection tools are used as well as complaint procedures. As part of the impact assessment, the Commission had carried out a Eurobarometer survey⁹⁴ and a public consultation on illegal online content in preparation for the proposed Regulation⁹⁵

The latest review of the Audiovisual Media Services Directive (AVMSD)⁹⁶ was completed on 6 November 2018. The final text was published in the EU Official Journal on 28 November 2018 and entered into force on 18

⁹¹ Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online C/2018/1177 OJ L 63, 6.3.2018, pp. 50–61.

⁹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Tackling Illegal Content Online Towards an enhanced responsibility of online platforms, 28.9.2017, COM(2017) 555 final.

⁹³ Regulation on preventing the dissemination of terrorist content online, 12.9.2018, COM(2018) 640 final.

⁹⁴ <https://ec.europa.eu/digital-single-market/en/news/flash-eurobarometer-illegal-content>

⁹⁵ https://ec.europa.eu/info/consultations/public-consultation-measures-further-improve-effectiveness-fight-against-illegal-content-online_en

⁹⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1553097581351&uri=CELEX:32018L1808>

December 2018. Member States have until 19 September 2020 to transpose the revised Directive into their national laws. The Commission will assist Member States in order to ensure a timely and correct transposition.

The revised Directive intensifies efforts to fight ‘hate speech’. In particular, it bans both incitement to hatred and incitement to violence, while extending the grounds for protection, in line with Article 21 of the EU’s Charter of Fundamental Rights, to include, among others, the grounds of sex, disability, age and sexual orientation.

In view of the growing consumption of audiovisual content online, the new Directive provides new obligations for video-sharing platforms., such as YouTube. Such platforms will need to take measures (parental control, age verification and content rating systems) to protect minors from harmful content and to protect the public from incitement to violence or hatred and from content constituting criminal offences. In addition, video-sharing platforms will also be required to respect certain obligations concerning commercial communications, depending on the degree of control they exercise over such commercial communications. As minors move increasingly towards consuming audiovisual content online, the new directive brings the rules governing online content into line with the existing rules to protect minors from seeing or hearing harmful content on TV or via on-demand services. It requires the most harmful content, such as gratuitous violence and pornography, to be subject to the strictest measures, providing a high level of control. Co-regulation on conduct on content descriptors are also encouraged.

As regards the independence of the audiovisual regulatory bodies, the revised Audiovisual Media Services Directive also substantially beefs up the provisions on independence of regulators. The directive imposes requirements which all national regulatory authorities for audiovisual media services must meet, including impartiality, adequate human and financial resources, adequate enforcement powers, and transparent procedures for the dismissal of the heads of such authorities or bodies.

In 2018 the Commission continued discussions with the Council and the European Parliament on the **proposal for a Directive on Copyright in the Digital Single Market**⁹⁷. The impact assessment accompanying the proposal assessed the impact of the measures and concluded that those designed to open up wider access to content across the EU and to adapt the exceptions and limitations are expected to have a limited impact on copyright as a property right and a positive impact on cultural diversity, the right to education and freedom of arts and sciences. Measures to protect press publications are expected to have a positive impact on copyright as a property right and on the freedom of expression and information, as they are likely to improve the quality of journalistic content. The impact assessment also concluded that the impact on freedom of expression which the proposed rules on the use of protected content by services storing and giving access to user-uploaded content might have would be expected to be mitigated by measures obliging these services to establish complaint and redress mechanisms for users, in case of disputes about the application of the new rules.

On 13 June 2018, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression sent a letter to the Commission about the potential implications of Article 13 of the proposal on the fundamental rights of users (freedom of expression and information), targeted service providers (freedom to conduct a business), and right holders (right to property). In its reply of 4 September 2018 the Commission stated

⁹⁷ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016) 593 final, 14.9.2016.

that it had taken full account of fundamental rights when drawing up its proposal. It also stated that the proposal provided for a number of safeguards to ensure a fair balance between right holders' property rights, users' freedom of information, and service providers' freedom to conduct business.

Negotiations also continued on the proposal for a **Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes**⁹⁸. The proposal establishes mechanisms that will make it quicker and easier to clear rights for making television and radio programmes that are available online across borders and for retransmission of packages of channels via internet-based networks equivalent to cable. The impact assessment accompanying the proposal concluded that it would be expected to have a limited impact on copyright as a property right and on the freedom to conduct business. The proposal would be expected to have a positive impact on freedom of expression and information, as it would increase the cross-border provision and receipt of TV and radio programmes originating in other Member States.

Policy

On 26 April 2018, the Commission adopted its **Communication on tackling online disinformation: a European Approach**⁹⁹, based on a wide-ranging stakeholder consultation.

The Communication presents the Commission's analysis of the phenomenon and outlines actions designed to counter disinformation and improve the online information ecosystem for European citizens. These include: (i) introducing an EU-wide Code of Practice on Disinformation; (ii) setting up an independent European network of fact-checkers; (iii) establishing a secure online platform on disinformation to support the work of the network of fact-checkers and relevant academic researchers; (iv) mobilising new technologies through the Horizon 2020 work programme, to tackle disinformation; (v) promoting literacy, as a way to make the public more resilient to disinformation; (vi) taking measures to support quality journalism as a means of uncovering and counterbalancing disinformation; (vii) taking measures to enable secure and resilient elections; and (viii) improving the strategic communication capabilities of the EU institutions and the Member States, to counter internal and external disinformation threats.

The first tangible outcome of the Communication is a self-regulatory **code of practice**, unveiled by online platforms and the advertising industry on 26 September 2018¹⁰⁰. It includes a wide range of commitments to combat online disinformation. On 16 October 2018, the first signatories formally subscribed to the Code; these include the three major platforms (Facebook, Google, Twitter) and Mozilla, plus trade associations representing other online platforms and the online advertising sector¹⁰¹. This is the first time ever that industry worldwide has voluntarily agreed on a set of self-regulatory standards to combat disinformation.

⁹⁸ Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, COM(2016) 594 final, 14.9.2016.

⁹⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on tackling online disinformation: a European Approach COM/2018/236 final, 26.4.2018.

¹⁰⁰ <https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation>

¹⁰¹ https://ec.europa.eu/commission/news/code-practice-fight-online-disinformation-2018-oct-16_en

On 5 December 2018, the Commission and the EU High Representative on Foreign Affairs and Security Policy presented an **action plan against disinformation** setting out further specific proposals for a coordinated EU response to the challenge of disinformation, including appropriate mandates and sufficient resources for the relevant strategic communications teams of the European External Action Service¹⁰². The action plan proposes a series of measures designed to: (i) improve capabilities to detect, analyse and expose disinformation; (ii) strengthen a coordinated and joint response to disinformation; (iii) ensure that industry abides by the Code of Practice on Disinformation; and (iv) raising awareness about disinformation, empowering citizens and civil society and supporting media. The action plan was presented to the European Council on 13-14 December 2018.

The action plan was accompanied by the **Commission's Report on the implementation of the Communication on tackling online disinformation**, which assesses progress made in taking the measures set out in the Communication¹⁰³.

The measures set out in the Communication and the action plan have been designed with the right of freedom of expression firmly in mind. At the same time, the Commission has recognised the threats that disinformation poses to genuine realisation of the right of freedom of expression and, more broadly, to public discourse and the functioning of democracy.

The EU spectrum policy enables the public to access and distribute the digital content and information of their choice. In recent years, initiatives to make more spectrum available for wireless broadband services have led to wider internet access through devices such as smartphones and tablets.

Commission departments have also been involved as observers and have closely followed up the Council of Europe's recommendation on the roles and responsibilities of internet intermediaries¹⁰⁴, adopted on 7 March 2018, with the aim of ensuring policy coherence in this area. Commission departments have also made sure to take part in discussions in the Council of Europe on the human rights aspects of automated data processing and different forms of artificial intelligence.

The Commission is aware of challenges to **media freedom and pluralism in the Member States** and has continued to take measures to strengthen media freedom and pluralism across the EU. In 2018, it continued to co-fund activities run by the European Centre for Press and Media Freedom, whose main aim is to unite Europe's fragmented media freedom community and to address and raise awareness of violations of media freedom in EU Member States and certain candidate countries. The Centre also provides practical help to journalists in need. In 2018, the Centre, together with its partner the International Press Institute, set up a fund for cross-border investigative journalism. The Index on Censorship¹⁰⁵ monitors violations, threats and limitations to media freedom with its 'Mapping Media Freedom Project'. Building on this crowd-sourced platform, it provides assistance to

¹⁰² Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on Action Plan against Disinformation JOIN/2018/36 final, 5.12.2018.

¹⁰³ Report from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of the Communication 'Tackling online disinformation: a European Approach' COM/2018/794 final 5.12.2018.

¹⁰⁴ https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14

¹⁰⁵ <https://www.indexoncensorship.org/>

journalists and disseminates knowledge about media freedom in Europe. Likewise, the International Press Institute¹⁰⁶ runs a project to address the risk that the abuse of defamation laws, and of criminal defamation laws in particular, poses to the public's right to information in the EU and in candidate countries. In 2018, the Institute devoted particular attention to the Visegrad countries, while another partner, SEEMO, focused on south-east Europe¹⁰⁷. Another EU-financed project is the Media Pluralism Monitor¹⁰⁸, designed to identify potential risks to media pluralism in Member States and run independently manner by the Centre for Media Pluralism and Media Freedom at the European University Institute. The results of the 2017 Media Pluralism Monitor, published in 2018, show that none of the countries monitored is free of risks to media pluralism. The Monitor is a scientific tool based on twenty indicators across four domains.

The Commission also contributes through financial initiatives to giving **all Europeans access to the very high-capacity digital networks**, and thereby to online content and services. Digital networks are essential to enable the digital transformation of the economy and society and a decisive factor in closing economic, social and geographical divides. They improve access to information and modern public services such as e-learning, e-health and e-administration for everyone in the EU, regardless of geographical location.

The WiFi4EU initiative¹⁰⁹, implemented as of 2018, promotes free access to WiFi connectivity for people in public areas including parks, squares, public buildings, libraries, health centres and museums in municipalities throughout the EU. It does so by giving municipalities the opportunity to apply for vouchers to the value of EUR 15 000. The vouchers are to be used to install WiFi equipment in public spaces within the municipality that are not already equipped with a free WiFi hotspot. The aim is to provide all EU residents, regardless of their income or area they live in, with access to digital services, allowing them to experience the benefits of a digitally connected society.

Article 12 — Freedom of assembly and of association

Freedom of peaceful assembly and freedom of association at all levels, notably in political, trade union and civic matters, are protected by Article 12 of the Charter, corresponding to Article 11 of the European Convention on Human Rights. However, Article 12 of the Charter has a wider scope, since it applies to all European levels. Moreover, unlike Article 11 of the Convention, it specifically mentions the major contribution which political parties make to expressing the political will of the people. This right is also based on Article 11 of the Community Charter of the Fundamental Social Rights of Workers.

Legislation and policy

In 2018, the EU continued its efforts to promote human rights and democracy in the development cooperation. In October 2018, the Commission adopted new strategic priorities for the **European Instrument for Democracy and**

¹⁰⁶ <https://ipi.media/>

¹⁰⁷ South East Europe Media Organisation, <http://www.seemo.org/>

¹⁰⁸ <http://cmpf.eui.eu/media-pluralism-monitor/>

¹⁰⁹ <https://ec.europa.eu/digital-single-market/en/policies/wifi4eu-free-wi-fi-europeans>

Human Rights (EIDHR)¹¹⁰ - the financial instrument for supporting human rights and fundamental freedoms in EU external action. The new priorities place more emphasis over the next 3 years (2018-2020) on protection for human rights defenders at risk and measures to tackle the shrinking scope of democratic, civic and civil society activities (e.g. freedom of association and assembly, freedom of expression). In 2018 alone, 1300 people under threat for defending human rights received assistance from the EIDHR emergency funds for human rights defenders, while the EIDHR human rights emergency facility for civil society action was boosted by an additional EUR 3.5 million.

Article 13 — Freedom of the arts and sciences

Article 13 of the Charter stipulates that the arts and scientific research must be free of constraint. This does not mean that the arts and scientific research cannot be restricted in any way; rather, it means that any such restrictions are possible only under the strict conditions provided for by Article 52 (1) of the Charter¹¹¹.

Article 14 — Right to education

The right to education and access to vocational and continuing training is enshrined in Article 14 of the Charter. It is based on the common constitutional traditions of the Member States and on Article 2 of Protocol No 1 to the European Convention on Human Rights.

Legislation

The Regulation¹¹² on the **European Solidarity Corps** was adopted in October 2018. It is designed to get young people and organisations involved in solidarity activities and to help boost cohesion and solidarity in Europe, supporting communities and responding to social challenges. The European Solidarity Corps will provide a single entry point for 17-30-year-olds keen to take part in solidarity activities in the EU. Young people will have access to volunteering, traineeships or jobs made available by public and private bodies. Participating organisations must obtain a quality label from the Commission or national agencies by demonstrating their ability to guarantee the quality of the activities on offer, in accordance with the principles and objectives of the programme.

On 15 March, the Council adopted a recommendation on the **European Framework for Quality and Effective Apprenticeships**¹¹³, designed to boost apprentices' personal development and make them more employable. The initiative identifies 14 criteria which the Member States should implement to ensure effective apprenticeships. These range from educational support and career guidance for apprentices to assessing outcomes and supporting companies in their efforts to make apprenticeships cost-effective.

¹¹⁰ https://ec.europa.eu/europeaid/commission-implementing-decision-multi-annual-action-programme-2018-2020-european-instrument_en

¹¹¹ For further explanations, see under Article 52.

¹¹² Regulation (EU) 2018/1475 of the European Parliament and of the Council of 2 October 2018 laying down the legal framework of the European Solidarity Corps and amending Regulation (EU) No 1288/2013, Regulation (EU) No 1293/2013 and Decision No 1313/2013/EU, *OJ L 250*, 4.10.2018, p. 1.

¹¹³ Council Recommendation of 15 March 2018 on a European Framework for Quality and Effective Apprenticeships, *OJ C 153*, 2.5.2018, p. 1.

Policy

On 22 May 2018, the Council adopted conclusions on **the role of young people in building a secure, cohesive and harmonious society in Europe**¹¹⁴. The conclusions underlined the importance of youth mobility in promoting intercultural competences and combating prejudices and discrimination¹¹⁵. They also underline the significant role of youth work and of non-formal and informal learning in addressing youth marginalisation and radicalisation. The Council called on the Member States, the Commission and the European External Action Service to develop a peaceful discourse that promotes the shared values of the EU, democracy, the rule of law and respect for fundamental rights and to ensure active and meaningful youth participation in building peaceful and inclusive societies. It also invited the EEAS to maintain and foster the intercultural dialogue between youth in and beyond Europe, as participation in intercultural dialogue provides various opportunities for young people to advance reconciliation processes and reduce prejudice, misunderstandings and discrimination among diverse groups as well as to combat hate speech and violent extremism using a human-rights based approach.

On the same day, the Council adopted a recommendation on **promoting common values, inclusive education and the European dimension of teaching**¹¹⁶. It encourages Member States to raise awareness of the shared values set out in Article 2 of the Treaty on European Union from an early age and at all levels, and to improve critical thinking and media literacy, especially in the use of the internet and social media. It also calls on EU countries to provide inclusive education for all learners, notably by providing them with support tailored to their particular needs, and to promote a European dimension in teaching by encouraging participation in the e-Twinning network and in other forms of cross-border mobility and to enable educational staff to promote common values and deliver inclusive education.

On 30 May 2018, the Commission tabled its proposal for the **Erasmus programme**¹¹⁷ for 2021-2027. The programme will step up mobility and exchanges and reach out to a larger target group, both within and beyond the EU. The Commission proposes doubling the programme's budget compared with 2014-2020. The programme will make a meaningful contribution to Europe's future sustainable growth and cohesion by encouraging innovation and bridging Europe's knowledge, skills and competences gap.

On 12 June 2018, the European Parliament adopted a resolution on the **modernisation of education in the EU**¹¹⁸. One of the measures it calls for is the provision of adequate financial support to schools of all categories and levels, provided the curriculum offered is based on the principles enshrined in the Charter and complies with the rules and regulations governing the quality of education and the use of such funds.

¹¹⁴ Council conclusions on the role of young people in building a secure, cohesive and harmonious society in Europe, OJ C 195, 7.6.2018, p. 13.

¹¹⁵ See under Article 21

¹¹⁶ Council Recommendation of 22 May 2018 on promoting common values, inclusive education, and the European dimension of teaching, OJ C 195, 7.6.2018, p.1.

¹¹⁷ Proposal for a Regulation of the European Parliament and of the Council, establishing 'Erasmus': the Union programme for education, training, youth and sport, and repealing Regulation (EU) No 1288/2013.

¹¹⁸ European Parliament resolution of 12 June 2018 on modernisation of education in the EU, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2018-0247>

In its communication of May 2018, **Education in Emergencies and Protracted Crises**¹¹⁹, the Commission committed to encouraging safe, inclusive and good-quality education when responding to emergencies and long-term crises outside the EU. The Communication proposes an updated EU policy framework to address education needs in emergencies and crises through humanitarian and development assistance, focusing on four priorities:

- strengthening systems and partnerships for a rapid, efficient, effective and innovative education response;
- promoting access, inclusion and equity;
- championing education for peace and protection;
- supporting quality education for better learning outcomes.

From 2019, the Commission will aim to allocate 10 % of its humanitarian assistance to education in emergencies and protracted crises.

Article 15 — Freedom to choose an occupation and right to engage in work

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

Article 16 — Freedom to conduct a business

Article 16 of the Charter recognises the freedom to conduct a business in accordance with EU law and national laws and practices. EU measures that could interfere with businesses' economic activity are frequently assessed by the courts to see whether they affect this freedom.

Legislation

In company law, two recent proposals, regarding **the use of digital tools and processes in company law**¹²⁰ and **cross-border conversions, mergers and divisions**¹²¹, are designed to reinforce the freedom to conduct a business. The **Regulation on a framework for the free flow of non-personal data in the European Union**¹²², which will apply from 28 May 2019, preserves the freedom to conduct a business, as it removes unjustifiable and disproportionate barriers to using or providing data services (such as cloud services or configuration of in-house IT systems). The freedom to conduct a business is also promoted by adopting a self-regulatory approach on the issue of facilitating the switching of service providers and porting of data for professional users.

¹¹⁹ Communication from the Commission to the European Parliament and the Council on Education in Emergencies and Protracted Crises, 18.5.2018, COM(2018) 304 final

¹²⁰ Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards the use of digital tools and processes in company law No 113/2018 (COM (2018) 239 final, 25.4.2018).

¹²¹ Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions No 114/2018 (COM (2018) 241 final, 25. 4.2018).

¹²² Regulation (EU) 2018/1807 of the European Parliament and of the Council on a framework for the free flow of non-personal data in the European Union, OJ L 303, 28.11.2018, pp. 59–68.

The **Geoblocking Regulation** entered into force in March 2018¹²³. Traders can continue to decide where and when they offer their goods or services to customers. The non-discrimination provisions of this Regulation are the sole limit on their freedom to refuse a sales request or to apply different conditions. All other reasons not to sell or to apply different conditions remain available to traders, e.g. if the product is no longer in stock.

Case law

In case *Stichting Greenpeace Nederland and PAN Europe*¹²⁴, concerning request for access to information pertaining to the approval of glyphosate as an active substance for use in plant protection products, the applicants alleged that there was an overriding public interest in disclosing information about emissions into the environment. The General Court – while dismissing the action in the concrete case considering that the requested information did not fulfil the definition of information relating to emissions into the environment - explained in paragraph 49 of the judgment that the first sentence of Article 6(1) of Regulation No 1367/2006 requires the disclosure of a document where the information requested relates to emissions into the environment, even if there is a risk of undermining the interests protected by Article 4(2), first indent, of Regulation No 1049/2001 [i.e. commercial interests]. That interpretation cannot be called into question under the pretext of an interpretation that is consistent, harmonious, or in conformity with Articles 16 and 17 of the Charter of Fundamental Rights of the European Union.

Article 17 — Right to property

Article 17 of the Charter protects the right of all to property, which includes the right to own and use lawfully acquired possessions and to have them at one's disposal. . The Charter also guarantees the protection of intellectual property.

Legislation

On 27 July 2018, the Commission presented a proposal for a Council Decision on the accession of the European Union to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications¹²⁵. Recital 7 of the proposal refers to Article 17(2) of the EU Charter of Fundamental Rights.

Furthermore, on 1 June 2018 the Commission proposed improving and simplifying the protection of geographical indications (GIs) in the sectors of agricultural products and foodstuffs, wines and aromatised wines¹²⁶. The

¹²³ Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJEU L 060, 02 March 2018, p. 1.

¹²⁴ Judgment of 21 November 2018 in case T-545/11 *Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe) v European Commission*.

¹²⁵ Proposal for a Council Decision on the accession of the European Union to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications (EU) No 214/2018 (COM(2018) 350 final, 27.7.2018).

¹²⁶ Proposal for a Regulation of the European Parliament and the Council amending Regulations (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No 1151/2012 on quality

proposal will significantly streamline the management of the EU registers by simplifying the GI systems and ensuring faster registration of GIs. It also proposes significant clarifications as regards the protection of GIs on the internet and of goods in transit through EU customs territory.

The Commission's **Communication on Protection of Intra-EU Investment** of 19 July 2018¹²⁷ explains how EU law protects EU investments and how investors can enforce rights under EU law before national administrations and courts. EU rules protecting investments include fundamental rights under the Charter, notably the freedom to conduct a business¹²⁸, the right to property and the right to an effective remedy and effective judicial protection¹²⁹. It clarifies when cross-border investors can invoke fundamental rights under the Charter, and specifies their content and possible restrictions on their exercise. For instance, 'the freedom to conduct a business can be successfully invoked against serious restrictions of the investor's contractual freedom.'¹³⁰ The right to property (i.e. to own, use and dispose of one's lawfully acquired possessions) extends to "property" in the broadest sense of the word¹³¹ and equally covers the peaceful enjoyment of the right. It directly entails a right to compensation for the deprivation of property in the general interest.' The Communication also clarifies that fundamental rights are not absolute and that their exercise may be subject to restrictions, if such restrictions are justified by objectives of general interest recognised by EU law and are proportionate.

The awareness of EU law protecting investments, including fundamental rights, has become even more important, as EU investors can no longer rely on intra-EU bilateral investment treaties (see the *Achmea* case below).

Policy

The Commission continued to manage the exclusive EU registers protecting the intellectual property rights of farmers and producers of agricultural products, foodstuffs and beverages held in geographical indications. By the end of 2018 the Commission had registered 3405 geographical indications and protected a further 1534 geographical indications and names of origin pertaining to goods from non-EU countries through bilateral agreements.

schemes for agricultural products and foodstuffs, (EU) No 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products, (EU) No 228/2013 laying down specific measures for agriculture in the outermost regions of the Union and (EU) No 229/2013 laying down specific measures for agriculture in favour of the smaller Aegean islands (EU) No 218/2018 (COM(2018) 394 final, 1.6.2018).

¹²⁷ Communication from the Commission to the European Parliament and the Council Protection of intra-EU investment (EU) (COM(2018) 547 final, 19.7.2018)

¹²⁸ See Article 16.

¹²⁹ See Article 47.

¹³⁰ Communication from the Commission to the European Parliament and the Council Protection of intra-EU investment (EU) (COM(2018) 547 final), 19.7.2018.

¹³¹ Judgment of 6 March 2018, case C-284/16 *Slovak Republic v Achmea BV*.

Case law

In case *Bastei Lübbe GmbH & Co. KG v. Michael Strotzer*¹³², the Court of Justice held that right holders must have at their disposal an effective remedy or means of allowing the competent judicial authorities to order the disclosure of necessary information. The Court noted that EU law precludes national legislation under which the owner of an internet connection used for copyright infringements through file-sharing cannot be held liable to pay damages if he can name at least one family member who might have had access to that connection, without providing further details as to when and how the internet was used by that family member. The Court concluded that a fair balance must be struck between the various fundamental rights, namely the right to an effective remedy and the right to intellectual property with the right to respect for private and family life.

In a recent judgment in the *Achmea* case of 6 March 2018¹³³, the Court confirmed that an investor-State arbitration in intra-EU bilateral investment treaties is unlawful. Following this judgment, the Commission has intensified its dialogue with all Member States, calling on them to take action to terminate the intra-EU bilateral investment treaties.

The General Court issued a judgment in joined cases T-429/13 and T-451/13 **Bayer CropScience AG and Syngenta Crop Protection AG v Commission**. This ruling concerned a request for annulment of a Commission implementing regulation as regards amendments to the conditions for approval of certain active substances for use in plant protection products. The applicants had claimed infringement of the Charter rights set out in Article 16 (freedom to conduct a business) and Article 17 (right to property). The Court confirmed established case law, concluding that 'both the freedom to pursue a trade or business and the right to property are, according to settled case law, general principles of EU law [...] and are now expressly guaranteed under Articles 16 and 17 of the Charter of Fundamental Rights'. It went on to recall that the rights are, however, not absolute and that their exercise may be restricted under certain circumstances. The Court established that the Commission had rightly concluded, on the basis of new scientific knowledge, that the criteria for the approval of active substances concerned under Regulation No 1107/2009¹³⁴ were no longer satisfied for a number of uses. Moreover, the contested act did not infringe the actual substance of the freedom to conduct a business or the right to property, as the applicants remain free to carry on their business of manufacturing plant protection products. Accordingly, the action and the claims concerning fundamental rights were dismissed.

Article 18 — Right to asylum

The right to asylum is guaranteed by Article 18 of the Charter. Asylum is granted to people fleeing persecution or serious harm in their own country and who are therefore in need of international protection. Granting asylum is an international obligation, first recognised in the 1951 Geneva Convention on the protection of refugees. Since 1999, the EU has been working to create a common policy on asylum, subsidiary protection and temporary protection (the 'Common European Asylum

¹³² Judgment of 18 October 2018, C-149/17 *Bastei Lübbe GmbH & Co. KG v. Michael Strotzer*.

¹³³ Judgment of 6 March 2018, case C-284/16 *Slovak Republic v Achmea BV*.

¹³⁴ Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, OJ L 309 24.11.2009, p. 1.

System'), in line with the Geneva Convention and related instruments, as required by the EU Treaties (Article 78 TFEU).

Legislation and policy

In September 2018, building on the broad political agreement reached on the new EU Asylum Agency in 2017¹³⁵, the Commission put forward an amendment to the proposal for a **Regulation establishing a European Union Agency for Asylum**¹³⁶. This amended proposal focuses on the provisions on operational and technical assistance. Its aim is to ensure that the Agency has a clear mandate to provide Member States with as much support as possible throughout the administrative procedure of international protection, or with parts of the procedure. However, this does not affect the Member States' right to take decisions on individual applications. The proposal also provides for a mandate for the Agency to provide assistance in the procedure to determine the Member State responsible for examining an application for international protection, and to assist the courts competent for handling appeals. In so doing, the Agency must respect judicial independence and impartiality in full.

In September 2018, the Commission adopted a new proposal on the **European Border and Coast Guard**, designed to improve border management at EU level and to guarantee adequate support to all Member States facing migratory challenges¹³⁷. The proposal is fully consistent with fundamental rights and abides by the principles of the Charter as regards the activities of the European Border and Coast Guard Agency and the Member States' border management authorities. The Agency's extended mandate is balanced by stronger fundamental rights safeguards and increased accountability, including in its cooperation with non-EU countries. The newly proposed standing corps of 10 000 operational staff will perform its tasks with full respect for EU and international law on fundamental rights. In particular, the proposal abides by the right to asylum, the principle of *non-refoulement*¹³⁸, the right to respect for private and family life¹³⁹, the protection of personal data¹⁴⁰ and the right to an effective remedy¹⁴¹. It also takes full account of the rights of the child¹⁴² and the special needs of people in a vulnerable situation. The proposal also provides for a complaints mechanism to safeguard respect for fundamental rights in all the Agency's activities. Already in place since 2016, this administrative mechanism entrusts the fundamental rights officer to handle complaints received by the Agency.

¹³² <https://www.consilium.europa.eu/en/press/press-releases/2017/06/29/eu-agency-for-asylum/>

¹³⁶ Amendment to the Proposal for a Regulation of the European Parliament and of the Council establishing a European Union Agency for Asylum and repealing Regulation No 439/2010, COM(2018) 633 final, https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-eu-agency-asylum-regulation-633_en.pdf

¹³⁷ Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council 12.9.2018 COM(2018) 631 final, https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-border-coast-guard-regulation-631_en.pdf

¹³⁸ See Article 19.

¹³⁹ See Article 7.

¹⁴⁰ See Article 8.

¹⁴¹ See Article 47.

¹⁴² See Article 24.

Following the Commission's call to Member States to resettle at least 50 000 additional people by the end of October 2019¹⁴³, approximately 21,000 places were filled by December 2018, including resettlements of evacuees from Libya via the Emergency Transit Centre in Niger. The implementation of the EU-Turkey Statement of 18 March 2016¹⁴⁴ also contributed to resettlement efforts as Member States continue to resettle Syrians from Turkey. **By the end of 2018, more than 18,600 people had been resettled¹⁴⁵.**

The Commission also adopted guidance on implementing the hotspot approach, giving prominence to the obligation to respect fundamental rights over operations and performance of tasks in the hotspots¹⁴⁶. **Based on the general framework of the European Agenda on Migration¹⁴⁷ and subsequent progress reports¹⁴⁸, the Rules of Procedure of the EU Regional Task Force in Greece (EURTF-GR) provide that European Union Fundamental Rights Agency (FRA) is a permanent participant of the EURTF-GR monthly meetings. These meetings aim to ensure the necessary communication on the implementation of the EU-Turkey Statement and strengthen the co-operation among the concerned national authorities and EU Institutions and Agencies on the issues related to fundamental rights.**

Application by Member States

In 2018, the Commission continued to monitor closely (i) how Member States have transposed into national legislation the provisions of the various legislative documents pertaining to the **Common European Asylum System** (and in particular, the amended **Long-Term Residence Directive¹⁴⁹** to include beneficiaries of international protection, the **Qualifications Directive¹⁵⁰**, the **Asylum Procedures Directive¹⁵¹** and the **Reception Conditions Directive¹⁵²**) and (ii) their compliance with these provisions.

In November 2018 the Commission sent a letter of formal notice to Bulgaria concerning breaches of the Asylum Procedures Directive (Directive 2013/32/EU) and the Reception Conditions Directive (Directive 2013/33/EU)¹⁵³.

¹⁴³ Commission Recommendation of 27.9.2017 on enhancing legal pathways for persons in need of international protection, C(2017) 6504.

¹⁴⁴ <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement>

¹⁴⁵ Please note that this is a general number of resettlements in 2018 and not only under this scheme.

¹⁴⁶ Commission Staff Working Document 'Best practices on the implementation of the hotspot approach' (COM(2017) 669).

¹⁴⁷ Commission Communication of 13.5.2015 on a European Agenda on Migration (COM(2015)240 final)

¹⁴⁸ https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/press-material_en

¹⁴⁹ Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, p. 44–53.

¹⁵⁰ Directive 2011/95/EU of the European Parliament and of the Council 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. 9–26.

¹⁵¹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, pp. 60–95.

¹⁵² Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.6.2013, pp. 96–116.

¹⁵³ http://europa.eu/rapid/press-release_MEMO-18-6247_en.htm

In December the Commission decided to refer Hungary to the CJEU in relation to the provisions concerning access to asylum, illegal summary returns and unlawful detention at the transit zone¹⁵⁴. The Commission considered that the introduction of a new non-admissibility ground for asylum applications is a violation of the EU Asylum Procedures Directive. In addition, the new Hungarian law and the constitutional amendment on asylum curtail the right to asylum in a way which is incompatible with the Asylum Qualifications Directive and the Charter. The Commission also opened an infringement case against Hungary for unlawfully criminalising NGOs when they assist asylum applicants with their claims, as well as for further curtailment of the right to asylum. On 19 July 2018, the Commission addressed a letter of formal notice to the Hungarian authorities, having found the criminalisation of support for asylum and residence applications and the related restraining measures to be in violation of the Asylum Procedures Directive and the Reception Conditions Directive, Articles 20 and 21(1) TFEU and the Free Movement Directive, and of the Charter.

Under AMIF (the **Asylum, Migration and Integration Fund**), a number of projects funded had a fundamental rights dimension. The following examples, selected from among a large number of projects, illustrate the importance of EU-supported assistance designed to address the specific needs of vulnerable people and guarantee respect for their fundamental rights.

- In **the Netherlands**, AMIF supports a project designed to make LGBT asylum seekers and refugees safer and to train staff involved in asylum procedures.
- In **Lithuania**, an ongoing project to build housing for vulnerable asylum seekers is receiving support from AMIF. The project's aim is to create suitable conditions to house asylum seekers in the Foreigners' Registration Centre run by the State Border Guard Service under the Ministry of the Interior. There is a need to improve the conditions under which asylum seekers live in the centre, taking particular account of the needs of vulnerable asylum seekers.
- In **Malta**, AMIF channels support to a project helping refugees to live a dignified life. This project includes personalised information and guidance on how to access rights and mainstream services, plus individual legal and/or psychosocial measures. It helps refugees overcome the obstacles they face when seeking stable and regular employment.
- In **France**, there is a project to help exiled journalists by providing them with shelter plus legal, administrative and social support. Another AMIF-supported project has established a centre to help mentally ill victims of torture and persecution by providing health services and training opportunities.

Case law

The CJEU handed down a judgment on 25 January 2018 on a case concerned a Nigerian national whose asylum application was rejected on the basis of a psychologist's report which stated that it was not possible to confirm his homosexuality through the various tests applied¹⁵⁵. The CJEU ruled that although certain reports by experts could be useful, and could be drawn up without infringing the asylum applicant's fundamental rights, such reports could be the sole source to be relied upon by the determining authority when assessing an asylum application. The Court also held that a psychologist's report constitutes an interference with the person's right to respect for his or her private life, even if he

¹⁵⁴ http://europa.eu/rapid/press-release_IP-18-4522_en.htm

¹⁵⁵ Case C 473/16, *F v Bevándorlási és Menekültügyi Hivatal* on 25 January 2018.

or she has consented to the performance of certain tests to determine sexual orientation. The Court observed that such interference is extremely serious, being intended to give an insight into the most intimate aspects of the asylum seeker's life.

In two judgments delivered in September 2018¹⁵⁶, the CJEU addressed the issue of whether EU law requires second instance appeals against decisions rejecting an application for international protection and imposing an obligation to return to have an automatic suspensory effect. The Court ruled that national legislation which, while it makes provision for appeals against judgments delivered at first instance which uphold a decision rejecting an application for international protection and impose an obligation to return, does not confer on that remedy automatic suspensory effect, even if the person concerned invokes a serious risk of infringement of the principle of non-refoulement, is not contrary to EU law.

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

Article 19 of the Charter enshrines the same right as that afforded by Article 4 of Protocol 4 ECHR (prohibition of collective expulsions) and codifies requirements flowing from case law on Article 3 ECHR (protection of individuals from being removed, expelled or extradited to a state where there is a serious risk of the death penalty, torture or other inhuman or degrading treatment or punishment).

Guarantees deriving from this provision are relevant in asylum and migration matters and are often the object of inquiries and complaints under the EU legal framework.

Legislation

In September 2018, the Commission proposed a **targeted review¹⁵⁷ of the Return Directive¹⁵⁸**. This new legislative proposal introduces faster procedures, common timelines and clearer rules, tightening the link between asylum and return, and ensuring a more effective use of detention to support the enforcement of returns. When drafting the various aspects of the proposal, particularly the issue of detention (maximum duration of 3 months) and effective remedies (limitation of certain rights, such as on suspensive effects), we took careful account of the jurisprudence of the Strasbourg and Luxembourg courts. The proposal did not change the general guarantees of the existing directive, which remain unaffected: Member States must abide by the principle of non-refoulement and take due account of family life, the best interests of the child and the state of health of the people concerned when applying this legislation.

¹⁵⁶ Cases C-175/17 and C-180/17 – *X v Belastingdienst/Toeslagen and X and Y v Staatssecretaris van Veiligheid en Justitie* - on 26 September 2018.

¹⁵⁷ COM(2018)634 final of 12.9.2018.

¹⁵⁸ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

Policy

During 2018, the Commission received a large number of questions from Members of the European Parliament and letters from the public about search and rescue operations on the central Mediterranean route and the treatment of migrants rescued at sea.

Replying to these questions and letters, the Commission referred to the Regulation¹⁵⁹ establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Border and Coast Guard Agency, which provides that any measure taken in the course of a surveillance operation must be proportionate to the objectives pursued and non-discriminatory, and should fully respect human dignity, fundamental rights and the rights of refugees and asylum seekers, including the principle of non-refoulement.

However, the rescue operations in the central Mediterranean fall under the overarching international law principle of duty of assistance to any vessel or person in distress. National authorities maintain competence in these matters, and it is not within the EU's power to coordinate search and rescue events.

In addition, the Commission pointed out in its replies that the EU has a comprehensive approach in the central Mediterranean, its aim being to manage migration flows better and in line with international standards. This includes improving Libyan capacity for border management, providing economic support for local communities affected by migration flows, and providing protection and assistance to vulnerable migrants. Various EU-funded projects covered by the EU trust fund have involved cooperating with and training the Libyan coast guard since 2016 on issues including search and rescue operations, border surveillance, codes of conduct and respect for migrants' human rights.

Case law

On 19 June 2018, the Court of Justice of the European Union handed down a judgment in case *Gnandi*¹⁶⁰. The case concerned a request for a preliminary ruling by the Belgian Council of State on the possibility of the adoption of a return decision, within the meaning of the Return Directive¹⁶¹, before the legal remedies against a rejection of an asylum decision had been exhausted and the asylum procedure concluded. EU law¹⁶², read in the light of the principle of non-refoulement¹⁶³ and the right to an effective remedy¹⁶⁴, does not preclude the adoption of a return decision in respect of a third-country national who has applied for international protection, immediately after the rejection of that application by the determining authority or together in the same administrative act, and thus

¹⁵⁹ Regulation (EU) No 656/2014 of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 189, 27.6.2014, pp. 93–107.

¹⁶⁰ Judgment of 19 June 2018 in case C-181/16, *Sadikou Gnandi v État belge*

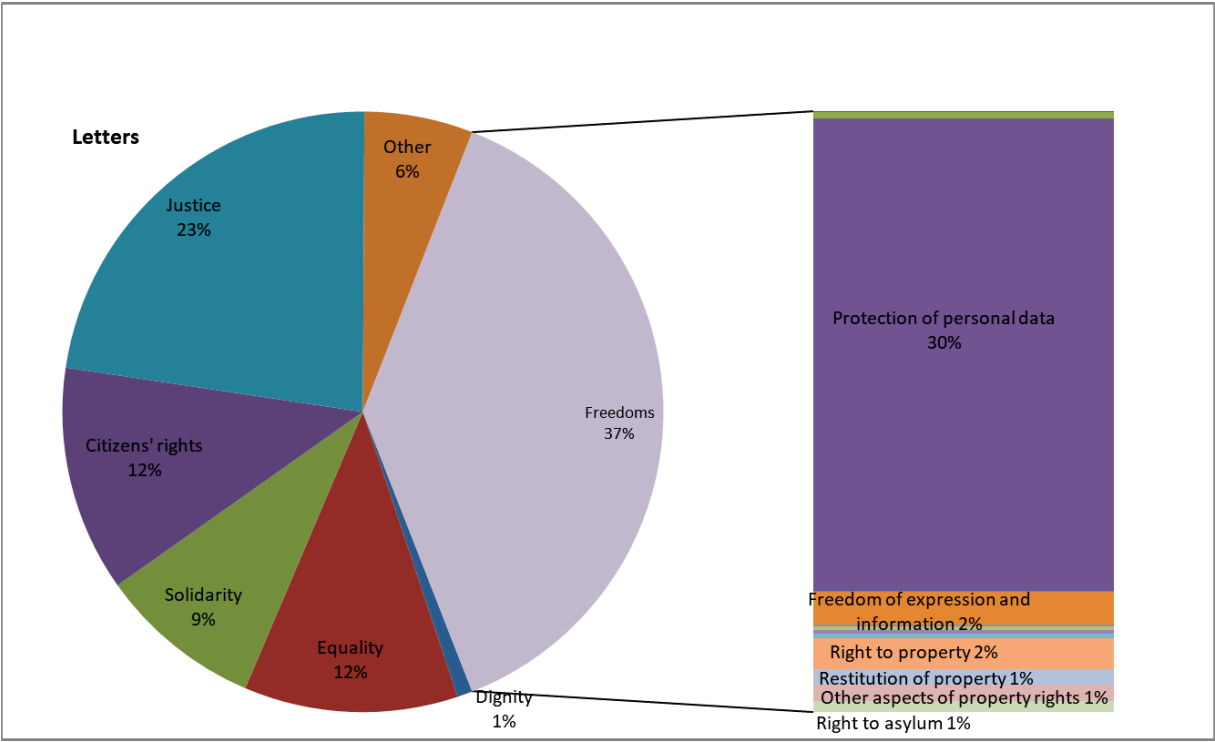
¹⁶¹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

¹⁶² Directive 2008/115/EC, read in conjunction with Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

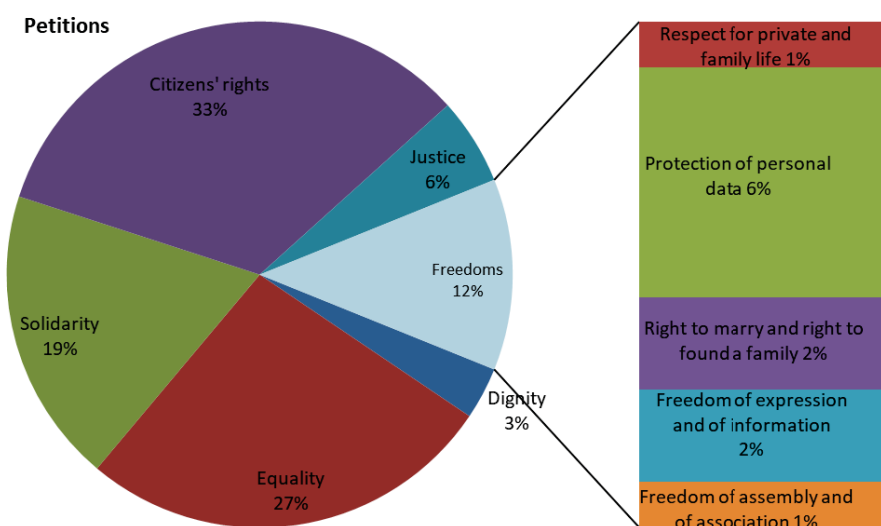
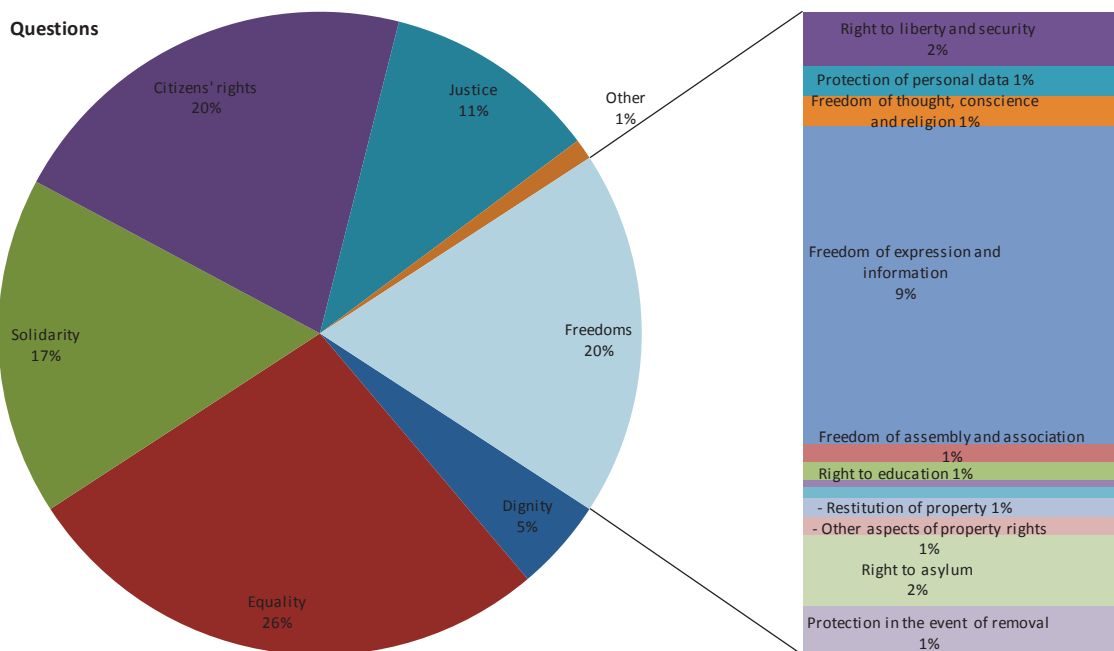
¹⁶³ See Article 18

¹⁶⁴ See Article 47

before the conclusion of any appeal proceedings brought against that rejection, provided that the Member State concerned ensures that all the legal effects of the return decision are suspended pending the outcome of the appeal¹⁶⁵.



¹⁶⁵ See further on that case under Article 47.



Title III

Equality

In 2018, the Commission adopted a **Recommendation on standards for equality bodies**, encouraging Member States to set out measures that help improve the equality bodies' independence and effectiveness.

On 1 March 2018, Zero Discrimination Day, Commissioner Jourová presented the second report on the **list of actions to advance LGBTI equality**. In addition, on 15 October she opened the 9th European Diversity Charters Forum and steered discussion aimed at engaging business to foster diversity on a voluntary basis.

The CJEU further developed its case law that protects LGBTI people against discrimination. In the *MB* case, the Court ruled that a national law that requires transgender people to be unmarried is contrary to sex equality provisions of Directive 79/7/EEC in relation to social security. In the *Coman* case, the Court clarified that the term 'spouse' used in the Free Movement Directive also applies to a person of the same sex as the citizen of the European Union to whom he or she is married.

On 4 December, the Commission adopted its report on the mid-term evaluation of the 2011 EU Framework for National Roma Integration Strategies. The report is based on the results of an in-depth evaluation of the framework's relevance, effectiveness, coherence, efficiency and EU added value.

Article 20 — Equality before the law

Article 20 of the Charter stipulates that everyone is equal before the law. It corresponds to a general principle of law included in all European constitutions and recognised by the CJEU as a basic principle of EU law.

Article 21 — Non-discrimination

The Charter prohibits discrimination on any grounds including 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. It also prohibits discrimination on grounds of nationality, within the scope of application of the EU 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 elsewhere. In the area of employment and occupation, EU legislation prohibits discrimination on grounds of religion or belief, disability, age or sexual orientation.

1. General non-discrimination issues

Legislation

On 22 June 2018, the Commission adopted a **Recommendation on standards for equality bodies**¹⁶⁶ encouraging Member States to set out measures that help improve the equality bodies' independence and effectiveness. This is of great value to these bodies' work, including on offering independent assistance to victims of discrimination, promoting equality, conducting independent surveys and issuing independent reports and recommendations.

On 12 March 2018, the Commission adopted a **proposal for a Directive amending Directive 2009/65/EC with regard to cross-border distribution of collective investment funds**¹⁶⁷. The main objective of this initiative is to facilitate the right to provide services in any Member State¹⁶⁸, ensuring that there is no discrimination, even indirect, on grounds of nationality. This further implements Article 21(2)¹⁶⁹ of the Charter.

Policy

The Commission supports diversity through a variety of actions and initiatives including targeted policies, awarding funding, promoting good practice and high-level discussions.

The **high-level group on non-discrimination, diversity and equality**, made up of national experts from the 28 Member States and Norway, met twice in 2018 to exchange good practices and discuss topical issues in the field of non-discrimination. Members set up a subgroup to develop specific guidelines on collecting equality data.¹⁷⁰ The high-level group endorsed these guidelines at their October meeting.

The Commission organised an exchange of good practices in Athens in 2018, specifically for Member States to discuss the topic of multiple discrimination and intersectionality.

The Commission continues to encourage businesses to run voluntary initiatives that promote diversity through an EU-level platform created to support the diversity charters¹⁷¹. The diversity charters are a recognised public trademark that demonstrates a company's commitment to promoting equality and diversity. A growing number of businesses and public authorities engage in and encourage diversity in the EU: over 10 000 companies covering

¹⁶⁶ Commission Recommendation on Standards of equality bodies. COM(2018)3850 final, 22.07.2018.

¹⁶⁷ Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/65/EC of the European Parliament and of the Council and Directive 2011/61/EU of the European Parliament and of the Council with regard to cross-border distribution of collective investment funds, adopted on 12.3.2018, 2018/0041 (COD), COM(2018) 92 final

¹⁶⁸ See Article 15

¹⁶⁹ See Article 21(2)

¹⁷⁰ http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612778&utm_source=just_newsroom&utm_medium=Website&utm_campaign=just&utm_content=Moving%20forward%20on%20equality%20data%20collection&utm_term=Tackling%20discrimination&lang=en

¹⁷¹ https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/tackling-discrimination/diversity-management/eu-platform-diversity-charters_en

15 million employees have signed diversity charters to date. In 2018, diversity charters were launched in Romania and Lithuania, bringing the total to 22 charters in the EU. The EU platform of diversity charters organises an annual forum for diversity charter signatories. In 2018, the forum took place on 15 October, brought together around 200 participants, and included a seminar on 'Diversity and Inclusion in SMEs'.

Funding also remains an important part of EU action in the fight against discrimination. This is why the Commission continued to support networks, NGOs and specific projects across Europe under the 'rights, equality and citizenship' programme¹⁷².

In 2018, the Commission continued to implement the **European Pillar of Social Rights**, where the principle of non-discrimination features prominently. It did so in particular by implementing the principle on equal opportunities¹⁷³ which states that: "*regardless of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation, everyone has the right to equal treatment and opportunities regarding employment, social protection, education, and access to goods and services available to the public*".

Application by the Member States

In its role as guardian of the EU Treaties, the Commission closely monitors Member States' compliance with the EU's non-discrimination legislation.

Case law

The CJEU further developed its case law that protects LGBTI people against discrimination. In the *MB* case¹⁷⁴, the Court ruled that a national law that requires transgender people to be unmarried is contrary to sex equality provisions of Directive 79/7/EEC in relation to social security. In the *Coman* case¹⁷⁵, the Court clarified that the term 'spouse' used in the Free Movement Directive also applies to a person of the same sex as the citizen of the European Union to whom he or she is married.

In addition, in the *Maniero* case¹⁷⁶, the Court clarified that the Race Equality Directive also covers discrimination in education, including conditions for access to education. It applies to private foundations' attribution of scholarships if there is a close enough connection between the scholarship and participation in education. This could be the case for example if the scholarship is linked to participation in a research/study project, if its objective is to remedy economic obstacles to participation.

¹⁷² <http://ec.europa.eu/research/participants/portal/desktop/en/opportunities/rec/index.html#c, calls=hasForthcomingTopics/t/true/1/1/0/default-group&hasOpenTopics/t/true/1/1/0/default-group&allClosedTopics/t/true/0/1/0/default-group&+PublicationDateLong/asc>

¹⁷³ Principle 3 of the European Pillar of Social Rights, https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en

¹⁷⁴ Judgment of 26 June 2018, in Case C-451/16, *MB v Secretary of State for Work and Pensions*.

¹⁷⁵ Judgment of 5 June 2018, in Case C-673/16, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, see also under Article 7.

¹⁷⁶ Judgment of 15 November 2018, in Case C-457/17, *Heiko Jonny Maniero v Studienstiftung des deutschen Volkes eV*.

The CJEU further issued a number of important judgments in the area of non-discrimination in employment. In two cases where ethos-based organisations treated workers differently based on their religion¹⁷⁷, the Court clarified for the first time the interpretation of Article 4(2) of Directive 2000/78/EC¹⁷⁸, which provides for an exception to the non-discrimination principle on the grounds of religion if the employer is a church or another ethos-based organisation. The CJEU found that, while Directive 2000/78/EC aims to protect the fundamental right of workers not to be discriminated against on grounds of their religion, it also aims to take into account the right of autonomy of churches and other ethos-based organisations, as recognised by Article 10 of the Charter.

As regards non-discrimination relating to sex, in the *Gonzalez Castro* case¹⁷⁹ the ECJ held that pregnant workers who work in shifts, including night shifts, and who have recently given birth or are breastfeeding must be regarded as performing night work and therefore are entitled to specific protection against the risks that night work may pose.

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

Policy

The Commission continued its efforts to improve the response of the EU and its Member States to the increase in the incidence of hate speech and hate crime.

This included organising discussions and exchanges of best practice and developing informal guidance through the high-level group on combating racism, xenophobia and other forms of intolerance¹⁸⁰ launched in June 2016. The group aimed to strengthen cooperation and links among national authorities, civil society and a range of other stakeholders including relevant international organisations and bodies. Based on this work, in 2018 the group published two sets of key guiding principles, on ‘Hate crime training for law enforcement and criminal justice authorities’¹⁸¹ and on ‘Ensuring justice, protection and support for victims of hate crime and hate speech’¹⁸². These provide informal guidance to Member States’ authorities and law practitioners.

The group’s discussions also addressed the specificities of particular forms of intolerance, including hate crime against people with disabilities, anti-migrant hatred, homophobia and transphobia¹⁸³. In 2018, the group held thematic discussions on afrophobia and on antigypsyism – two worrying trends which exemplify how important it is to develop a comprehensive approach made up of coherent but also diversified legislative and policy responses to discrimination, exclusion, prejudice, stereotyping and manifestations of intolerance, taking into account the

¹⁷⁷ Judgment of 17.04.2018 and 11.09.2018 in cases C-414/16, *Egenberger contre Evangelisches Werk für Diakonie und Entwicklung eV* and C-68/17, *IR*, see also under Article 10.

¹⁷⁸ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16

¹⁷⁹ Judgment of 19 September 2018, in case C-41/17 *Isabel Gonzalez Castro v. Mutua Umivale, Prosegur España SL, Instituto Nacional de la Seguridad Social (INSS)*

¹⁸⁰ For more information, see http://ec.europa.eu/newsroom/just/item-detail.cfm?&item_id=51025

¹⁸¹ http://ec.europa.eu/newsroom/document.cfm?doc_id=43050

¹⁸² http://http://ec.europa.eu/newsroom/just/document.cfm?doc_id=48874

¹⁸³ On EU action to promote LGBTI equality see section 4.

specific challenges faced by different communities and groups. The group was regularly informed about the work and initiatives of the Commission coordinator on combating antisemitism¹⁸⁴ and the Commission coordinator on combating anti-Muslim hatred¹⁸⁵, which focused on monitoring trends and developments at national level, preventing and countering hate speech and fostering education and youth empowerment.

The EU Agency for Fundamental Rights led expert discussions on how to improve national methodologies for recording and collecting data on hate crime. During 2018, the Agency, together with the Organisation for Security and Cooperation in Europe's Office for Democratic Institutions and Human Rights,¹⁸⁶ helped Member States improve their ability to record and collect hate crime data by organising national workshops. Workshops were also organised to help compile information for the *'Improving the recording of hate crime by law enforcement authorities'*¹⁸⁷ publication.

Significant progress was also made on countering illegal hate speech online¹⁸⁸. The regular monitoring of the implementation of the code of conduct¹⁸⁹ carried out by the Commission in cooperation with civil society organisations showed further progress since its adoption. This shows that the self-regulatory tool, agreed with major IT companies in May 2016, contributed to achieving a clear and steady increase in the removal of illegal hate speech content by the IT companies¹⁹⁰.

The Commission also continued to support umbrella organisations as well as specific projects on preventing and combating racism, xenophobia and other forms of intolerance under the 'rights, equality and citizenship' programme¹⁹¹. In this context, the Commission made EUR 7 million available in 2018 to support projects run in this area by national authorities and/or civil society and other stakeholders. The projects included:

- mutual learning and exchange of best practice,
- training and capacity building,
- supporting victims of discrimination,
- underreporting of cases of racism, xenophobia and other forms of intolerance,
- building trust between communities and national authorities,

¹⁸⁴ http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=50144

¹⁸⁵ http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=50085

¹⁸⁶ <http://fra.europa.eu/en/news/2017/improving-recording-hate-crime-law-enforcement-authorities>

¹⁸⁷ <http://fra.europa.eu/en/news/2017/improving-recording-hate-crime-law-enforcement-authorities>

¹⁸⁸ http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54300

¹⁸⁹ http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf

¹⁹⁰ According to the latest evaluation, released in January 2018 (UPDATE this reference?), IT companies removed on average 70 % of illegal hate speech notified to them — with ethnic origin, sexual orientation and gender identity, anti-Muslim hatred and xenophobia being among the grounds of hate speech most commonly reported within the exercise. The monitoring also shows that all IT companies now meet the target of reviewing the majority of notifications within 24 hours, reaching an average of more than 81 %. Building on the progress made, Google+ and Instagram also decided to adopt the Code of Conduct, which is now considered an industry standard. The Commission now aims to consolidate and stabilise the progress achieved and ensure that it is sustainable over time. It also aims to help Member States overcome challenges in their legal responses to hate speech online.

¹⁹¹ <http://ec.europa.eu/research/participants/portal/desktop/en/opportunities/rec/index.html#c,calls=hasForthcomingTopics/t/true/1/1/0/default-group&hasOpenTopics/t/true/1/1/0/default-group&allClosedTopics/t/true/0/1/0/default-group&+PublicationDateLong/asc>

- monitoring, preventing and countering hate speech online, including through the development of online balanced narratives,
- creating better understanding between communities, including through interreligious and intercultural activities and projects focusing on coalition building.

The Council and the representatives of governments of the Member States meeting within the Council adopted on 23 May 2018 conclusions on promoting the common values of the EU through sport¹⁹². Among others, Member States are specifically invited to promote the fight against racism and xenophobia, gender stereotyping and misogyny, the exploitation of young athletes, all forms of discrimination and violence in stadiums, and to support sport organisations in fighting these violations.

Application by Member States

In line with Protocol No. 36 to the Lisbon Treaty, as from 1 December 2014 the Commission acquired the power to oversee, under the control of the CJEU, the application of framework decisions, including the **Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law**¹⁹³. On that basis, the Commission continued its dialogues with the Member States in which major transposition gaps remained, to ensure that the minimum standards set in the Framework Decision, which penalises racist and xenophobic hate speech and hate crime, are correctly turned into national law.

3. EU Framework for national Roma integration strategies

The Commission continues to work together with Member States to ensure that all Roma people have fair and equal opportunities. It does this through various legal, policy and funding instruments, and mainly through the **EU Framework for national Roma integration strategies** up to 2020.

The objective of the EU framework for national Roma integration strategies adopted in 2011 is to tackle the socioeconomic exclusion of and discrimination against the Roma in the EU and the Western Balkans and in Turkey by promoting their equal access to education, employment, health and housing. The EU framework invited Member States to design national Roma integration strategies and to meet Roma integration goals.

Each year, the Commission assesses the implementation of the national Roma integration strategies and reports to the European Parliament and the Council on progress made on integrating the Roma population in Member States and on the achievement of goals in each area defined in the EU framework.

In 2018, the Commission carried out a mid-term evaluation of the EU framework for national Roma integration strategies. The evaluation covers the 2011-2017 period and assesses the framework's relevance, coherence, effectiveness, efficiency, coordination, equity, sustainability and EU added value. It concluded that the framework

¹⁹² OJ C 196, 8.6.2018, p. 23

¹⁹³ 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.

is the beginning of a process that, despite many limitations and taking into account the massive amount of work involved, has shown positive results and an initial change in trends, with education being the area with most progress. On 4 December 2018, the Commission published a Communication¹⁹⁴ reporting on the mid-term evaluation, which underlines that the framework:

- added value by putting Roma inclusion on EU and national agendas, developing increasing coherence between EU policy, and legal and funding instruments;
- provided flexibility to Member States to adapt its objectives to specific national contexts which allowed them to follow a tailored approach; however, this contributed to fragmented implementation, reducing effectiveness and limiting progress towards EU Roma integration goals;
- had limited capacity to deal with diversity within the Roma population as it did not pay sufficient attention to targeting specific groups among Roma (Roma women, youth, children as well as EU-mobile Roma);
- would have been stronger with a specific non-discrimination goal alongside the four Roma integration goals and a stronger focus on the fight against antigypsyism to complement the inclusion approach.

In 2018, the Commission continued to organise regular meetings of the network of National Roma Contact Points¹⁹⁵, consultation meetings with civil society organisations working on Roma inclusion, as well as meetings of the European Platform for Roma Inclusion. In the context of the European Semester, it continued to monitor progress in Roma inclusion and proposed country specific recommendations on high-quality inclusive mainstream education for Roma children in four countries (Bulgaria, Hungary, Romania and Slovakia).

In its May 2018 **proposals for 2021-2027 Regulations for the Structural Funds**¹⁹⁶, the Commission proposed strong links between policy and funding priorities related to Roma inclusion. Directly managed EU funding has also been mobilised under the 'rights, equality and citizenship' programme to finance projects that foster Roma inclusion and fight discrimination and antigypsyism across Europe.

4. Fight against homophobia

The Commission is committed to annually report on the implementation of the '**List of actions to advance LGBTI equality**'¹⁹⁷ as requested by the Council Conclusions on LGBTI equality¹⁹⁸ adopted in June 2016. On 1 March 2018, the Commissioner for Justice, Consumers and Gender Equality, Věra Jourová, presented the second annual report on the list of actions to the high-level group on non-discrimination, equality and diversity. This was followed by in-depth workshops on bisexuality, intersex and health for LGBTI people.

¹⁹⁴ Communication from the Commission to the European Parliament and the Council. Report on the evaluation of the EU Framework for National Roma Integration Strategies up to 2020. COM/2018/785 final

¹⁹⁵ https://ec.europa.eu/research/participants/portal/desktop/en/support/national_contact_points.html

¹⁹⁶ Proposal for a Regulation on the European Social Fund Plus COM(2018) 382 final; Proposal for a Regulation laying down common provisions COM(2018) 375 final

¹⁹⁷ https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality_en

¹⁹⁸ <https://www.consilium.europa.eu/en/press/press-releases/2016/06/16/epsco-conclusions-lgbti-equality/>

In October 2018, the high-level group facilitated an extensive exchange of best practice between Member States and civil society organisations that are being supported in implementing projects to combat the discrimination of LGBTI people through the 'rights, equality and citizenship' programme. In addition, an LGBTI dimension was included in the good practices exchange on multiple discrimination and intersectionality, which took place in December 2018 in Athens.

In June 2018, a meeting of the subgroup on equality data focused specifically on data pertaining to LGBTI equality. It aimed to improve the methodology and definition of current surveys (notably those carried out among transgender and intersex people) and to brainstorm on how to better reach out to the LGBTI community and raise awareness of the importance of equality data.

To highlight the importance of LGBTI equality, the Commission marked the International Day Against Homophobia and Transphobia (17 May) by illuminating its headquarters (the Berlaymont building) in the colours of the rainbow flag. It also participated in events like Belgian Pride and the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) Europe's Annual Conference.

To support their awareness-raising activities, European Commission representations received an *#EU4LGBTI* Toolkit to help them organise events, meet with stakeholders and participate in national pride- and other LGBTI events. The toolkit included a rainbow flag, promotional items, relevant publications, factsheets, a standard powerpoint presentation and a social media toolkit.

In addition, the Commission created a video on the equality of bisexual people in March 2018 and a video on lesbian equality in April 2018. In total, the Commission created five videos, one for every letter of the L-G-B-T-I acronym. These were specifically disseminated and promoted in the Member States in which the social acceptance of LGBTI people is below the EU average.

On 20 November 2018, the International Transgender Day of Remembrance, the Commission published a new comparative analysis on trans- and intersex equality rights in Europe¹⁹⁹. This was authored by the European network of legal experts in gender equality and non-discrimination.

Article 22 — Cultural, religious and linguistic diversity

Article 22 of the Charter states that the EU must respect cultural, religious and linguistic diversity. This is based on Article 167(1) and (4) TFEU on culture. Respect for cultural and linguistic diversity is also set out in Article 3(3) TEU. Article 22 is also inspired by Article 17 TFEU.

Legislation

In April 2018, the European Parliament and the Council adopted the Regulation amending the Regulation establishing the Creative Europe programme²⁰⁰ in order to ensure continuity in the funding of the European

¹⁹⁹ https://ec.europa.eu/info/sites/info/files/trans_and_intersex_equality_rights.pdf

Union Youth Orchestra. This orchestra is unique on the European scene. It acts as a cultural ambassador for the EU by showcasing the richness and diversity of European cultures and emerging talent. It provides regular training for young musicians through a residence programme and offers performance opportunities.

Policy

The 2018 European Year of Cultural Heritage²⁰¹ encouraged more people to discover and engage with Europe's cultural heritage, and fostered a sense of belonging to a common European space. The slogan for the year was: *'Our heritage: where the past meets the future'*. Cultural heritage has a universal value for individuals, communities and societies. It is important to preserve and pass on to future generations.

In its conclusions on the role of young people in building a secure, cohesive and harmonious society in Europe²⁰², the Council invited the European External Action Service to maintain and foster (i) intercultural dialogue between young people in and beyond Europe, and (ii) participation in intercultural dialogue to provide various opportunities for young people to advance reconciliation processes and reduce prejudice, misunderstandings and discrimination among diverse groups, as well as to combat hate speech and violent extremism using a human-rights based approach.

On 14 June 2018, the European Parliament adopted a Resolution on **structural and financial barriers in the access to culture**²⁰³, in which it encourages an interactive and inclusive community-based approach to developing cultural and educational policies. The objectives are to increase cultural interest and participation, promote Europe's cultural heritage and develop European cultural and linguistic diversity. The Resolution also recommends actions to remove financial barriers to participation in culture, such as high prices of cultural goods and services, as well actions to ensure a cultural offer that is accessible to everyone, with specific measures for certain groups, including young people, the elderly, disabled people or migrants.

In September 2018, the European Parliament also adopted a Resolution on **language equality in the digital age**²⁰⁴. This stresses the importance of linguistic diversity for the future of Europe and calls on Member States, the Council and the Commission to take various further measures to promote linguistic diversity and multilingualism, in particular in the digital sphere, including by developing digital teaching materials in minority and regional languages.

²⁰⁰ Regulation (EU) 2018/596 of the European Parliament and of the Council of 18 April 2018 amending Regulation (EU) No 1295/2013 establishing the Creative Europe programme (2014-2020), OJ L 103, 23.4.2018, p. 1.

²⁰¹ https://europa.eu/cultural-heritage/european-year-cultural-heritage_en

²⁰² Council conclusions on the role of young people in building a secure, cohesive and harmonious society in Europe, OJ C 195, 7.6.2018, p. 13.

²⁰³ European Parliament resolution of 14 June 2018 on structural and financial barriers in the access to culture, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2018-0262>

²⁰⁴ European Parliament resolution of 11 September 2018 on language equality in the digital age, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2018-0332>

The Regulation that established the **Creative Europe programme** with a total budget of 1.46 billion EUR²⁰⁵ brings together actions supporting the European cultural and creative sectors for 2014-2020. Implementation of the programme continued throughout 2018, safeguarding and promoting cultural and linguistic diversity and Europe's cultural heritage, as well as strengthening the competitiveness of the European cultural and creative sectors. In May 2018, the Commission also presented a new European agenda for culture, which provides the framework for the next phase of EU-level cooperation. The Creative Europe programme will play a direct role in supporting the new agenda as of 2019.

Regular dialogue with churches, religious associations and communities and philosophical and non-confessional organisations is envisaged under the Lisbon Treaty²⁰⁶ and meetings at different levels are regularly held²⁰⁷. The aim is to discuss the challenges facing the EU and policy developments in areas of interest to these organisations, which makes it possible for the EU to take into account the diversity of religious and non-confessional views. In 2018, the dialogue focused on the main policy challenges faced by the EU in the coming year, as well as on the perspectives for the future, beyond the 2019 European Parliament elections. In particular, participants discussed how the EU is addressing migration, social integration and the sustainability of the European way of life. A high-level meeting held with non-confessional organisations focused on 'Artificial Intelligence: addressing ethical and social challenges'. More specifically, it looked at the potential impact of artificial intelligence on fundamental rights, in particular when it comes to privacy, dignity, consumer protection and non-discrimination.

The social dimension of artificial intelligence was also addressed in terms of the impact on social inclusion and the future of work. Consultations were held under Article 17 to allow stakeholders to take part in the drafting of the 'Ethics guidelines for trustworthy artificial intelligence', which the high-level expert group on artificial intelligence issued on 18 December 2018²⁰⁸.

In March 2018, First Vice-President Timmermans held a roundtable discussion with European imams and scholars as part of the Future of Europe debate and the Commission's engagement with Europe's Muslim communities.

Article 23 — Equality between women and men

Under Article 23, equality between women and men is to be ensured in all areas, including employment, work and pay. The principle of equality does not preclude the maintenance or adoption of measures providing for specific advantages in favour of the underrepresented sex.

Legislation

²⁰⁵ Regulation (EU) No 1295/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Creative Europe Programme (2014 to 2020) and repealing Decisions No 1718/2006/EC, No 1855/2006/EC and No 1041/2009/EC, OJ L 347, 20.12.2013, p.221.

²⁰⁶ See Article 17

²⁰⁷ https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=50189

²⁰⁸ <https://ec.europa.eu/digital-single-market/en/news/draft-ethics-guidelines-trustworthy-ai>

In 2018, progress was made on the EU's accession to the Council of **Europe Istanbul Convention on preventing and combating violence against women and domestic violence**²⁰⁹, following the EU signing the Convention in June 2017. The Commission and the Member States agreed on a **Code of Conduct**, which sets out the practical arrangements for the EU and Member States meeting their legal obligations under the Convention. The Convention was signed by all Member States and three of them (Greece, Croatia and Luxembourg) ratified it in 2018²¹⁰. The Commission is working with the Council of Europe and the remaining Member States to ensure that the Convention is swiftly ratified across the EU.

To follow up on the 2017 **gender pay gap action plan**²¹¹, the Commission launched an evaluation²¹² of the **Equal Opportunities Directive**²¹³. The evaluation will help the Commission assess potential amendments, in particular those that address pay transparency and build on the 2014 Commission Recommendation on strengthening the principle of equal pay between men and women through transparency²¹⁴.

Case law

In the *MB* case²¹⁵, the Court ruled that a national law that requires transgender people to be unmarried is contrary to the sex equality provisions of Directive 79/7/EEC in relation to social security. MB, who had undergone a male-to-female intersex change, was refused a pension when reaching the retirement age for women. The reason given was that the change of gender was not legally recognised because MB had not divorced her wife.

Policy

In May 2018, the Commission adopted a report²¹⁶ on the **Barcelona objectives on childcare**²¹⁷. The report showed improvement since 2013, with some countries still lagging behind. On average in the EU Member States, the target has been reached for children under the age of three and has almost been reached for children between the ages of 3 and the mandatory school age.

²⁰⁹ Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence signed in Istanbul on 11 May 2011, <https://rm.coe.int/168008482e>.

²¹⁰ Bringing the total number of Member States' ratifications to 20: Belgium, Denmark, Germany, Estonia, Greece, Spain, France, Croatia, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Finland and Sweden.

²¹¹ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee 'EU Action Plan 2017-2019. Tackling the gender pay gap', 20 November 2017, COM(2017) 678 final.

²¹² The roadmap is : http://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-3415794_en

²¹³ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204, 26.7.2006, p. 23–36).

²¹⁴ Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency (OJ L 69, 8.3.2014, p. 112–116).

²¹⁵ Judgment of 26 June 2018 in case C-451/16, *MB v Secretary of State for Work and Pensions*

²¹⁶ COM(2018) 273 final,

²¹⁷ In 2002, the heads of state and government agreed upon two targets for the participation of children under mandatory school age in childcare (the so-called Barcelona objectives): 33 % of children under the age of 3 and 90 % of children between 3 years old and mandatory school age.

To further its work on work-life balance, the Commission launched a Eurobarometer²¹⁸ survey that showed that less than half of European men (41%) either have taken or are considering taking paternity leave. An even smaller proportion of men (32%) are interested in parental leave, while 57% of European women are thinking of taking parental leave. The survey also showed that flexible working arrangements are unavailable to one in three Europeans.

The Commission continued its 'No.Non.Nein. #Say No Stop VAW' communication campaign for ending violence against women. Various social media and communications material was produced and disseminated.²¹⁹ In December 2018, the Commission concluded the campaign with a high-level event to look back on progress made towards eliminating gender-based violence, and to identify next steps and challenges at national, European and international level.

November 2018 marked the 5-year anniversary of the 2013 Communication²²⁰ on the **elimination of female genital mutilation**, a practice carried out for cultural, religious and/or social reasons. Eliminating it requires a range of actions focusing on data collection, prevention, protection of girls at risk, prosecution of perpetrators and provision of services for victims. The Commission will continue implementing the measures set out in the Communication and use appropriate instruments to eradicate **female genital mutilation** and build on this experience to tackle other harmful practices.

In October 2018, the European Instrument for Democracy and Human Rights - the specific financial instrument for support to human rights and fundamental freedoms in EU external action - continued to focus on actions to end violence against women and girls. Specific actions in 2018 included:

- the launch of the 'Safe and Fair' programme, which aims to improve the working conditions of female migrants from the South-East Asian countries,
- support to the Panzi hospital in the Democratic Republic of Congo (managed by Nobel Prize Laureate Dr Mukwege and providing health services and support to women and girl victims of violence, and
- agreement on programmes against femicide in five Latin American countries (Argentina, El Salvador, Guatemala, Honduras and Mexico) and against sexual and gender-based violence, including harmful practices, in eight African countries (Liberia, Malawi, Mali, Mozambique, Niger, Nigeria, Uganda, Zimbabwe).

In 2018, **rural development programmes** (under the European Agricultural Fund for Rural Development) supported a wide range of actions targeting women and touching on various aspects of rural life.

On 10 December 2018, the European Council adopted its first-ever Conclusions on Women, Peace and Security and its annex with the EU Strategic Approach to Women, Peace and Security that represents the new EU framework for the implementation of the Women, Peace and Security Agenda.

²¹⁸ Flash Eurobarometer 470 (2018), work-life balance, :

<http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/survey/getsurveydetail/instruments/flash/surveyky/2185>

²¹⁹ <http://ec.europa.eu/justice/saynostopvaw/>

²²⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2013:0833:FIN>

Article 24 — The rights of the child

Protecting children's rights is a priority for the EU, as enshrined in Article 3(3) TEU. Article 24 of the Charter recognises that children are independent and autonomous holders of rights and states that children have the right to the protection and care necessary for their well-being. It codifies children's right to participation by emphasising that children may express their views freely, and that their views are to be taken into consideration on matters that concern them, according to their age and maturity. Article 24 states that all actions affecting children, whether carried out by public authorities or private institutions, must have the child's best interests as a primary consideration. It also enshrines every child's right to maintain on a regular basis a personal relationship and direct contact with their parents, unless this is contrary to their interests.

Policy

During 2018, the Commission continued to work on implementing the 2017 Communication on the **protection of children in migration**²²¹

To monitor progress in implementing the Communication, the Directorates-General for Justice and Consumers and Migration and Home Affairs organise joint expert meetings twice a year. These bring together child rights experts and experts in asylum and migration from Member States, the Commission and EU agencies (the European Asylum Support Office, the Agency for Fundamental Rights and the European Border and Coast Guard Agency). The meetings provide a forum for discussing current challenges and exchanging best practices. The agenda and minutes of the first two meetings of the informal joint expert group, held on 1 December 2017 and on 1 June 2018 in Brussels, are available online²²². Information on the third meeting, on 3 December 2018, will be published soon.

In addition, to follow-up on the April 2017 Communication²²³, the Commission makes available an online overview of Commission and EU agency actions in this area. In cooperation with Member States' migration and child protection authorities²²⁴, it has also published survey responses from several Member States reporting on progress made at national level²²⁵.

Progress has been achieved on several accounts, for example on:

²²¹ Communication from the Commission to the European Parliament and the Council on the protection of children in migration, 12 April 2017, COM (2017) 211 final.

²²² <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3564&NewSearch=1&NewSearch=1>

²²³ https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/children-migration_en#euactiononchildreninmigration.

²²⁴ https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/children-migration_en#documents

²²⁵ http://ec.europa.eu/newsroom/just/document.cfm?doc_id=49908.

- improving access to qualified guardianship for unaccompanied children in frontline countries (in the summer of 2018 Greece adopted a framework law reforming the system of guardianship for unaccompanied children, and in April 2017 Italy adopted Law 47/2017, which introduced a system of voluntary guardians for unaccompanied minors);
- establishing an EU Guardianship Network, which is being financed by the Directorate-General for Justice with a direct grant; and
- publishing an Asylum, Migration and Integration Fund 2018 call for project proposals to promote alternative care systems for unaccompanied children and alternatives to detention.²²⁶

However, child protection frameworks for migrant children are still rather fragmented across the EU, and a number of challenges still need to be addressed in order to make the policy on protecting children in migration tangible and consistent. This is especially the case for:

- improving reception conditions for migrant children and ensuring their access to the services specific to their situation (healthcare, education, assistance in cases of special vulnerabilities);
- implementing the principle of the best interests of the child in all decisions concerning migrant children;
- making available effective alternatives to the detention of migrant children and expanding the use of non-custodial community- or family-based living arrangements for children while their status is being resolved and before return.

On 25 and 26 June 2018, the Commission organised a conference on child-friendly justice and integrated child protection systems – lessons learned from EU projects. The event aimed to showcase examples of good practice, to take stock of what has been achieved under the ‘rights, equality and citizenship’ programme, and to explore how EU funds can best support the implementation and enforcement of the rights of the child, with a view to informing future policy and funding priorities²²⁷.

Following the European Parliament’s call to implement a preparatory action on a possible child guarantee scheme that would help ensure that every child in the EU at risk of poverty or social exclusion has access to free healthcare, education, early childhood education and care, decent housing and adequate nutrition, the Commission contracted a feasibility study in 2018²²⁸. The study will focus on four specific target groups: children living in precarious family situations, children residing in institutions, children of recent migrants and refugees and children with disabilities and other special needs. It will analyse the feasibility, added value, cost-effectiveness, design, governance and implementation of existing schemes and compare these to the added value of an EU child guarantee scheme.

In 2018, under the ‘better Internet for kids’ strategy, the Commission launched the #SaferInternet4EU campaign²²⁹ to help children learn, express themselves and critically assess what they discover online in order to become responsible and resilient digital citizens. The campaign’s resources and activities cover topics concerning

²²⁶ https://ec.europa.eu/home-affairs/content/call-Proposals-area-integration-third-country-nationals-2018_en_en.

²²⁷ https://ec.europa.eu/info/sites/info/files/chfj_report_dgt_final.pdf

²²⁸ European Commission, Child guarantee for vulnerable children, <https://ec.europa.eu/social/>

²²⁹ <https://www.betterinternetforkids.eu/web/portal/saferinternet4eu>

young users, including cyberbullying, fake news, sexting, harmful content, critical thinking, media literacy and digital skills, and cyber-hygiene.

In 2018, the Commission adopted a Communication on **education in emergencies and protracted crises**. The Communication highlighted the right to education²³⁰, the commitment to promote the protection of the rights of the child under the Treaty on European Union²³¹, and the right to quality and inclusive education, training and life-long learning as the first principle of the **European Pillar of Social Rights**²³². Furthermore, the Communication stated that “*progress in the condition of children is essential if we are to prevent state fragility and ensure long-term sustainable development, social cohesion, stability and human security at national, regional and global levels*”²³³.

On 3 December 2018, the Commission adopted its **second report**²³⁴ and accompanying staff working document²³⁵, including EU-wide statistics²³⁶, on **progress made in the fight against trafficking in human beings since 2015**. This highlighted the main trends and outlined remaining challenges.

On 22 May 2018, the Council conclusions on **the role of young people in building a secure, cohesive and harmonious society in Europe**²³⁷ underlined the importance of youth mobility in promoting intercultural competences and fighting prejudices and discrimination. They also highlighted the significant role of youth work and non-formal and informal learning in addressing youth marginalisation and radicalisation.

On 22 May 2018, a Council recommendation on **promoting common values, inclusive education and the European dimension of teaching**²³⁸ encouraged Member States to promote inclusive education for all learners, from early childhood onwards, and to take all learners’ needs into account. This means in particular the needs of learners from disadvantaged socioeconomic backgrounds, migrant backgrounds and with special needs.

²³⁰ Article 14, Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407; UN General Assembly, Convention on the Rights of the Child, 20.11.1989, UN, Treaty Series, vol. 1577.

²³¹ Article 3(3) and (5), Treaty on European Union (TEU). These provisions expressly commit the EU to promote the protection of the rights of the child in EU internal and external action.

²³² Commission Communication on Establishing a European Pillar of Social Rights, 27.04.2017, COM(2017) 250.

²³³ COM(2008) 55 and the EU Guidelines for the Promotion and Protection of the Rights of the Child, adopted by Council in 2017.

²³⁴ Report from the Commission to the European Parliament and the Council, *Second report on the progress made in the fight against trafficking in human beings (2018) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims*, COM(2018) 777 final, 3.12.2018, : https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20181204_com-2018-777-report_en.pdf

²³⁵ Commission staff working document accompanying the document *Second report on the progress made in the fight against trafficking in human beings (2018) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victim*; SWD(2018) 473 final, 3.12.2018; : https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20181204_swd-2018-473-commission-staff-working-document_en.pdf

²³⁶ Data collection on trafficking in human beings in the EU (2018), : https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20181204_data-collection-study.pdf

²³⁷ OJ C 195, 7.6.2018, p. 13

²³⁸ OJ C 195, 7.6.2018, p.1

On 26 November 2018, the Council adopted conclusions on the role of **youth work in the context of migration and refugee matters**²³⁹. It called on Member States to empower youth structures to act as a link between public services, the local population and young refugees and other non-EU nationals. In particular, it encouraged Member States to promote actions and projects that combat prejudice and stereotypes, to create safe spaces where the local community may engage in respectful dialogue to address discrimination, and to create safe, child- and youth-friendly spaces within reception centres, taking into account the principle of the best interest of the child. It also invited the Commission to suggest action, where needed, to improve the situation of young people, especially of young refugees and other third country nationals, if their life circumstances are not in accordance with the Convention of the Rights of the Child and the Charter.

On 26 November 2018, the Council conclusions on the role of youth work in the context of migration and refugee matters²⁴⁰ invited Member States to create safe, child- and youth friendly spaces within receiving structures and refugee reception centres, taking into account the principle of the best interest of the child and young people.

Legislation

The new Regulations on the establishment, operation and use of the Schengen Information System²⁴¹ entered into force on 27 December 2018. They envisage new types of alerts for vulnerable people, including children, who need to be prevented from travelling to ensure their protection. These new alerts would cover people at risk of becoming victims of trafficking in human beings or gender-based violence. The new Regulation on police cooperation and judicial cooperation in criminal matters includes a clear requirement to consider the best interest of the child in any decision on measures that concern the child and any decision to move the child to a safe place. Such decisions must be made immediately and not later than 12 hours after the child is located, in consultation with relevant child protection authorities.

Case law

In the *Sindicatul Familia Constanța* case²⁴², the Court stated that limitations to the right to periods of daily and weekly rest as well as a period of paid annual leave, accorded to all workers by Article 31(2) of the Charter, may

²³⁹ Council conclusions on 13 July 2018 on youth work in the context of migration and refugee matters , 26 November 2018, <http://data.consilium.europa.eu/doc/document/ST-14082-2018-INIT/en/pdf>

²⁴⁰ OJ C 441, 7.12.2018, p. 5

²⁴¹ Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals, OJ L 312, 7.12.2018, p. 1.

Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006, OJ L 312, 7.12.2018, p. 14.

Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU, OJ L 312, 7.12.2018, p. 56.

²⁴² Judgment of 20 November 2018, in case C-147/17 *Sindicatul Familia Constanța v Direcția Generală de Asistență Socială și Protecția Copilului Constanța*

be provided for in respect of the strict conditions set out in Article 52(1) of the Charter and, in particular, of the essential content of those rights. In this case, the Court concluded that the statutory limitations placed on the foster parents' right to periods of daily and weekly rest and to paid annual leave respect the essence of those rights. In addition, they are necessary for the achievement of the public service objective recognised by the EU, namely the protection of the best interests of the child, which is enshrined in Article 24 of the Charter. As far as the latter provision of the Charter is concerned, the Court also added that the integration, on a continuous and long-term basis, into the home and family of a foster parent, of children who, on account of their difficult family situation, are particularly vulnerable, constitutes an appropriate measure to safeguard the best interests of the child.

In its judgment in the *A and S v. Staatssecretaris van Veiligheidsdienst Justitie* case²⁴³, the Court expressly underlined the objective of the Family Reunification Directive²⁴⁴, to ensure that, in accordance with Article 24(2) of the Charter of Fundamental Rights, Member States have the best interests of the child as a primary consideration when they apply the directive. In this case, the Court found that Article 2(f) of the Directive, read in conjunction with its Article 10(3)(a), must be interpreted as meaning that a non-EU national or stateless person who is below the age of 18 at the time of his or her entry into the territory of a Member State and of the introduction of his or her asylum application in that State, but who, in the course of the asylum procedure, attains the age of majority and is thereafter granted refugee status, must be regarded as a 'minor' for the purposes of that provision.

In its judgment in the *K. A. and others v. Belgische Staat* case²⁴⁵, the Court emphasised twice that, in migration-related cases involving family unity, the competent authorities must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter. This article must be read, when necessary, in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter.

Article 25 — The rights of the elderly

Article 25 of the Charter sets out one of the first legally binding human rights provisions addressing the rights of older people. It states that the EU recognises and respects the rights of the elderly to lead a life in dignity and independence and to participate in social and cultural life. Participation in social and cultural life also covers participation in political life. Most of the policies directly affecting these rights are within the competences and responsibilities of individual Member States, but the EU is committed to respecting and promoting them in relevant EU law, policies and programmes.

The growing recognition of the rights of older people is illustrated by the fact that, in May 2018, for the first time, the annual Fundamental Rights Report of the European Union Agency for Fundamental Rights contained a special Focus Chapter on 'Shifting perceptions: towards a rights-based approach to ageing'²⁴⁶. This chapter explores the shift away from thinking about old age in terms of 'deficits' that create 'needs' to a 'rights-based' approach

²⁴³ Judgement of 12 April 2018 in case C-550/16, *A and S v. Staatssecretaris van Veiligheidsdienst Justitie*

²⁴⁴ Council Directive 2003/86/EC on the right to family reunification, OJ L 251, 3.10.2003, p. 12 - 18.

²⁴⁵ Judgement of 8 May 2018 in case C-82/16, *K. A. and others v. Belgische Staat*

²⁴⁶ Fundamental Rights Report 2018 Focus - Shifting perceptions: towards a rights-based approach to ageing
<https://fra.europa.eu/en/publication/2018/frr-2018-focus-rights-based-ageing>

towards ageing with the need to respect the fundamental right to equal treatment of all individuals, regardless of age.

In the first half of 2018, the Commission published two major reports on ageing, with both being issued every three years. The first was the 2018 Ageing Report with economic and budgetary projections for the EU Member States (2016-2070)²⁴⁷, dealing with the impact of ageing populations on the labour market and potential economic growth. It identifies policy challenges for the setting of sustainable medium-term budgetary objectives for public finances and is used in a range of policy processes at EU level, for example in the Europe 2020 strategy. The second report related to ageing was the 2018 Pensions Adequacy Report²⁴⁸, prepared by the Commission together with the Social Protection Committee. It analyses how current and future pensions help prevent old-age poverty and maintain the income of men and women for the duration of their retirement. It underlines that Member States pay more and more attention to sustainable, adequate pensions in their reforms, but that further measures are necessary. It is used as a knowledge basis for the annual European Semester policy review. This pension income-adequacy issue is inextricably linked to the broader spectre of respect for the whole range of human rights of older people.

The most prominent international forum dealing specifically with the right of older people is the United Nations Open-Ended Working Group on Ageing. For the group's 2018 session²⁴⁹, the EU, after coordinating its position with the EU Member States in the Council Working Group on Human Rights, contributed to discussions on autonomy and independence and long-term and palliative care, including by sharing data and best practices. The EU is keen to continue its active participation in the Open-ended Working Group, and is also engaged in other multilateral discussions on the rights of older people, including in the 3rd Committee of the United Nations General Assembly, at the Human Rights Council, and the Commission for Social Development.

The EU also took part in other international events on ageing and demography, such as the Asia-Europa Meeting International seminar in Seoul in June 2018, the International Conference on Population and Development, and the United Nations Economic Commission for Europe Regional Conference on 'Enabling Choices: Population Dynamics and Sustainable Development' in Geneva on 1 and 2 October 2018.. This is aligned with the EU's commitment to the Regional Implementation Strategy of the Madrid International Plan of Action on Ageing²⁵⁰ and to safeguarding older people's enjoyment of human rights as set out in these strategies, plans and other relevant United Nations, international and regional conventions and treaties.

Together, the United Nations Economic Commission for Europe, the European Commission, the University of the Basque Country and the Oxford Institute of Population Ageing, organised the second International Seminar on the

²⁴⁷ 2018 Ageing Report with Economic and Budgetary Projections for the EU Member States (2016-2070) https://ec.europa.eu/info/publications/economy-finance/2018-ageing-report-economic-and-budgetary-projections-eu-member-states-2016-2070_en

²⁴⁸ 2018 Pensions Adequacy Report <file:///C:/Users/ljungve/Downloads/KE-01-18-457-EN-N.pdf>

²⁴⁹ EU Opening Statement – United Nations Open-ended Working Group on Ageing: General Discussion, Delegation of the European Union to the United Nations - New York https://eeas.europa.eu/delegations/un-new-york_me/48754/EU%20Opening%20Statement%20%E2%80%93%20United%20Nations%20Open-ended%20Working%20Group%20on%20Ageing:%20General%20Discussion

²⁵⁰ Madrid Plan of Action and its implementation <https://www.un.org/development/desa/ageing/madrid-plan-of-action-and-its-implementation.html>

Active-Ageing Index in Bilbao (Spain) in September 2018. This brought together researchers, civil society representatives, policymakers and other stakeholders. The objective was to provide a multidisciplinary forum for those interested in using the active-ageing Index to improve knowledge about ageing and older people with a view to developing better policies.

Article 26 — Integration of persons with disabilities

The Charter provides that the EU recognises and respects the right of people with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

Policy

The Commission continues to pay attention to disability matters in the context of the European Pillar of Social Rights. Principle 17 on the inclusion of person with disabilities recognises their right to income support that ensures living in dignity, services that enable them to participate in the labour market and in society and a work environment adapted to their needs.²⁵¹ The Commission promotes its application in several Member States and civil society, for example in the context of the High-Level Group on Disability.

Political agreement on the draft Directive on the approximation of Member States' laws, regulations and administrative provisions on the accessibility requirements for products and services²⁵² - the so-called European Accessibility Act - was reached in November 2018. It highlights the role of the European Accessibility Act in implementing the United Nations Convention on the Rights of Persons with Disabilities in a harmonised way across the EU, as well as its contribution to implementing the Charter of Fundamental Rights.

The Commission organised the annual work forum on the implementation of the United Nations Convention on the Rights of Persons with Disabilities to support the coherent implementation of the Convention in the EU. The 2018 forum addressed the following three areas:

- health, habilitation and rehabilitation in the Convention,
- knowing your rights: disability awareness and training programmes,
- the role of the Convention's Committee.

As every year, the Commission continued to raise awareness of disability issues through a conference celebrating the International Day of Persons with Disabilities, which it organises in cooperation with the European Disability Forum. The 2018 event brought together a wide range of participants representing people with disabilities, organisations and groups of people with disabilities, policymakers from the Member States, social partners,

²⁵¹ European Commission, The European Pillar of Social Rights in 20 principles, <https://ec.europa.eu/commission/priorities/>

²⁵² Proposal for a Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services, COM/2015/0615 final - 2015/0278 (COD), 02.12.2015

disability and accessibility experts, academics and the European institutions. Discussion took place around three main issues:

- the path towards the new European disability strategy,
- the question of how the next multiannual financial framework will contribute to implementing the new strategy,
- making cultural heritage accessible to all as part of the European Year of Cultural Heritage 2018.

Back-to-back with the European Day of Persons with Disabilities, the ninth Access City Awards took place in Brussels. This award continues to promote accessibility in the urban environment, especially for elderly and disabled people, and also recognises improvements made in this area by cities across the continent. In 2018, Lyon (France) won the award.

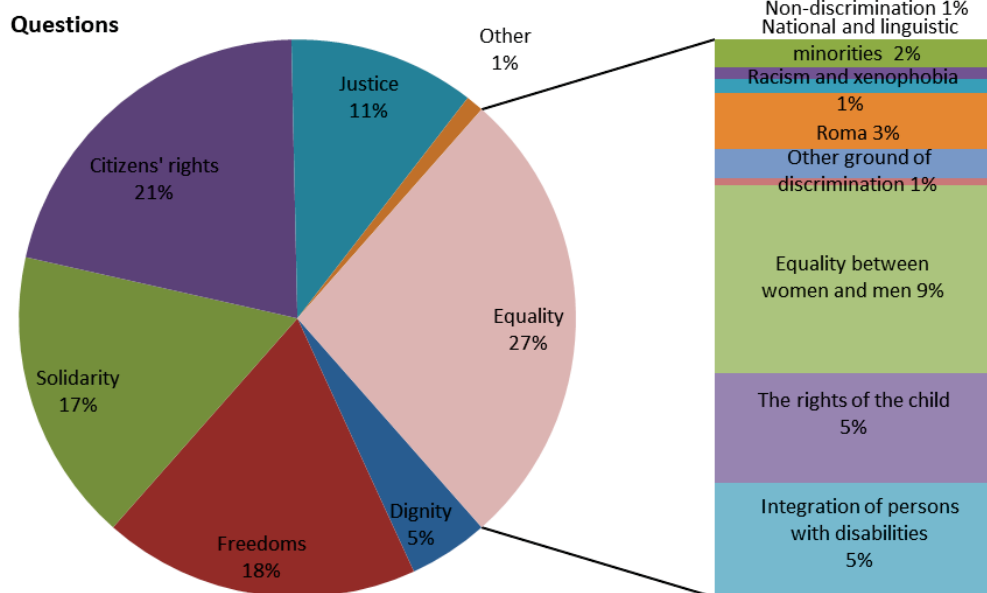
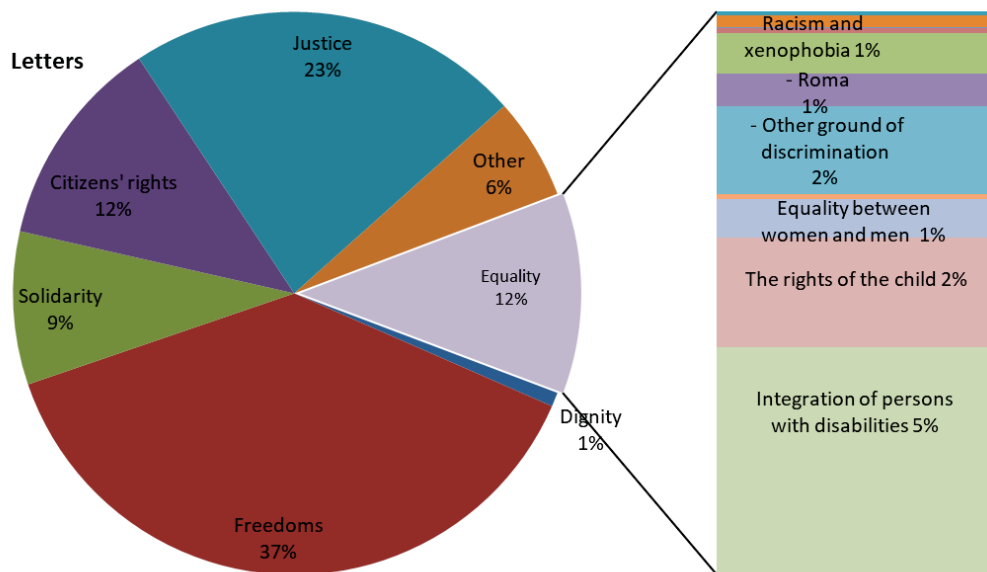
The eight pilot projects on implementing the European Disability Card in Member States were finalised. The EU card creates a system of voluntary mutual recognition of disability status and opens up the national benefits in certain areas mainly related to culture, leisure, sports and transport. A study to assess the results of these eight pilot projects was launched at the end of 2018 with a view to feeding the discussion on the projects' possible continuation across the EU.

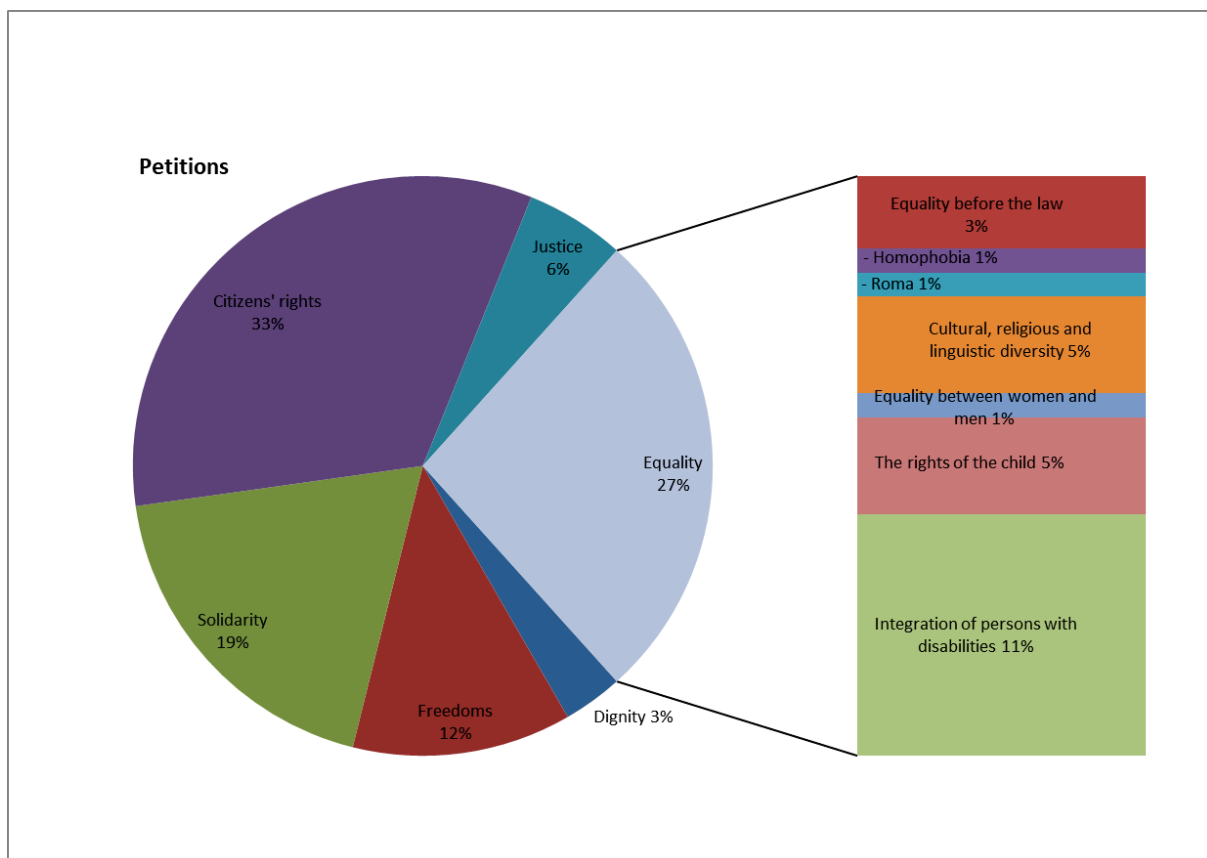
Finally, in the framework of the European Semester process, the Commission continues to monitor the situation of people with disabilities in Member States, notably in the fields of employment, poverty and social inclusion and education. In 2018, disability issues were more present both in the country reports issued by the Commission and in the country-specific recommendations.

In 2017, the Mental Disability Advocacy Centre sent to the Commission a complaint about the alleged mistreatment of people in the Hungarian Topház Special Home, suggesting violation of the Charter by an institution which was awarded EU funding for its activities. The Commission analysed the case and assessed whether, if a breach of the Charter could be established, it would have sufficient legal grounds to impose a financial correction leading to the full or partial recovery of funds. In 2018, it was concluded that the treatment of residents of the Topház Special Home did not constitute the implementation of EU law within the meaning of Article 51 of the Charter and therefore the Charter was not applicable in this case. Furthermore, as EU funding was used only to finance energy efficiency measures and not in the treatment of residents, there was no irregularity that would justify a financial correction.

Nevertheless, the Commission contacted the responsible managing authority to remind it of its general responsibilities when it comes to ensuring and contributing to the respect of fundamental rights in projects selected. Furthermore, additional information was requested to ensure that the fundamental rights of Topház Special Home residents were being fully respected.

Three other complaints, related to EU-funded projects in Greece and concerning alleged breaches of the rights of people with disabilities to be integrated in the community, were also closed as the projects were considered as not co-financed by the EU's structural funds.





Title IV

Solidarity

The European Platform tackling undeclared work, launched in 2016, brings together Member States' enforcement authorities and social partners. The platform has already helped increasing knowledge and building Member States' capacity to tackle undeclared work through cooperation, joint action and mutual learning and contributed to more effective EU and national action, in particular to:

- promote integration in the labour market;
- improve social inclusion;
- reduce undeclared work and create formal jobs; and
- ensure better law enforcement in these areas²⁵³.

²⁵³ Biennial report 2017-2018: Key results and achievements of the European Platform tackling undeclared work
<https://ec.europa.eu/social/BlobServlet?docId=20472&langId=en>

On 13 December, the Commission presented a **proposal to revise the EU legislation on social security coordination** to facilitate labour mobility and ensure fairness for those who move and for taxpayers, increasing the right to social security and social assistance.

The European Commission's proposal for a **European Social Fund+ (ESF+)** will help to implement the three chapters of the European Pillar of Social Rights, namely: (i) equal opportunities and access to labour market; (ii) fair working conditions; and (iii) social protection and inclusion. EU funding for investing in people clearly demonstrates EU values such as promoting equality, social fairness and social progress through concrete measures to empower and protect. The overarching policy objective of the **European Social Fund+** Regulation is to help create a more efficient and resilient 'Social Europe' and implement the European Pillar of Social Rights and the social and employment priorities endorsed by the European economic governance process.

Article 27 — Workers' right to information and consultation within the undertaking

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

Policy

Principle 8 ('Social dialogue and involvement of workers')²⁵⁴ of the European Pillar of Social Rights enshrines the right for all workers in all sectors to be informed and consulted directly or through their representatives on matters relevant to them. The Commission continues to monitor the effective implementation of all directives to do with information and consultation. The legal monitoring is complemented by financial support to projects that encourage workers' involvement.

In May 2018, the Commission presented the evaluation of Directive 2009/38 establishing **European Works Councils** (Recast Directive)²⁵⁵. European Works Councils are bodies representing European employees within transnational companies. Through them, employees are informed and consulted by management on the progress of the business and any significant EU decision that could affect their employment or working conditions. The evaluation concluded that the provisions of the Recast Directive are generally consistent with Article 27 of the Charter of Fundamental Rights. The evaluation revealed that most of the challenges to effective implementation remain at company level. The Commission is therefore considering whether, in conjunction with the social partners, to produce a practical handbook to support the creation and effectiveness of the European Works Councils.

²⁵⁴ European Commission, The European Pillar of Social Rights in 20 principles, <https://ec.europa.eu/commission/priorities/>

²⁵⁵ Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 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 (Recast) COM(2018)292 final, 15.04.2018, <https://ec.europa.eu/transparency/>

Article 28 — Right of collective bargaining and action

Article 28 of the Charter provides that workers and employers, or their respective organisations, have, in accordance with EU law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflict 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 level²⁵⁶. Member States remain bound by the provisions of the Charter, including the right to strike, in instances where they implement EU law.

Article 29 — Right of access to placement services

Under Article 29 of the Charter, everyone has the right of access to a free placement service. This Article is based on Article 1(3) of the European Social Charter and point 13 of the Community Charter of the Fundamental Social Rights of Workers.

Article 30 — Protection in the event of unjustified dismissal

According to Article 30, every worker has the right to protection against unjustified dismissal, in accordance with EU law and national laws and practices. This Article draws on Article 24 of the revised Social Charter. It is given effect by means of Directive 2001/23/EC on the safeguarding of employees' rights in the event of transfers of undertakings, and Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer, as amended by Directive 2002/74/EC.

Case law

In 2018, the Court of Justice of the European Union (CJEU) clarified the EU rules on the dismissal of pregnant workers²⁵⁷. In *Porras Guisado*²⁵⁸, the Court ruled that the EU directive does not preclude national legislation that allows an employer to dismiss a pregnant worker in the context of a collective redundancy. In such cases, the employer must provide the dismissed pregnant worker with the reasons justifying the redundancy as well as the objective criteria chosen to identify the workers to be dismissed.

Article 31 — Fair and just working conditions

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

²⁵⁶ Article 153(5) TFEU stipulates that it does not apply to the right to strike.

²⁵⁷ Directive 92/85 EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ L 348, 28.11.1992, p. 1–7, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31992L0085>

²⁵⁸ Judgment of 22 February 2018 in case C- 103/16, *Jessica Porras Guisado v Bankia SA and Others*

Legislation

In 2018, the Commission took a series of measures following the adoption of the European Pillar of Social Rights in 2017. In its preamble, the Pillar specifically refers to the Charter of Fundamental rights. The European Pillar of Social Rights dedicates its second chapter, principles 5-10, to workers' entitlement to fair working conditions, including decent wages and work environments free from health and safety risks²⁵⁹.

The proposal for a **Directive on the protection of workers from the risks related to exposure to carcinogens or mutagens at work**²⁶⁰ aims to improve the protection of workers' health and safety.

On 23 January 2018, the Council adopted Directive (EU) 2018/131 implementing the Agreement concluded by the European Community Shipowners' Associations and the European Transport Workers' Federation to amend Directive 2009/13/EC in accordance with the 2014 amendments to the 2006 Maritime Labour Convention approved by the International Labour Conference on 11 June 2014²⁶¹. This Directive is fully in line with the Charter of Fundamental Rights of the European Union and in particular with the right protected under Article 31 to fair working conditions.

The motive behind the EU legislators' suggestions to amend the Commission proposals on the social and market rules in road transport was always to protect drivers' social rights and to ensure that the freedom to provide cross-border services was applied fairly. The balance between the social protection rights and the rights to conduct business has been maintained in the General Approach adopted by the Council on 3 December 2018. The Council text suggests to further improve the resting conditions for drivers and to encourage the development of safe and secure parking areas that allow drivers to rest comfortably and safely. It also strengthens the Commission proposal that aims to ensure equal pay for equal work for drivers that mostly work abroad. The amendments proposed by the Parliament also showed the attempts to ensure better and safer resting conditions for drivers, including shorter periods away from home and work-life balance. However, the Parliament has not yet reached an agreement on the compromise proposals.

Application by the Member States

In late 2015 and during 2016, there were several reports on cases of alleged abuses and forced labour of migrant fishers in the EU fishing industry. Following these reports, the Member State concerned adopted various measures to rectify the situation, including setting up a new recruitment scheme for non-EEA workers. Despite these efforts, various international and national public and private bodies, including the Council of Europe, have

²⁵⁹ European Commission, The European Pillar of Social Rights in 20 principles, <https://ec.europa.eu/commission/priorities/>

²⁶⁰ Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work, COM(2018)0171, 05.04.2018

²⁶¹ Directive 2018/131/EU of 23 January 2018 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) to amend Directive 2009/13/EC in accordance with the amendments of 2014 to the Maritime Labour Convention, 2006, as approved by the International Labour Conference on 11 June 2014 (Text with EEA relevance.), OJ L 22, 26.1.2018, p. 28.

continued to find shortcomings in the protection of migrant workers in the fisheries sector. The relevant Commission departments held a meeting with the authorities of the Member State concerned to examine the various aspects of the scheme, including from a human trafficking perspective. In 2018, a trade union started a court case against the government of the Member State in question, claiming the scheme does not protect workers from exploitation and human trafficking.

Case law

In *Max-Planck*²⁶² and *Bauer and Willmeroth*²⁶³ the CJEU held that Article 31(2) of the Charter on the right to a period of paid annual leave, is, as regards its very existence, both mandatory and unconditional in nature. Provisions of EU or national law do not need to give a concrete expression to the right to paid annual leave. They are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right. It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law in order to disapply national legislation that prevents a worker from receiving an allowance in lieu of the paid leave not taken.

In *Sindicatul Familia Constanța*²⁶⁴, the CJEU stated that limitations to the right to periods of daily and weekly rest as well as a period of paid annual leave, accorded to all workers by Article 31(2) of the Charter, may be provided for in respect of the strict conditions set out in Article 52(1) of the Charter and, in particular, of the essential content of those rights. In this case the Court concluded that the statutory limitations placed on the foster parents' right to periods of daily and weekly rest and to paid annual leave respect the essence of those rights. In addition, they are necessary for achieving the public service objective, recognised by the EU, namely the protection of the best interests of the child, which is enshrined in Article 24 of the Charter. On the latter provision of the Charter, the Court added that the integration, on a continuous and long-term basis, into the home and family of a foster parent, of children who, on account of their difficult family situation, are particularly vulnerable, constitutes an appropriate measure to safeguard the best interests of the child.

Article 32 — Prohibition of child labour and protection of young people at work

Article 32 prohibits the employment of children. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development, or to interfere with their education.

This Article is based on Directive 94/33/EC on the protection of young people at work, Article 7 of the European Social Charter and points 20 to 23 of the Community Charter of the Fundamental Social Rights of Workers.

²⁶² Judgment of 6 November 2018, in case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu*

²⁶³ Judgment of 6 November 2018, in joined cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*

²⁶⁴ Judgment of 20 November 2018, in case C-147/17 *Sindicatul Familia Constanța v Direcția Generală de Asistență Socială și Protecția Copilului Constanța*

Article 33 — Family and professional life

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

Article 34 — Social security and social assistance

Article 34 of the Charter recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment. Everyone residing and moving legally within the EU is entitled to social security benefits and social advantages in line with EU law and national laws and practices.

In March 2018 the Commission made a proposal for a Council Recommendation on Access to Social Protection for workers and the self-employed²⁶⁵. This initiative is one of the key deliverables under the European Pillar of Social Rights. The objective is to support people in non-standard forms of employment and self-employment who, due to their employment status, are not sufficiently covered by social security schemes and thus are exposed to higher economic uncertainty. It encourages EU Member States to allow non-standard workers and the self-employed to adhere to social security schemes (closing formal coverage gaps); take measures allowing them to build up and take up adequate social benefits as members of a scheme (adequate effective coverage) and facilitating the transfer of social security benefits between schemes; and increase transparency regarding social security systems and rights. The Recommendation covers social security schemes for unemployment, sickness and healthcare, maternity or paternity, accidents at work and occupational diseases, disability and old age. The Recommendation was politically agreed by the Council in December 2018 and is awaiting final adoption.

Legislation

In 2018 the Commission continued to support the negotiations of the co-legislators on the proposal to revise the EU legislation on social security coordination.²⁶⁶ The proposal aims to facilitate labour mobility by protecting the social security rights of those moving to another Member State, and ensure fairness for those who move and for taxpayers.

Article 35 — Healthcare

Article 35 of the Charter provides that everyone has the right of access to preventive healthcare and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of

²⁶⁵ [COM \(2018\) 132](#)

²⁶⁶ Proposal for a Regulation amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004, [COM \(2016\) 815](#).

human health protection must be ensured in the definition and implementation of all the EU's policies and activities.

Legislation

On 31 January 2018 the Commission tabled a proposal for a **Regulation on health technology assessment**²⁶⁷ that aims to contribute to a high level of human health protection and the better functioning of the internal market. As mentioned in the Explanatory Memorandum, this proposal contributes to achieving a high level of human health protection and is thus consistent with the Charter of Fundamental Rights in this regard. It effectively applies the principle that a high level of health protection shall be ensured in the definition and implementation of all of the EU's policies and activities.

The Commission also adopted a proposal for a **Regulation on the European Social Fund Plus (ESF+)**²⁶⁸ whose main policy objective is to create a resilient 'Social Europe' and implement the European Pillar of Social Rights. ESF+ merges several EU programmes and instruments including the Health Programme. Accordingly, its aims include promoting health and raising the standard of living and health as set out in the TFEU and the EU Charter of Fundamental Rights.

The ESF+ has three strands. Its third strand concerns incentives designed to protect and improve human health under Article 168 TFEU, in order to complement Member States' action in line with the relevant strategies. In particular, the health strand of the ESF+ should contribute to disease prevention throughout people's lives and to health promotion by addressing health risk factors, such as tobacco use, harmful use of alcohol, consumption of illicit drugs, unhealthy dietary habits and physical inactivity. The health strand of the ESF+ should make broad use of effective prevention models, innovative technologies and new business models and solutions to contribute to innovative, efficient and sustainable health systems in the Member States and facilitate access to better and safer healthcare for European citizens.

Policy

The Commission received a high number of Parliamentary Questions requesting legally binding EU legislation in the area of health care. Topics raised included: (i) the protection of consumers and users of online gambling services, particularly minors; (ii) health diagnosis and treatment; (iii) the psychiatric care system; (iv) the management of patient care in hospitals; (v) the impact of austerity policies on the health of the population; (vi) establishing an innovative, high-quality health system in the EU; and (vii) creating a minimum level of emergency healthcare at EU level. In its replies, the Commission recalled that according to the Article 168(7) TFEU, Member States are responsible for the definition of their health policy and for the organisation and delivery of health services and medical care and that the Commission fully supports access to health services and medical care in all Member States in line with Article 35 and other articles of the Charter.

²⁶⁷ Proposal for a Regulation of the European Parliament and of the Council on health technology assessment and amending Directive 2011/24/EU (COM(2018/051), 31.1.2018).

²⁶⁸ Proposal for a Regulation of the European Parliament and of the Council on the European Social Fund Plus (ESF+) (COM(2018) 382 final 30.5.2018).

In addition, as in 2017²⁶⁹, several measures and projects were carried out in 2018 and funded under the third EU Health Programme 2014-2020²⁷⁰.

NATIONAL CASE LAW BOX

As in previous years, in the majority of the 2018 court decisions analysed, the question of whether or not and why the Charter applied to the specific case in question remained unaddressed. For example, in Greece²⁷¹ the Athens Pharmaceutical Association lodged a petition with the Council of State to annul ministerial decrees enabling military pharmacies to sell medicines at a reduced price and exempting them from the minimum standards applying to private pharmacies. The Pharmaceutical Association considered this special treatment to be discriminatory and to violate the freedom of private pharmacies to provide services. The petitioners also claimed a violation of Article 35 (health care) of the Charter, especially as non-pharmacists are not forbidden from working in military pharmacies. The Council of State referred to Article 35 of the Charter as a ground to contest the regulatory framework applying to military pharmacies, but did not elaborate on its applicability and rejected the complaint.

Article 36 — Access to services of general economic interest

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

Legislation

To lay the ground for implementing the **Directive on the accessibility of the websites and mobile applications of public sector bodies**²⁷², Member States had to transpose the Web Accessibility Directive by 23 September 2018. The directive aims to: (i) increase digital inclusion by ensuring that the websites and mobile applications of public sector bodies are more accessible to users, in particular to people with disabilities; and (ii) improve the functioning of the internal market by establishing common accessibility requirements, thus contributing to building a social and inclusive European Union.

The common accessibility requirements will have a positive spill over effect on the accessibility market, making it more competitive and thereby increasing the potential to provide accessible websites and mobile applications beyond the public sector, for the benefit of people with disabilities and the elderly.

²⁶⁹ See further in the 2017 Annual report on the application of the EU Charter of Fundamental Rights, pp. 112-113.

²⁷⁰ Regulation (EU) No 282/2014 of the European Parliament and of the Council of 11 March 2014 on the establishment of a third Programme for the Union's action in the field of health (2014-2020) and repealing Decision No 1350/2007/EC Text with EEA relevance, OJ L 86, 21.3.2014, p. 1.

²⁷¹ Greece, Council of State, case 311/2018, 8 February 2018.

²⁷² Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies, OJ L 327, 2.12.2016, p. 1–15.

In 2018, the Commission adopted two implementing **decisions under the directive establishing (i) a model accessibility statement for websites and mobile applications of public sector bodies**²⁷³; and **(ii) a monitoring methodology and the arrangements for reporting by Member States**²⁷⁴. The Commission also published the references to the harmonised European standard in support of the directive²⁷⁵.

The directive contributes to: (i) the integration of people with disabilities²⁷⁶; (ii) non-discrimination²⁷⁷ in the access to public sector information and public services; (iii) the access to services of general economic interest²⁷⁸; and (iv) the inclusion of the elderly to help them remain independent²⁷⁹.

Article 37 — Environmental protection

Article 37 of the Charter provides that a high level of environmental protection and improving the quality of the environment must be integrated into EU policies and ensured in line with the principle of sustainable development.

Legislation

In 2018, the Commission adopted or put forward a number of proposals concerning CO2 emission standards. On 28 June 2018, the European Council and the Parliament adopted a **Regulation on the monitoring and reporting of CO2 emissions and fuel consumption with respect to heavy-duty vehicles**. This Regulation lays down the requirements for the monitoring and reporting of CO2 emissions from and fuel consumption of new heavy-duty vehicles registered in the European Union²⁸⁰.

On 17 December 2018, the European Parliament and the Council reached a provisional agreement on the Commission's proposal setting new CO2 emission standards for passenger cars and light commercial vehicles (vans) in the European Union for the period after 2020. The provisional agreement is now being examined by the co-legislators with a view to adoption.

²⁷³ Commission Implementing Decision (EU) 2018/1523 of 11 October 2018 establishing a model accessibility statement in accordance with Directive (EU) 2016/2102 of the European Parliament and of the Council on the accessibility of the websites and mobile applications of public sector bodies, OJ L 256, 12.10.2018, p. 103–107.

²⁷⁴ Commission Implementing Decision (EU) 2018/1524 of 11 October 2018 establishing a monitoring methodology and the arrangements for reporting by Member States in accordance with Directive (EU) 2016/2102 of the European Parliament and of the Council on the accessibility of the websites and mobile applications of public sector bodies, OJ L 256, 12.10.2018, p. 108–116.

²⁷⁵ Commission Implementing Decision (EU) 2018/2048 of 20 December 2018 on the harmonised standard for websites and mobile applications drafted in support of Directive (EU) 2016/2102 of the European Parliament and of the Council, OJ L 327, 21.12.2018, p. 84–86.

²⁷⁶ See Article 26.

²⁷⁷ See Article 21.

²⁷⁸ See Article 36.

²⁷⁹ See Article 25 of the Charter on the rights of the elderly.

²⁸⁰ Regulation (EU) 2018/956 of the European Parliament and of the Council of 28 June 2018 on the monitoring and reporting of CO2 emissions from and fuel consumption of new heavy-duty vehicles (OJ L 173, 9.7.2018, p. 1–15).

The European Parliament and the Council are also discussing the Commission's legislative proposal adopted on 8 November 2017 setting new CO₂ emission standards for the four main classes of heavy-duty vehicles (lorries) in the EU from 2025, with a view to reaching a final agreement before the end of this legislative term.

In 2018, the co-legislators revised the EU Emissions Trading Scheme for 2021-2030, and adopted a Regulation to limit post-2020 national emissions of greenhouse gases in sectors not covered by the EU Emissions Trading Scheme – known as the Effort Sharing Regulation. In parallel, they adopted a Regulation to balance out emissions and removals from land use, land use change and forestry and integrate them into the 2030 climate and energy framework²⁸¹. This legislation will enable the EU to deliver on its commitment to reduce its greenhouse gas emissions by at least 40 % by 2030 compared to 1990.

The EU also raised the level of ambition on renewable energy and energy efficiency. The 32.5% energy efficiency target (Article 1 of the revised Energy Efficiency Directive²⁸²) and the 32% renewable energy target (Article 3 of the Renewable Energy Directive²⁸³) for 2030 are estimated to reduce greenhouse gas emissions by 45%, which would allow the Union to largely meet its binding target to cut emissions by at least 40% below 1990 levels by 2030. To ensure proper governance and coordinate Member States' action in those fields, a **Regulation on the Governance of the Energy Union and Climate action** was adopted²⁸⁴. The Regulation notably sets up a comprehensive framework for energy and climate policies, including planning, reporting and monitoring provisions to improve environmental protection among others. It requires that Member States draw up integrated national energy and climate plans setting out their policies and measures until 2030 and to adopt long-term strategies. In this context, the EU's progress towards renewables and energy efficiency has clear positive environmental impacts.

The new Renewable Energy Directive also introduces a sectoral target of 14% of renewables in transport and, for the first time, measures to promote renewables in the heating and cooling sector. Furthermore, the amended

²⁸¹ Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 (OJ L 76, 19.3.2018, p. 3). Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU (OJ L 156, 19.6.2018, p. 1). Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 (OJ L 156, 19.6.2018, p. 26).

²⁸² Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC, as amended by Directive (EU) 2018/2002 of the European Parliament and of the Council of 11 December 2018 (OJ L 328, 21.12.2018, p. 210)

²⁸³ Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ L 328, 21.12.2018, p. 82)

²⁸⁴ Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council (OJ L 328, 21.12.2018, p. 1).

Energy Performance of Buildings Directive²⁸⁵ requires Member States to establish a long-term renovation strategy to support the renovation of the building stock into a highly efficient and decarbonised building stock by 2050. The increased use of renewable energy and further energy efficiency are essential to reduce greenhouse gas emissions, in compliance with the 2015 Paris Agreement on Climate Change.

In 2018, the Commission presented several legislative proposals to ensure a high level of environmental protection and meet the objective of 2030 sustainability agenda. In particular, in the area of agriculture the **proposal for a Common Agricultural Policy on Strategic Plans**²⁸⁶ promotes a higher level of environmental and climate ambition across the EU by establishing general objectives for the common agricultural policy to further improve the sustainable development of rural areas. Such objectives include: (i) contributing to climate change mitigation and adaptation; (ii) fostering sustainable development and the efficient management of natural resources such as water, soil and air; (iii) preserving habitats and landscapes; and (iv) encouraging the use of sustainable sources of energy.

In addition, on 24 May 2018 the Commission adopted a **proposal for a Regulation on disclosures relating to sustainable investments and sustainability risks**²⁸⁷. This proposal aims for a high level of environmental protection since its main objective is to encourage institutional investors and asset managers to integrate sustainability in their investments. It provides for a disclosure framework as regards the integration and impacts of investments on the real economy and their ability to stimulate and provide for the right incentives for transitioning to a green, low-carbon and resource-efficient economy.

Policy

Environmental protection and climate-related goals play a prominent role in supporting the sustainable development of rural areas and respond to society's increasing demands for environmental services. Under the European Agricultural Fund for Rural Development, for the 2014-2020 programming period a minimum of 30% of each rural development programme is earmarked for environmental protection and climate change mitigation and adaptation measures.

On 28 November 2018, the Commission presented its strategic long-term vision for a prosperous, modern, competitive and climate-neutral economy by 2050 - 'A Clean Planet for All'²⁸⁸. This set out how the EU can lead

²⁸⁵ Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings, as amended by Directive (EU) 2018/844 of the European Parliament and of the Council of 30 May 2018 (OJ L 156, 19.6.2018, p. 75)

²⁸⁶ COM (2018)392 Proposal for a Regulation of the European Parliament and of the Council establishing rules on support for strategic plans to be drawn up by Member States under the Common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulation (EU) No 1305/2013 of the European Parliament and of the Council and Regulation (EU) No 1307/2013 of the European Parliament and of the Council, in particular Articles 5,6,92 and 123.

²⁸⁷ Proposal for a Regulation of the European Parliament and of the Council on disclosures relating to sustainable investments and sustainability risks and amending Directive (EU) 2016/2341, adopted on 24.5.2018, COM(2018) 354 final, 2018/0179 (COD).

²⁸⁸ Clean Planet for all - A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy (COM(2018) 773 final), :

the way to climate neutrality by: (i) investing in realistic technological solutions; (ii) empowering citizens; and (iii) aligning action in key areas such as industrial policy, finance and research, while ensuring a transition that is fair to all. The Commission's strategic vision is an invitation to all EU institutions, national parliaments, the business sector, non-governmental organisations, cities, communities, and citizens - especially young people, to help ensure that the EU can continue to show leadership and encourage other international partners to do the same.

All such policy initiatives that aim to increase the use of renewable energy and energy efficiency play an essential role in reducing greenhouse gas emissions, in compliance with the 2015 Paris Agreement on Climate Change.

Case law

On 29 November 2018, Advocate General Kokott issued her opinion in the preliminary ruling request from the Belgium Constitutional Court in the case *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*²⁸⁹. The case was brought by Inter-Environnement Wallonie, which challenged the life extension of two nuclear power plants in Belgium arguing that the decision had not been preceded by the relevant impact assessment and public involvement required by the Environmental Impact Assessment Directive, the Habitats Directive, the Espoo Convention (on impact assessment of activities with transboundary effects) and the Aarhus Convention (on information and participation of the public on decision making). The Belgium Constitutional Court referred a number of questions to the Court of Justice on the application of those pieces of legislation in the nuclear field, and on the relevance of security of energy supply in this context. In her opinion, Advocate General Kokott addressed the principle of environmental protection and makes a direct reference to Article 47 of the Charter²⁹⁰.

Article 38 — Consumer protection

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

Legislation

In April 2018, the Commission adopted a **New Deal for Consumers**²⁹¹, including two legislative proposals. The proposal for a **Directive on representative actions for the protection of the collective interests of consumers**²⁹² provides a means for non-profit organisations designated as qualified entities to request courts or administrative authorities to stop illegal practices and order redress where justified. This proposal aims to address mass harm situations where the collective interest of consumers is at stake.

https://ec.europa.eu/clima/sites/clima/files/docs/pages/com_2018_733_en.pdf

²⁸⁹ Request for a preliminary ruling from the Cour constitutionnelle (Constitutional Court, Belgium) lodged on 7 July 2017 in case C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen v Conseil des ministres*.

²⁹⁰ See Article 47.

²⁹¹ See the relevant factsheets for more information: https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers_en

²⁹² Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184 final, 11.4.2018.

The second proposal²⁹³ focuses on intensified enforcement and on modernising several existing directives in light of market developments, in particular the digital economy. For example, consumers should have the right to individual remedies (such as financial compensation) when they are affected by aggressive, misleading or otherwise unfair commercial practices. Moreover, it is proposed that national authorities should have the power to impose more effective, proportionate and dissuasive penalties, especially for widespread infringements that affect consumers in several Member States, for which national authorities will have the power to impose a fine of at least up to 4 % of the trader's turnover. Both proposals therefore help to ensure a high level of consumer protection²⁹⁴ and help consumers exercise their right to an effective remedy²⁹⁵. Furthermore, safeguards in the Representative actions proposal and burden reduction and modernisation measures in the other proposal contribute to the freedom to conduct business²⁹⁶.

Following up on its guidelines of September 2017, in 2018 the Commission proposed in the New Deal for Consumers to update the Unfair Commercial Practices Directive to explicitly set out that national authorities can assess and address misleading commercial practices involving inaccurate claims that a product is identical to that sold in other EU countries, if their composition or characteristics are significantly different. The aim is to restore citizens' confidence and trust in the Single Market, especially in Central and Eastern Europe, following claims on differences in the quality of food products sold across the EU. The Commission held consumer dialogues in 27 Member States to explain its proposals and seek stakeholders' feedback. More than 2500 people participated in these events.

The **Directive establishing the European Electronic Communications Code**²⁹⁷ was published and entered into force at the end of 2018. Provisions on the promotion of the internal market, including the ban on discriminatory requirements or conditions of access or use to end-users, take full account of the fundamental rights and principles recognised by the Charter of Fundamental Rights of the EU. The proposed measures aim to achieve higher levels of connectivity with a modernised set of end-user protection rules. This will in turn: (i) ensure non-discriminatory access to any contents and services, including public services; (ii) help promote freedom of expression and of doing business; and (iii) enable Member States to comply with the Charter at a much lower cost in the future. Furthermore, the fundamental rights safeguard²⁹⁸ of the Directive sets out that national measures on end-users access to or use of services and applications through electronic communications networks should respect the Charter.

The Code will provide stronger consumer protection in areas where general consumer protection rules do not address the sector-specific needs. Updated rules make it easier to switch suppliers when consumers are signed up to bundles (packages combining internet, phone, TV, mobile, etc.) and ensuring that vulnerable groups (like the elderly, people with disabilities and those receiving social assistance) have the right to affordable internet

²⁹³ Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernization of EU consumer protection, COM(2018) 185 final, 11.4.2018.

²⁹⁴ See Article 38.

²⁹⁵ See Article 47.

²⁹⁶ See Article 16.

²⁹⁷ Directive (EU) 2018/1972 of the European Parliament and of the Council establishing the European Electronic Communications Code, OJ L 321, 17.12.2018, p. 36–214.

²⁹⁸ See Article 100 of the Directive.

contracts²⁹⁹. The Directive also sets requirements to ensure equivalent access and choice for people with disabilities. It will also support a safer online environment for users and fairer rules for all. Selected rules are extended to new online business operators, which offer equivalent services to traditional operators, to ensure that security requirements (making sure networks and servers are secure) apply. A regulation³⁰⁰ was also published ensuring that prices of international communications within the Union do not exceed a safety cap starting 15th May 2019 (with exceptionnal derogations).

Provisions on the promotion of the internal market, including the ban on discriminatory requirements or conditions of access or use to end-users, support Articles 16 and 21 of the Charter³⁰¹.

Policy

In 2018 the Commission worked actively to ensure the correct and effective implementation of various consumer law directives. This has helped ensure a high level of consumer protection throughout the EU. Among others, the Commission opened infringement proceedings against 14 Member States for failure to transpose the 2015 **Package Travel and Linked Travel Arrangements Directive**³⁰² into their national laws on time. All Member States but one have now notified their transposition measures. The Commission continued its compliance checks of national transposition measures, particularly of the **Consumer Rights Directive**³⁰³ and of the **Unfair Commercial Practices Directive**³⁰⁴. For the Unfair Commercial Practices Directive, three further infringement procedures were closed in 2018 due to satisfactory legislative amendments by the relevant Member States, while six cases were still open at the end of 2018. Regarding the Consumer Rights Directive, five infringement procedures were open at the end of 2018. In addition, one infringement case is open for failure to ensure full and correct implementation of the **Unfair Contract Terms Directive**³⁰⁵, in accordance with the relevant CJEU case law.

The Commission was involved in a number of joint actions with national bodies to enforce consumer protection rules in 2018. Following the 'dieselgate' emission scandal, Volkswagen committed itself to continuing the repairs free of charge until the end of 2020. In July 2018, 80% of affected cars had been repaired. Another joint action involving Facebook, Twitter and Google+ resulted in improved terms of service for more than 250 million social

²⁹⁹ See Articles 11 and 26.

³⁰⁰ Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office) OJ L 321, 17.12.2018, p. 1–35

³⁰¹ See Articles 11 and 26.

³⁰² Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ L 326, 11.12.2015, p. 1.

³⁰³ Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, p. 64–88.

³⁰⁴ Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149, 11.6.2005, p. 22–39.

³⁰⁵ Council Directive 93/13/EEC.

media users in the EU. In 2018, action began against AirBnB to improve the transparency of their pricing and bring their terms of service in line with EU standards.

The Commission continued to work against misleading commercial practices, such as those involving the marketing of products as being identical to those sold in other EU countries when in fact their composition or characteristics are significantly different, including by proposing to clarify the applicable EU law within the New Deal for Consumers initiative. In addition, the Commission released a common testing methodology developed with industry. The national authorities are currently implementing the methodology in an EU-wide testing campaign under the coordination of the Commission's Joint Research Centre.

During 2018, the Commission also introduced comprehensive measures to ensure the effective application of EU legislation on consumer alternative dispute resolution and online dispute resolution, including by improving the European Online Dispute Resolution platform and by hosting the first-ever Alternative Dispute Resolution Assembly in June 2018 (a two-day networking event with more than 350 participants from the European Alternative Dispute Resolution community). In December 2018, the Commission published the second report on the European Online Dispute Resolution platform. The platform was launched in February 2016, and has since helped consumers and traders to resolve their disputes online without going to court by connecting them with quality-certified alternative (i.e. out-of-court) dispute resolution bodies.

In 2018, the Commission helped ensure a high level of consumer protection on financial services by implementing the consumer financial services action plan and by ensuring the effective application by the Member States of the EU legislation protecting consumer rights such as the **Mortgage Credit Directive**³⁰⁶. The Commission has also continued to support the network of national ombudsmen in financial services - the FIN-NET network - which provides consumers with easy access to out-of-court dispute resolution in cross-border cases.

Case law

A recurrent issue addressed by the CJEU is the compatibility of national rules of civil procedure with the right to an effective remedy resulting from Article 7 of the Unfair Contract Terms Directive³⁰⁷ and enshrined in Article 47 of the Charter³⁰⁸. In *Profi Credit Polska*³⁰⁹ and *PKO*³¹⁰, the CJEU confirmed its case law on effective remedies against unfair contract terms. In relation to payment order proceedings, based on a promissory note or a bank ledger excerpt, directed against consumers, it found that - where there is a significant risk that consumers will not object to a payment order - national rules that prevent national courts from assessing the unfairness of relevant contract terms of their own motion before issuing the payment order do not comply with the Unfair Contract Terms Directive. Such significant risk can be created by procedural obstacles, for instance, a time-limit of only 2

³⁰⁶ Directive 2014/17/EU of the European Parliament and of the Council on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, OJ L 60, 28.2.2014, p. 34–85.

³⁰⁷ Council Directive 93/13/EEC on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29–34

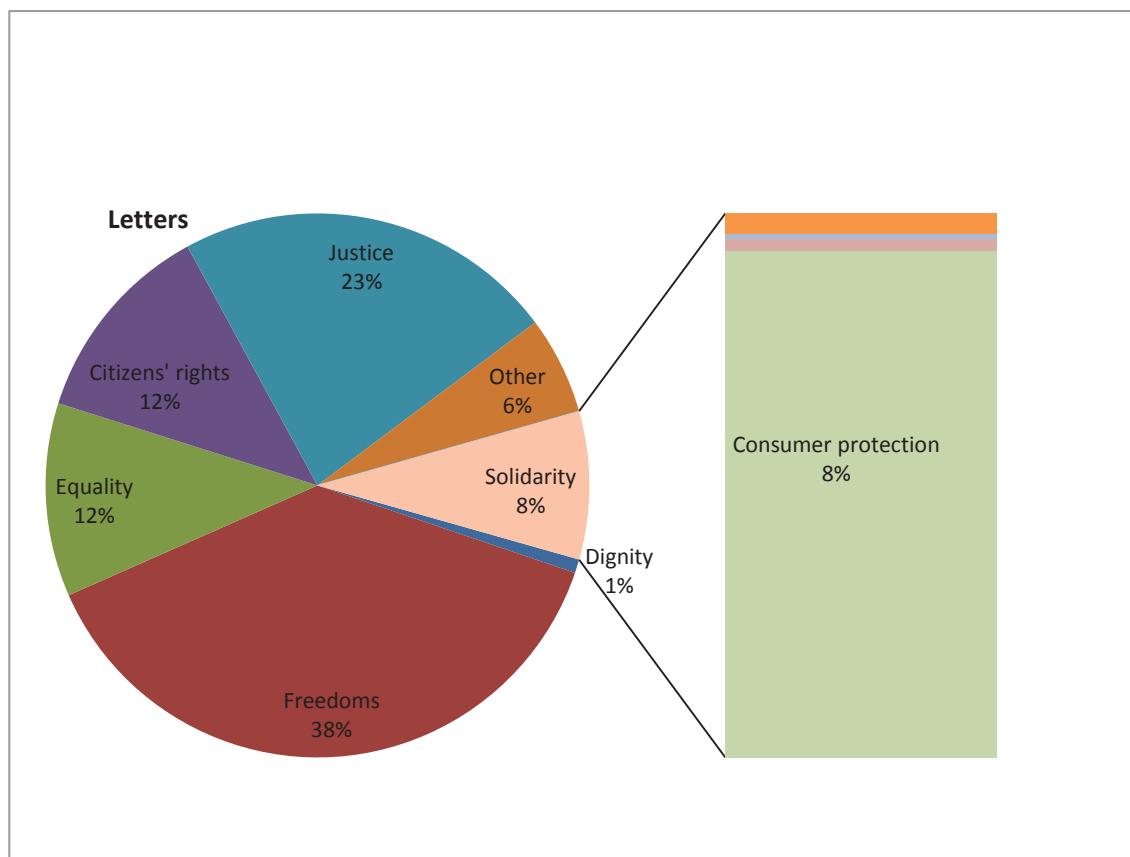
³⁰⁸ See Article 47

³⁰⁹ Judgment of 13 September 2018 in case C-176/17, *Profi Credit Polska S.A. w Bielsku Bialej v Mariusz Wawrzosek*.

³¹⁰ Order of 28 November 2018 in case C-632/17, *Powszechna Kasa Oszczędności (PKO) Bank Polski S.A. v Jacek Michalski*.

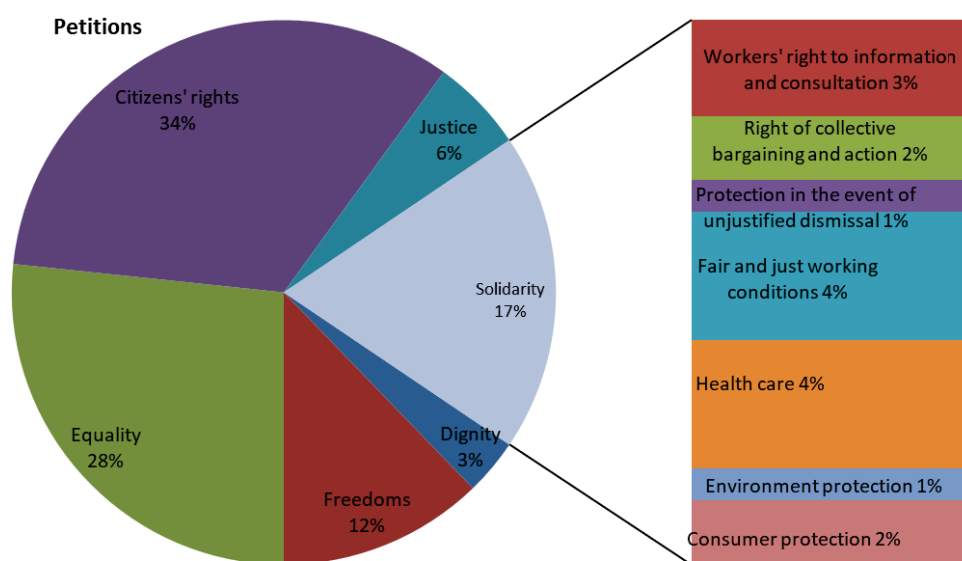
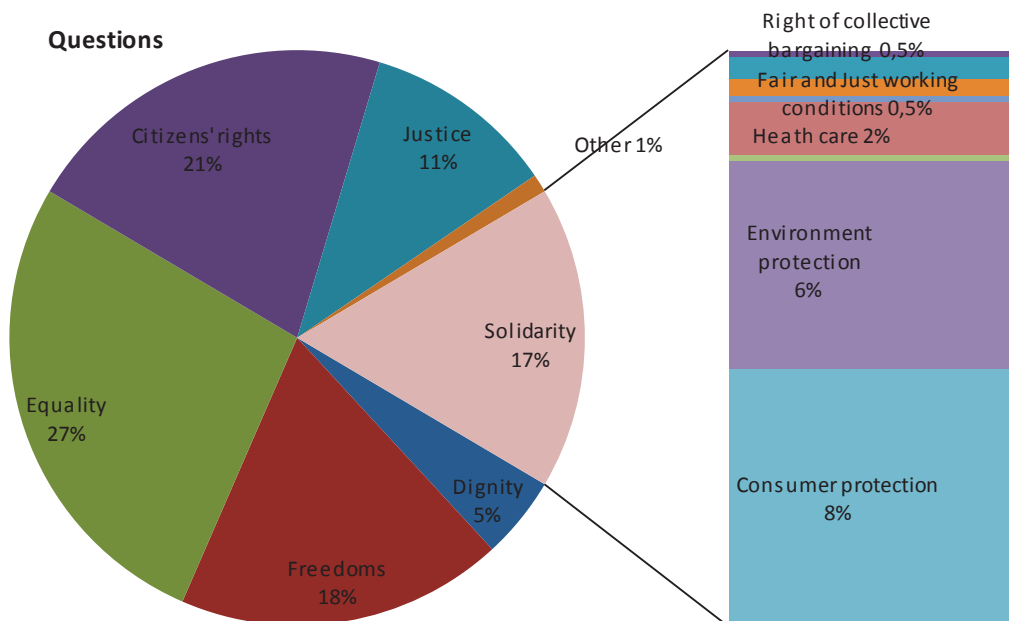
weeks to present all necessary factual and legal elements, or rules on court fees that may deter consumers from lodging an objection, or the limited knowledge and information of consumers.

In *OTP Bank*³¹¹ the Court found that a standard contract term relating to the exchange rate risk in a foreign-currency denominated mortgage loan agreement is not excluded from the scope of the Unfair Contract Terms Directive, even if national law contains mandatory provisions on the exchange rate mechanism. Confirming the *Andriciuc* case³¹², the CJEU found that the unfairness of such contract terms is to be assessed if the bank did not inform the borrower that they are exposing themselves to a certain foreign currency exchange rate risk which will, potentially, be difficult to bear in the event of a depreciation of the currency in which they receive their income and failed to set out the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency.



³¹¹ Judgment of 20 September 2018 in case C-51/17, *OTP Bank Nyrt., OTP factoring Követeléskezelő Zrt. V Teréz Ilyés, Emil Kiss*.

³¹² Judgment of 20 September 2017 in case C-186/16, *Ruxandra Paula Andriciuc and Others v Banca Românească*.



Title V

Citizens' rights

In March 2018, the Commission published the findings of a dedicated public consultation and two Eurobarometer surveys on EU citizenship, including one on electoral rights. It looked at people's experiences and views as to how their rights as EU citizens are protected and enjoyed, what could be done to promote democratic participation and common EU values further, and how the EU could make their lives easier. This fed into the preparation of the Commission's next *EU Citizenship Report*, putting forward concrete proposals for promoting, protecting and strengthening EU citizenship rights.

In April 2018, the Commission adopted a new **proposal on the security features of identity cards and residence documents**, which seeks to facilitate the freedom of EU citizens to move and reside freely within the territory of the Member States enshrined in Article 45 of the Charter³¹³.

In May 2018, the Commission adopted a **proposal on EU emergency travel documents** which seeks to facilitate EU citizens' right to diplomatic and consular protection.

In September 2018, the Commission presented a package of concrete **measures to secure free and fair elections to the European Parliament**, including greater transparency in online political advertisements and communication, measures to protect against cyber threats, awareness-raising activities and a legal proposal on the possibility of imposing sanctions for the illegal use of personal data in order to deliberately influence the outcome of the European Parliament elections as well guidance on the application of EU data protection rules in the electoral context.

Following the UK's referendum on its membership of the EU, there was considerable interest in the impact of the outcome on the rights protected under Chapter V of the Charter. Almost half of the more than 70 petitions received on the referendum related to citizenship and citizenship rights. Many of the over 100 questions from the European Parliament to the Commission on this subject also raised issues of citizenship. Following the referendum, the Commission received many hundreds of related enquiries and letters from citizens, covering a variety of subjects and views.

The withdrawal of the United Kingdom from the European Union continued to be a main concern of citizens. Safeguarding the status and rights derived from EU law at the date of withdrawal of EU citizens and UK nationals, and their families, was an essential objective of the EU's negotiations with the United Kingdom. In November 2018, the EU and UK reached agreement on a **draft Withdrawal Agreement** at negotiators' level, which was then endorsed by the European Council (Article 50) on 25 November 2018. The draft Withdrawal Agreement enshrines in legal form the understanding reached in the December 2017 joint report that those EU and UK citizens who have exercised their right to move and reside freely in accordance with EU law in the host country at the end of a defined transition period following the UK's withdrawal will have the right to stay in the their respective host

³¹³ See Article 45

countries and continue to enjoy the plethora of free movement rights including the right to equal treatment and the right to work, study or run a business. These rights also cover the family members of the EU and UK citizens concerned. One important principle that the Agreement safeguards is that its concepts and rules will need to be interpreted using the methods and general principles of interpretation applicable in EU law. This covers, for instance, the obligation to interpret the concepts or provisions of EU law referred to in the Withdrawal Agreement in a manner consistent with the Charter of Fundamental Rights. This will be particularly important in applying the citizens' rights part of the Agreement. The Withdrawal Agreement still needs to be formally approved by both the EU and the UK, before it can enter into force.

Article 39 — Right to vote and stand as a candidate at elections to the European Parliament

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

Legislation and policy

On 12 September 2018, the Commission issues a package of concrete measures, including greater transparency in online political advertisements. The package contains:

- a chapeau **Communication on securing fair and free European elections**, which sets out the issues³¹⁴;
- **guidance on data protection rules** for all participants in the elections process, to provide additional indications on how to work with personal data in an elections context³¹⁵;
- a **Recommendation** on election cooperation networks, online transparency, protection against cybersecurity incidents and fighting disinformation campaigns³¹⁶.
- a **proposal to amend the Regulation on the statute and funding of European political parties and foundations**, including the possibility of imposing sanctions for the illegal use of personal data in order to deliberately influence the outcome of the European elections³¹⁷.

The Commission recommended that Member States and national and European political parties, foundations and campaign organisations take steps to:

- promote greater transparency in online political advertisements and communication
- apply sanctions in the relevant electoral context
- prevent and respond to cyber threats and

³¹⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1537434682871&uri=CELEX%3A52018DC0637>

³¹⁵ https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-data-protection-law-electoral-guidance-638_en.pdf

³¹⁶ https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-cybersecurity-elections-recommendation-5949_en.pdf

³¹⁷ Regulation 1141/2014 of the European Parliament and of the Council on the statute and funding of European political parties and European political foundations, OJ L 317, 4.11.2014, p. 1–27

- sanction cases of infringements of rules on the protection of personal data being used to deliberately influence or attempt to influence the elections to the European Parliament.

It also recommended that Member States engage with third parties in awareness-raising activities to increase the transparency of elections and build trust in the electoral processes. Guidance is also provided on the application of data protection safeguards in the electoral context.

The Commission furthermore recommended that Member States set up national election cooperation networks of relevant authorities – covering areas such as elections, cybersecurity, data protection, media and, where necessary, liaising with law enforcement authorities – in order to support national authorities in their respective electoral tasks, by facilitating the swift, secured exchange of information on issues that might affect the elections to the European Parliament. This includes jointly identifying threats and gaps, sharing findings and expertise, and liaising on the online application and enforcement of relevant rules.

The Commission also encouraged Member States to meet as soon as possible, with the Commission's support, in a European coordination network focusing on the elections to the European Parliament, so as to be best prepared to protect the 2019 elections. This European coordination network, convened by the Commission, brings together contact points designated by the Member States.

All the measures in the package are framed to fully respect the rule of law and fundamental rights, including the freedoms of association and expression³¹⁸.

The Commission organised an event on democratic participation and electoral matters on 25-26 April 2018 to improve democratic participation in the EU.

The fourth Annual Colloquium on Fundamental Rights dedicated to Democracy in Europe was organised on 26-27 November 2018. It focused on encouraging best practice to increase participation by young people and vulnerable and underrepresented groups.

Application by Member States

The Commission has continued its dialogue with a number of Member States on their implementation of European electoral law.

In particular, the Commission sent a reasoned opinion to a Member State on mobile EU citizens' right to become member of a political party there, as the law of that Member State did not allow citizens of other EU countries living there to join a political party under the same conditions as its own nationals. This relates to discrimination against non-national EU citizens, in particular those who have been resident for less than 5 years or whose residence has been interrupted.

³¹⁸ See Articles 39 and 40.

Dialogues were successfully closed with three other Member States following legislative amendments to address the Commission's concerns.

Article 40 — Right to vote and to stand as a candidate at municipal elections

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

Article 41 — Right to good administration

According to Article 41 of the Charter, every person has the right to have his or her affairs handled impartially, fairly and within a reasonable timeframe by the institutions, bodies and agencies of the EU. This includes the right to be heard, have access to his or her file, receive reasons for a decision, address the EU administration in one of the languages of the Treaties and receive a reply in the same language, and a right to be compensated for damages caused by the institutions or its staff.

"Revolving doors" phenomenon

The issue of people recruited by the EU institutions, often from the private sector, and staff leaving the institutions (e.g. at the end of a contract or on retirement) taking up new employment in the private sector is often referred to as the "revolving doors" issue. It can raise concerns with regard to the independence and objectivity of the administration of the EU institutions. The Ombudsman carried out an inquiry into the issue in 2014. In 2017, the Ombudsman opened a follow-up inquiry, as noted in last year's report. This inquiry was still ongoing in 2018.

"Code of Conduct for Commissioners/Role of the ad hoc Ethical Committee"

The Commission adopted a new Code of Conduct for the Members of the Commission in 2018, creating a new Independent Ethical Committee. An inquiry by the European Ombudsman, which began in 2017 and which was mentioned in last year's report, examined the previous Code of Conduct, post-mandate employment of former Commissioners, the role of the ad hoc Ethical Committee and the new role of a former Commission President. This inquiry closed in 2018³¹⁹.

Legislation

The Commission's legislative **proposal for EU funding policies** under shared management for the post-2020 period³²⁰ provides that Member State should ensure effective examination of complaints in relation to the funds (proposed Article 63(6)). This gives effect to Article 41 of the Charter.

³¹⁹ Detailed information and the entire exchange of correspondence can be found on the European Ombudsman's website: <https://www.ombudsman.europa.eu/fr/decision/en/99946>

³²⁰ Proposal for a Regulation of the European Parliament and of the Council laying down common provisions

Case law

The respect of the right enshrined in Article 41(2)(a) of the Charter was raised in the *Goldman Sachs*³²¹ case regarding the right of the parties to have the opportunity to make known their views on the truth and relevance of the facts and circumstances and on the documents used by the Commission to support its claim that the Treaty has been infringed. In the case, the applicant claimed that its right of defence had been breached because certain documents had not been disclosed. The court recalled that, under Article 27(1) of Regulation 1/2003 on the implementation of the rules on competition³²², the Commission must hear the parties on the matters to which they have taken objection and that the Commission's decision(s) must be based only on objections on which the parties concerned have been able to comment. However, the failure to provide access to a document constitutes a breach of the right of defence only if the applicant can show that the Commission relied on that document to support its objection concerning the existence of an objection, and that the proof necessary for demonstrating the merits of that objection could be adduced only by reference to that document. In this case, the General Court concluded that the Commission had not denied access to the documents concerned and therefore the applicant's rights had not been breached.

In the *Prysmian*³²³ case, the applicant claimed that the length of the procedure (nearly 62 months) was unreasonable and in breach of Article 41(1) of the Charter. Affirming that the obligation to conduct administrative procedures within a reasonable time is also a general principle of EU law³²⁴), the General Court recalled that this obligation must be assessed in relation to the individual circumstances of each case. In particular, these include its context, the conduct of the parties during the procedure, what is at stake for the various undertakings concerned and its complexity. The Court also recalled that, in matters relating to competition policy, the administrative procedure may involve an examination in two successive stages and thus, the assessment of any interference with the exercise of the rights of defence must extend to the whole procedure and not only to the second phase where the rights of defence may be fully exercised. Finally, the Court pointed out that, according to settled case law, a failure to comply with the obligation to adopt a decision within a reasonable time can affect the validity of the administrative procedure under Regulation 1/2003 only where it is proved that the breach of the reasonable time principle has adversely affected the rights of defence of the undertakings concerned. In this case, the General Court concluded that the length of the procedure was not excessive in the circumstances and that, even if it were to have been, this would be insufficient to conclude that the contested decision should be annulled.

In the *NKT Verwaltungs and NKT*³²⁵ case, the applicants alleged breaches of the right of defence and the principle of equality of arms enshrined in Articles 41 and 47 of the Charter³²⁶. According to the applicant, the Commission had breached those rights *inter alia* by not disclosing evidence post-dating the statement of objections, which, on balance of probabilities, contained exculpatory evidence. The evidence had been submitted by other addressees

on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument, COM(2018)375, 29.5.2018.

³²¹ Judgment of 12 July 2018 in case T-419/14, *the Goldman Sachs Group, Inc. v Commission*

³²² Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25.

³²³ Judgment of 12 July 2018 in case T-475/14, *Prysmian SpA and Prysmian Cavi e Sistemi Srl v Commission*

³²⁴ Judgment of 19 December 2012 in case C-452/11P, *Heineken Nederland and Heineken v Commission*

³²⁵ Judgment of 12 July 2018 in case T-447/14 *NKT Verwaltungs and NKT v Commission*

³²⁶ See Article 47

in their replies to the statement of objections. The General Court recalls that, in accordance with the case law, the right of access to the file means that the Commission must allow the defence the opportunity to examine all the documents in the investigative file which may be relevant for its defence, including both incriminating and exculpatory evidence, with the exception of business secrets, internal documents of the Commission or other confidential information.

The parties' right does not extend to the replies to the statement of objections. Nevertheless, there are circumstances in which it may apply. First, if the Commission wants to rely on a passage from a reply to the statement of objections or on a document annexed to such reply in order to prove the existence of an infringement under Article 101(1) TFEU, the parties must be given the possibility to express their views on such incriminating evidence. By analogy, if a passage in a reply to a statement of objections may be relevant for the defence of an undertaking because it enables it to invoke evidence which is not consistent with the allegations of the Commission, "such evidence would be exculpatory and the undertaking concerned must be authorised to examine the passage or document and express its view thereon"³²⁷. However, the Court concluded that the non-disclosure of evidence which may be categorised as exculpatory can only infringe the rights of defence "if the party concerned shows that the document could have been useful for its defence". According to case law, it is for the applicant to adduce *prima facie* evidence that the undisclosed documents would be useful for their defence³²⁸.

In the *Consorzio di garanzia dell'olioextra vergine di oliva di qualità*³²⁹ case, the applicant claimed (in addition to other issues) that the Commission had violated its right to good administration due to the lack of coordination between the Commission staff responsible for managing two simultaneous promotion campaigns in non-EU countries for olive oil, one financed by the European Agricultural Guarantee Fund (EAGF), and the other financed by the European Agricultural Fund for Rural Development. The Court dismissed the application for damages, finding that none of the applicable rules in this case provided for the obligation to coordinate campaigns and programmes taking place in non-EU countries, so that there could not be a violation of the right to good administration due to lack of coordination.

In the *Bankwatch Network*³³⁰ case, relating to documents relating to a Commission decision on granting a Euratom loan to support the Ukrainian programme to upgrade the safety of nuclear power units, the Court recalled that "the right of access to documents has been upgraded to a fundamental right under Article 42 of the Charter of Fundamental Rights and that, under Article 6(3) EU, the fundamental rights as they result from the constitutional traditions common to the Member States, have the value of general principles of law in the EU legal order."

In the *CRM Srl*³³¹ case, relating to a motion brought by CRM Srl. to annul Commission Implementing Regulation (EU) No 1174/2014 entering a name in the register of protected designations of origin and protected geographical indications (Piadina Romagnola/Piada Romagnola12), the applicant argued that the Commission violated the right

³²⁷ Judgment of 12 July 2011 in case T-113/07 *Toshiba v Commission*, paragraph 44

³²⁸ Judgment of 14 March 2013 in case T 587/08 *Fresh Del Monte Produce v Commission*, paragraph 690

³²⁹ Judgment of 31 May 2018 in case T-163/17, *Consorzio di garanzia dell'olio extra vergine di oliva di qualità v European Commission*

³³⁰ Judgment of 27 February 2018 in case T-307/16, *CEE Bankwatch Network v European Commission*

³³¹ Judgment of 23 April 2018, in case T-43/15, *CRM Srl v European Commission*

to good administration in its appreciation of the conditions for registration of the contested Piadina Romagnola/Piada Romagnola. It argued in particular that, at the time of the adoption of the contested regulation, the Commission ignored the fact that TAR Lazio had partially cancelled the specification attached to the request. The Court found that the Commission unlawfully granted the application for registration and acted in breach of its duty to examine the file and the principle of good administration. However, it dismissed the action on the grounds that such a procedural violation cannot constitute a violation of the right to effective judicial protection within the meaning of Articles 6 and 13 of the ECHR and Article 47 of the Charter³³².

In the *Fruits de Ponent, SCCL*³³³ case, relating to an action for damages following the adoption of Commission delegated Regulations³³⁴, Fruits de Ponent SCCL argued that the withdrawal mechanism was objectively inadequate, arbitrary and contrary to Article 41 of the Charter, in that the Commission failed to bring together in a diligent manner the facts essential to the exercise of its wide discretion, the duty of care, the duty of assistance, and the principles of protection and good administration. The action was dismissed on the grounds that the withdrawal mechanism in the complaint was not objectively inadequate, arbitrary and contrary to Article 41 of the Charter.

Application by Member States

The Commission launched infringement proceedings against a Member State, specifically referring to a violation of the right to good administration, in connection with the right of applicants for long-term resident status under the Directive concerning the status of third-country nationals who are long-term residents³³⁵ to be provided with the reasons for the rejection of their applications.

The violation of the right to good administration was a recurring grievance in a number of complaints received by the Commission from citizens on the implementation of EU instruments on legal migration and asylum, in connection with long delays for the processing of and deciding on applications for permits and for asylum.

Enquiry by the Ombudsman

The NGO European Centre for Constitutional and Human Rights made a complaint to the Ombudsman relating to the involvement of the European Asylum Support Office in the decision-making process concerning the admissibility of applications for international protection submitted in the Greek hotspots. It claimed that when conducting ‘admissibility interviews’ in the ‘hotspots’ on the Greek islands, the European Asylum Support Office failed to comply with the provisions on ‘the right to be heard’ in Article 41 of the Charter.

³³² See Article 47

³³³ Judgment of 13 December 2018, in case T-290/16, *Fruits de Ponent, SCCL v European Commission*

³³⁴ Commission delegated Regulation (EU) No 913/2014¹⁴ and Commission delegated Regulation (EU) No 932/2014¹⁵

³³⁵ Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, OJ L 16 of 23/01/2004, p. 44

The Ombudsman opened an investigation on 13 July 2017. On 5 July 2018, the Ombudsman decided³³⁶ that further inquiries into the issues raised in the complaint were not justified and closed the inquiry. The primary reason for the Ombudsman's decision was that responsibility for decisions on individual asylum applications rests with the Greek authorities.

Complaints by citizens

In the context of the process of approval of active substances or the renewal of existing approvals of active substances for use in plant protection products under the Regulation³³⁷ concerning the placing of plant protection products on the market, applicants who face a restriction on approval conditions or who receive a decision not to approve an active substance or not to renew an existing approval (in the form of a Commission Regulation) regularly refer to the right to good administration. This right is notably invoked to support claims that the applicants were not able to submit additional data to underpin the safety of the substance during the risk assessment (which provides for restricted possibilities to submit additional information in addition to the application dossier), that the Commission did not take appropriate account of such submissions and that the right to be heard was not respected in the relevant proceedings. Commission staff assessed these claims and found no violation of this right.

NATIONAL CASE LAW BOX

In Slovakia, the Supreme Court made a detailed reference to Article 41 of the Charter, in a case concerning the removal of a car from the official registry of vehicles. Without analysing the applicability of the Charter, the judges referred to the Council of Europe's recommendations and resolutions of the Committee of Ministers as well as Article 41 of the Charter, which form the basis of a *"spirit of European standards on general requirements of the quality of procedures and actions of the public administration called principles of 'good administration'"*.³³⁸

Article 42 — Right of access to documents

Article 42 of the Charter guarantees the right of any EU citizen and any natural or legal person residing or having its registered office in a Member State to access documents of the EU institutions, bodies, offices and agencies. This right is subject to certain exceptions³³⁹. In particular, the institutions refuse access where disclosure would undermine the protection of the public interest, or the right to privacy and integrity of the individual.

³³⁶ Decision in case 735/2017/MDC on the European Asylum Support Office's (EASO) involvement in the decision-making process concerning admissibility of applications for international protection submitted in the Greek Hotspots, in particular shortcomings in admissibility interviews.

³³⁷ Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, OJ L 309, 24.11.2009, p. 1–50

³³⁸ Slovakia, Supreme Court, case 10Asan/3/2017, 27 April 2018.

³³⁹ Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.

Policy

In 2018, the European Commission registered 6 912 initial requests for access to documents. Full or partial access was granted in more than 83% of cases. The European Commission received 318 confirmatory applications requesting a review of initial decisions. This independent review led to wider access being granted in approximately 40% of the cases reviewed.

In 2018, the European Commission continue to honour its commitment to ensure transparency in the Brexit negotiations. In addition, in February 2018, the European Commission started to publish the Commissioners' travel expenses on a regular basis.

Finally, the European Commission continued to publish information on the Europa website about the meetings of Commissioners and their closest advisors with representatives of interest groups, and applied a rule that meetings could not take place with groups that were not listed on the Transparency Register. By the end of December 2018, information had been published about more than 19,000 meetings. This policy allows individuals and stakeholders to know who is seeking to influence the Commission and on which subjects.

Case law

In its judgments in the *ClientEarth*³⁴⁰ and *Emilio De Capitani*³⁴¹ cases, the Court clarified the interpretation of the exception in Article 4(3) of Regulation regarding public access to European Parliament, Council and Commission documents³⁴² prepared in the context of deliberations and preliminary consultations and in legislative negotiations. In the first judgment, the Court stated that an institution cannot rely on a general presumption of refusing disclosure of a draft impact assessment on the grounds that public disclosure, would, in principle, seriously undermine its ongoing decision-making process. In the second judgment, the General Court clarified that, in principle, the institutions' views reflected in trilogue documents do not fall under a general presumption of non-disclosure, even if the legislative procedure is still ongoing.

Article 43 — European Ombudsman

The Charter provides that any EU citizen and any natural or legal person residing or having its registered office in a Member State, has the right to refer to the European Ombudsman in cases of maladministration in the activities of the EU institutions, bodies, offices and agencies, with the exception of the CJEU acting in its judicial role.

Every year, the European Ombudsman presents an annual report on her activities to the European Parliament. The Parliament's Committee on Petitions publishes its own-initiative annual report, together with a motion for a

³⁴⁰ Judgment of 4 September 2018 in Case C-57/16 P, *ClientEarth v Commission*.

³⁴¹ Judgment of 22 March 2018, Case T-540/15, *Emilio De Capitani v European Parliament*.

³⁴² Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, L 145 , 31/05/2001, p. 43-48

European Parliament resolution subject to a debate and vote in a plenary session, which provides an overview of the petitions received during the year and of its relations with other institutions³⁴³.

In 2018, the European Ombudsman was able to help 17,976 citizens. This includes individuals who complained directly to the European Ombudsman (2,160), those who received a reply to their request for information (1,220), and those who obtained advice through the interactive guide on the European Ombudsman's website (14,596).

There were 522 complaints that fell within the competence of a member of the European Network of Ombudsmen, of which 495 fell within the competence of a national/regional ombudsman or similar body and 27 were referred to the European Parliament's Committee on Petitions.

Article 44 — Right to petition

All EU citizens, as well as any natural or legal person residing or with its registered office in a Member State, have the right to petition the European Parliament on matters which come within the EU's fields of activity and which affect the petitioner directly.

Petitions addressed to the European Parliament are considered by the European Parliament's Committee on Petitions. Each year, the Committee draws up a report on its activities, which *inter alia* provides an overview of the petitions received during the year and of the Committee's relations with other institutions. This report is then debated during a plenary sitting of the Parliament which adopts a resolution³⁴⁴.

Petitions can be addressed to the Parliament either in writing or electronically, using the Parliament's web portal. This was created to facilitate the public's interaction with the work of the Committee on Petitions. Petitioners have the right to attend the Committee meeting where their petition is being debated. These meetings provide the Committee and representatives of the Commission, who are also invited to attend, with the opportunity to hear directly from citizens who consider that their rights have not been respected.

In accordance with Parliament's rules of procedure, the Committee on Petitions may request assistance from the Commission in the form of information on the application of, or compliance with, EU law and information or documents relevant to the petition.

In 2018 the Commission received a total of 531 petitions from the Committee on Petitions, 90 of which concerned fundamental rights. The Directorate-General for Justice was responsible for addressing the petitioners' concerns in this area. Recurring fundamental rights issues raised by citizens in 2018 included freedom of movement and of residence (article 45), integration of persons with disabilities (article 26) and protection of personal data (Article 8).

³⁴³ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONGML%2bREPORT%2bA8-2017-0328%2b0%2bDOC%2bPDF%2bV0%2f%2fEN>

³⁴⁴ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONGML%2bREPORT%2bA8-2017-0387%2b0%2bDOC%2bPDF%2bV0%2f%2fEN>

Citizens' initiatives

Another instrument available to EU citizens is the possibility of registering a citizens' initiative. A European citizens' initiative allows EU citizens to participate directly in the development of EU policies by calling on the European Commission, within the framework of its powers, to propose legislation on matters where the EU has competence to legislate for the purpose of implementing the EU Treaties. A citizens' initiative has to be backed by at least one million EU citizens, coming from at least 7 out of the 28 Member States. A minimum number of signatories is required in each of those 7 Member States. The organisers must collect all signatures within one year of the formal registration of the proposed initiative.

In 2018, seven citizens' initiatives were registered:

- 'We are a welcoming Europe, let us help!', registered on 15/02/2018;
- 'Stop starvation for 8% of the European population!', registered on 19/07/2018;
- 'Permanent European Union Citizenship', registered on 23/07/2018;
- 'End the Cage Age', registered on 11/09/2018;
- 'STOP FRAUD and abuse of EU FUNDS - by better control of decisions, implementation and penalties', registered on 27/09/2018;
- 'Eat ORIGINAL! Unmask your food', registered on 02/10/2018;
- 'Mandatory food labelling Non-Vegetarian / Vegetarian / Vegan', registered on 12/12/2018.

Two proposed initiatives were refused as they clearly fell outside the framework of the Commission's powers to submit a proposal for an EU legal act for the purpose of implementing the Treaties; both were related to Article 50(1) of the TEU ('British friends stay with us', refused in March 2018, and 'EU-wide referendum whether the European Citizens want the United Kingdom to remain or to leave!', which the Commission refused to register on 28 November 2018).

Article 45 — Freedom of movement and of residence

The Charter guarantees the right of every EU citizen to move and reside freely, while respecting certain conditions, within the territory of the Member States. This fundamental right is also included in the TFEU.

Legislation

In March 2018, the Commission adopted a proposal on the establishment of a European Labour Authority³⁴⁵ whose main objective is to contribute to ensuring fair mobility in the internal market. The aims of the new Authority are: to improve access to information in the area of labour mobility; to strengthen operational

³⁴⁵ Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority (COM (2018)131 final available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1555400931298&uri=CELEX%3A52018PC0131>

cooperation between authorities in the cross-border enforcement of relevant Union law; and to provide mediation and facilitate solutions in cases of dispute in cross-border cases.

In April 2018, the Commission adopted a new **proposal on the security features of identity cards and residence documents**³⁴⁶, which seeks to facilitate the freedom of EU citizens to move and reside freely within the territory of the Member States. At the same time, the proposal ensures that citizens' right to the protection of their personal data³⁴⁷ are adequately safeguarded. In accordance with EU law on free movement of people, identity cards can be used by EU citizens as travel documents, both when travelling within the EU and also to enter the EU from abroad. Currently, the security levels of national ID cards delivered by Member States and of residence documents for EU nationals residing in another Member State and their family members vary significantly. This increases the risk of falsification and document fraud and can lead to practical difficulties for people when exercising their right of free movement. The provisions of the General Data Protection Regulation will apply to the processing of personal data collected for the purpose of the proposal.

Work continued on the **proposal for a Regulation as regards the rules applicable to the temporary reintroduction of border control at internal borders**³⁴⁸ in the Council and in the European Parliament. The amendments proposed by the co-legislators aimed to support and strengthen the fundamental rights and principles set out in the Charter, in particular the freedom of movement and residence.

Application by Member States

The Commission sent a letter of formal notice to a Member State in relation to new legislation which criminalises activities that support asylum and residence applications. In particular, the Commission considered that by preventing anyone who is subject to a criminal procedure under these new laws from approaching the transit zones at that Member State's borders, the legislation unduly restricts the exercise of free movement rights of EU citizens. This is in violation of Articles 20 and 21(1) TFEU³⁴⁹ and the Directive³⁵⁰ on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, as well as of Article 45 of the Charter.

³⁴⁶ Proposal for a Regulation of the European Parliament and of the Council, of 17 April 2018, on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement, COM(2018) 212 final, https://ec.europa.eu/info/sites/info/files/placeholder_1.pdf

³⁴⁷ See Article 8

³⁴⁸ Regulation (EU) 2016/399 of the European Parliament and of the Council on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77, 23.3.2016, p. 1–52

³⁴⁹ See Articles 20 and 21(1) TFEU.

³⁵⁰ Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77–123

Case law

In the *Coman*³⁵¹ case, the Court confirmed that the term ‘spouse’ in the provisions of EU law on free movement and residence of EU citizens refers to a person joined to another person by the bonds of marriage, is gender-neutral and may therefore cover the same-sex spouse of an EU citizen. In particular, the Court pointed out that the rights guaranteed by Article 7 of the Charter³⁵² have the same meaning and the same scope as those guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms³⁵³. The Court referred to the case law of the European Court of Human Rights, concluding that the relationship of a same-sex couple falls within the notions of ‘private life’ and ‘family life’ in the same way as the relationship of a heterosexual couple in the same situation.

In the *Diallo*³⁵⁴ case, the Court, taking into account Articles 7, 20, 21 and 41 of the Charter³⁵⁵, clarified that Member States must adopt and notify the decisions on applications for residence cards by non-EU family members of EU citizens within the deadline of 6 months stipulated in Article 10 of the Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States³⁵⁶, and that the judicial annulment of the decision does not reopen a new period of 6 months as referred to in the same Article. The Court found that an automatic opening of a new six-month period would render it excessively difficult for the family member of an EU citizen to exercise their right to obtain a decision on their application for a residence card on the basis of Article 10(1) of Directive. Indeed, the right to free movement, if it is to be exercised under objective conditions of dignity, must also be granted to the family members of those citizens, irrespective of nationality.

In the joined cases *K.v Staatssecretaris van Veiligheid en Justitie* and *H.F. v Belgische Staat*³⁵⁷, the Court confirmed that restrictions on the freedom of movement and residence of an EU citizen, or a family member of an EU citizen, who is suspected of having participated in war crimes must also be assessed on a case-by-case basis, as required by the Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. That assessment requires the threat that the individual concerned represents to the fundamental interests of the host society to be weighed against the need to protect the rights of EU citizens and their family members. The Court clarified that in this assessment, account must be taken in particular of the right to respect for private and family life, as enshrined in Article 7 of the Charter³⁵⁸.

³⁵¹ Judgment of 5 June 2018, in case C-673/16, *Coman*

³⁵² See Article 7

³⁵³ See Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

³⁵⁴ Judgment of 27 June 2018, in case C-246/17, *Diallo*

³⁵⁵ See Articles 7, 20, 21 and 41

³⁵⁶ Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77–123

³⁵⁷ Judgment of 2 May 2018, in joined cases C-331/16, *K. v Staatssecretaris van Veiligheid en Justitie* and C-366/16, *H.F. v Belgische Staat*

³⁵⁸ See Article 7

Another case relating to the right to respect for private and family life as enshrined in Article 7 of the Charter³⁵⁹ is the *Deha Altiner*³⁶⁰ case. The Court confirmed its previous case law on the concept of 'returning nationals', i.e. the right of EU citizens to be accompanied or joined by their non-EU national family member when returning to their home Member State after having exercised free movement rights in another Member State. It confirmed that the EU citizen must have exercised free movement rights genuinely and effectively in another Member State, and must have created or strengthened family life there, before he can invoke similar rights of entry and residence for his family members as provided for under EU free movement law, including in relation to his home Member State. The Court further clarified the maximum period of time which may elapse between the return of the EU citizen and the time when the non-EU family member joins the EU citizen in the home Member State and how Member States may deal with delays.

In the *Banger*³⁶¹ case, the Court clarified that extended family members of EU citizens who return to their home Member State from another Member State can, like other family members such as spouses, also avail themselves of the protection of EU law on free movement of EU citizens and can apply to have their entry and residence facilitated in accordance with national law. In particular, the Court pointed out that the provisions of the Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States must be interpreted in a manner which complies with the requirements flowing from Article 47 of the Charter³⁶².

Article 46 — Diplomatic and consular protection

Article 46 of the Charter guarantees the right of unrepresented EU citizens to seek diplomatic or consular protection from embassies or consulates of other Member States in third countries under the same conditions as nationals. EU citizens must be able to rely effectively on this right when travelling abroad.

In May 2018, the Commission adopted a **proposal on EU emergency travel documents**³⁶³ which seeks to facilitate citizens' right to diplomatic and consular protection. By creating a modern and secure format for emergency travel documents issued to EU citizens abroad whose passports have been lost, stolen or destroyed, the proposal implements the right granted by the Charter.

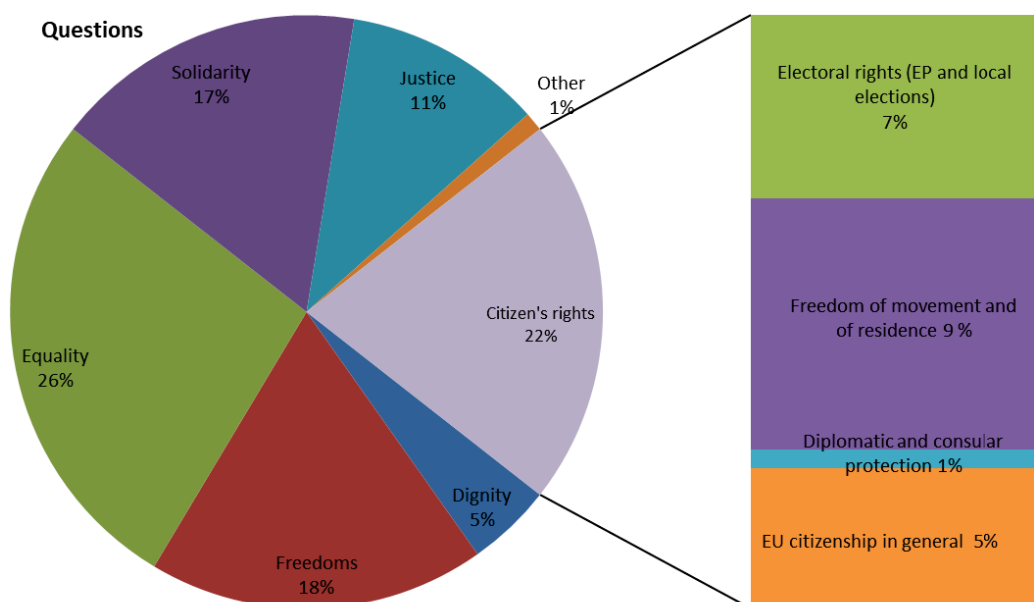
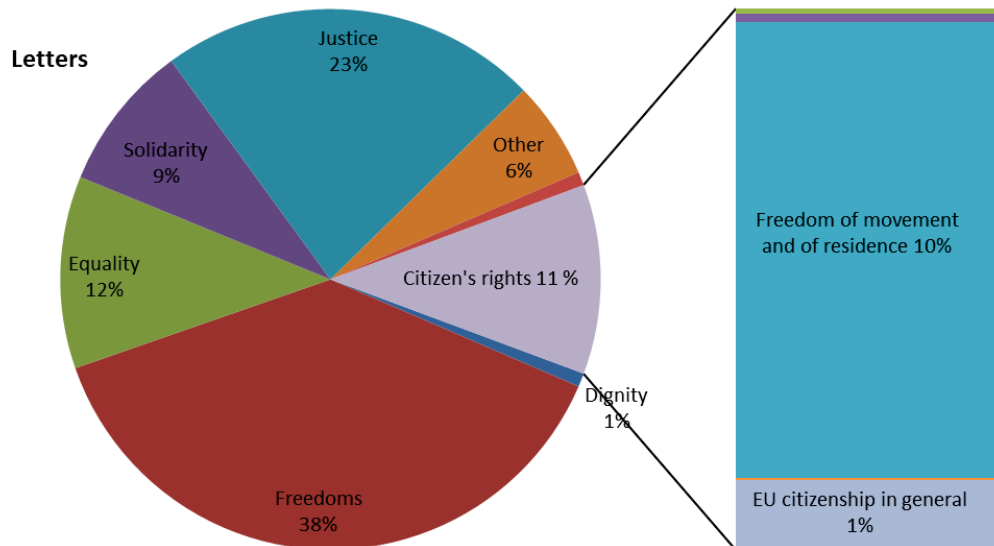
³⁵⁹ See Article 7

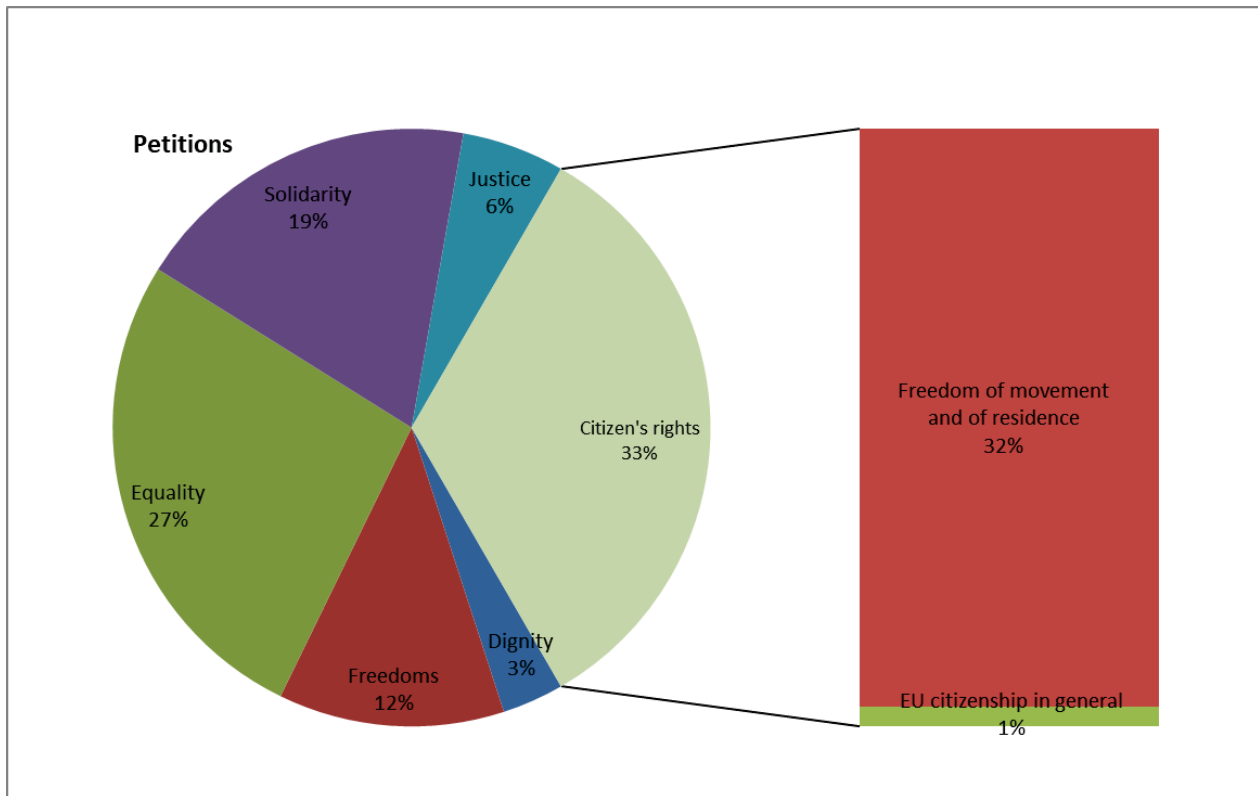
³⁶⁰ Judgment of 27 June 2018, in case C-230/17, *Deha Altiner*

³⁶¹ Judgment of 12 July 2018 in case C-89/17 *Banger*

³⁶² See Article 47

³⁶³ Proposal for a Council Directive establishing an EU Emergency Travel Document and repealing Decision 96/409/CFSP, COM(2018) 358 final,
https://ec.europa.eu/info/sites/info/files/com_2018_358_f1_proposal_for_a_directive_en_v2_p1_978952.pdf





Title VI

Justice

The **European e-Justice portal** is a key part of the EU e-Justice architecture. It aims to promote knowledge about and correct application of EU law and the rights enshrined in the EU Charter of fundamental rights. It now includes '**CharterClick**' that allows users to check if a specific case falls within the scope of the Charter. The portal also features a guide with in-depth information on the Charter and the scope of its application, interpretation and effects.

An effective justice system is essential to guarantee the respect of the **right to an effective remedy and to a fair trial** and of all other rights enshrined in the Charter. On 24 September 2018, the Commission decided to refer Poland to the Court of Justice for the new law on the Supreme Court's violations of the principle of judicial independence and asked the Court to order interim measures until a final judgment on the case is made. EU law on judicial independence was also at the centre of two important judgments handed down by the Court of Justice. In *Associação Sindical dos Juizes Portugueses*³⁶⁴, the Court clarified the scope of Article 19(1) TEU, underlining that Member States must ensure that their courts meet the requirements of effective judicial

³⁶⁴ Judgment of 27 February 2018, in case C-64/16, *Associação Sindical dos Juizes Portugueses*.

protection and that the independence of national courts is essential to ensure such judicial protection. In *LM*³⁶⁵, the Court affirmed that a judicial authority called upon to execute a European arrest warrant must refrain from enforcing it if it considers that there is a real risk that the individual concerned would suffer a breach of their fundamental right to an independent tribunal and, therefore, of the essence of their fundamental right to a fair trial on account of deficiencies liable to affect the independence of the judiciary in the issuing Member State.

The Commission adopted a proposal to amend the **Regulation concerning investigations conducted by the European Anti-Fraud Office (OLAF)**. It aims to adapt the operation of OLAF to the establishment of the European Public Prosecutor Office in 2017 and to increase the effectiveness of OLAF's investigative role. Under OLAF's investigations, the rights of suspects and accused individuals enshrined in the Charter are protected, in particular by specific provisions on procedural guarantees.

Article 47 — Right to an effective remedy and to a fair trial

Article 47 of the Charter provides that people have the right to an effective remedy before a tribunal if a right granted under EU rules is violated. This provides individuals with a legal solution, decided by a tribunal, should an authority apply EU law incorrectly. It guarantees judicial protection against any such violation and therefore plays a key role in ensuring the effectiveness of all EU provisions, ranging from social policy to asylum legislation, competition, agriculture, etc.

A closely related provision, also enshrined by Article 47, is that legal aid is to be made available to those who lack sufficient resources, in so far as such aid is necessary to ensure effective access to justice. This means that the right to effective access to justice cannot be hampered by the fact that a person cannot afford to hire a lawyer.

Article 47 also stipulates that, in all judicial proceedings which relate to the interpretation or the validity of EU rules, everyone should have the right to a fair trial. This encompasses:

- the right to a fair and public hearing;
- the right to have one's case adjudicated within a reasonable time;
- the principles of independence and impartiality of the tribunal; and
- the right to be advised, defended and represented.

Legislation and policy

An **effective justice system** is essential for guaranteeing the respect of the right to an effective remedy and to a fair trial, as well as all other rights enshrined in the Charter. Every year, the Commission publishes its **annual EU justice scoreboard**, to provide comparable data on the independence, quality, and efficiency of national justice systems and recommendations paving the way for a more investment, business and citizen-friendly environment³⁶⁶. Improving the quality, independence and efficiency of national justice systems are also among

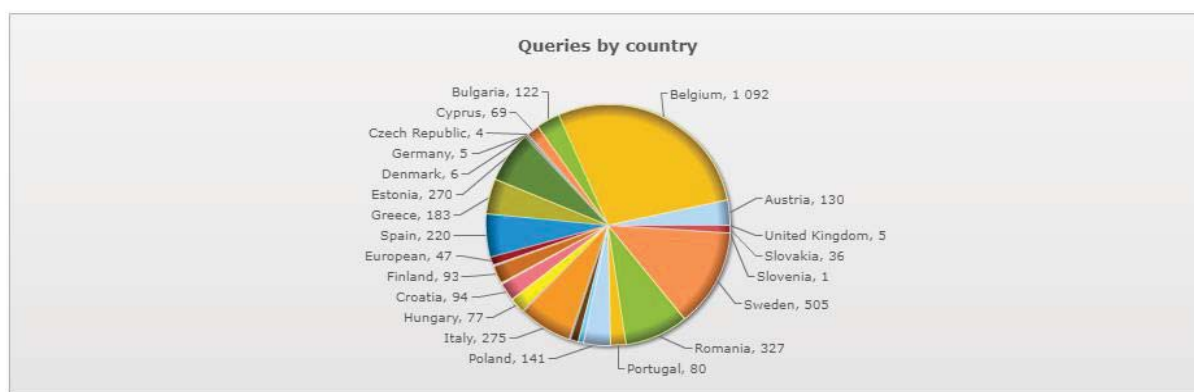
³⁶⁵ Judgment of 25 July 2018, in case C-216/18 PPU, *LM*.

³⁶⁶ https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/eu-justice-scoreboard_en

the key priorities of the European Semester – the EU annual cycle of economic policy coordination, as expressed in the Communication from the Commission on the 2019 Annual Growth Survey³⁶⁷.

The Commission closely follows justice reforms in Member States and each year the Council adopts **country specific recommendations** in this area on the basis of Commission proposals. In 2018, Croatia, Italy, Cyprus, Slovakia and Portugal, received a country specific recommendation to improve their justice system³⁶⁸. The Commission has also closely monitored the efforts in this area of other Member States such as Belgium, Bulgaria, Greece, Spain, Latvia, Malta, Poland, Romania and Slovenia.

To ensure the correct application of the Charter and the right to access to justice, a new tool called '**CharterClick**' that allows the user to verify if a specific case falls within the scope of the Charter was launched on the e-Justice portal in October 2018³⁶⁹. The portal also features a guide with in-depth information on the Charter and the scope of its application, interpretation and effects. The **Fundamental Rights Interactive Tool** (FRIT) of the European e-Justice portal attracted 3,871 searches in 2018. This tool allows users to identify the competent organisation which can assist with alleged violations of citizens' fundamental rights.



Source: European Commission

Various legislative proposals were adopted in 2018 that directly promote the right to an effective remedy. In May 2018, the Commission adopted two proposals on modernisation and digitalisation of judicial cooperation: the **proposal for a Regulation on Service of Documents**³⁷⁰ and the **proposal for a Regulation on Taking of Evidence**³⁷¹. These proposals aim to make access to civil justice cheaper, more efficient and more accessible to citizens and businesses. They will strengthen the procedural rights of the parties and access to justice, for

³⁶⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1547650919951&uri=CELEX%3A52018DC0770>

³⁶⁸ https://ec.europa.eu/info/publications/2018-european-semester-country-specific-recommendations-commission-recommendations_en

³⁶⁹ https://beta.e-justice.europa.eu/583/EN/does_the_charter_apply_to_my_case

³⁷⁰ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) {SEC(2018) 272 final} {SWD(2018) 286 final} {SWD(2018) 287 final}; of 31.5.2018 COM(2018) 379 final, 2018/0204(COD).

³⁷¹ Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters {SEC(2018) 271 final} {SWD(2018) 284 final} {SWD(2018) 285 final} of 31.5.2018 COM(2018) 378 final 2018/0203(COD).

instance by clarifying when and how people can exercise the right of refusal. The rights of the defence will also be strengthened.

On 8 September 2018, the **Directive on combating terrorism**³⁷² entered into force. This Directive strengthens the right of victims of terrorism to access justice. In particular, it contains provisions on **support, assistance and protection of victims of terrorism** which build upon the Victims' Rights Directive³⁷³ to respond more directly to the specific needs of victims of terrorism (for instance, victims of terrorism will have access to specialised support services immediately after a terrorist attack and for as long as necessary). These provisions increase access to justice for victims of terrorism in particular by **strengthening access to legal aid** (Member States will have to take into account the gravity and circumstances of the offence when deciding on legal aid for victims of terrorism, if such approach is not contrary to their legal systems); and by **facilitating access to compensation** (victims' support services will provide assistance with claiming compensation).

Initiatives to **support judicial training** also helped to promote the right to an effective remedy for the enjoyment of rights derived from EU law, including fundamental rights enshrined in the Charter. The **2018 report on judicial training in the EU**, based on the results of a questionnaire for Member States' authorities, European networks of legal professionals and their members and the main EU trainers of legal practitioners on EU law, showed that 7.6 % of the training activities followed by legal practitioners on EU law or on the law of another Member States in 2017 dealt mainly or exclusively with fundamental rights³⁷⁴.

Under the Justice Programme's 2017 call for proposals, four contracts were signed awarding grants totalling more than €2 million, for EU judicial training sessions on fundamental rights in 2018 to train more than 1,500 justice professionals.

The **2018 call for proposals for action grants in European judicial training** specifically mentioned fundamental rights as one of the priority topics on which the training projects should focus, including the scope and application of the Charter of Fundamental Rights of the EU.

The call for proposals also aimed to fill gaps in training for court staff and bailiffs, for example through cross-border training activities or exchanges of good training practices, on all areas of EU civil, criminal and fundamental rights law relevant for their judicial work. It included training for prison and probation staff, for example through cross-border training activities or exchanges of good training practices, on EU law and fundamental rights relevant for their work, including on countering radicalisation to violent extremism in prison, on the minimum standards laid down by the Council of Europe and on rehabilitation programmes. The call is expected to result in an increased knowledge of fundamental rights instruments among legal practitioners and more awareness among justice professionals on the added value and scope of the EU Charter of Fundamental Rights, thereby strengthening the protection of fundamental rights across the EU.

³⁷² Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88, 31.3.2017, p. 6–21.

³⁷³ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012, p. 57–73.

³⁷⁴ http://www.ejtn.eu/PageFiles/18504/2018%20Training%20report_v2_EU_en.pdf

As part of the European Commission's strategy for the effective implementation of the Charter, its Justice and Consumers Directorate-General decided to fund a **European training programme for judges and prosecutors related to the rule of law covering all EU countries and Western Balkans**. The European Judicial Training Network (EJTN) and the Tipik Communications Agency were tasked with implementing this training programme during 2018 and 2019. This entailed organising a series of seven seminars and one webinar, and developing a practitioner's manual and a training strategy guide. To date, three of the seven seminars took place: one for judges and prosecutors (Brussels, October 2018); one for judges (Barcelona, October 2018) and another for prosecutors (Bucharest, December 2018). The CJEU will host a final conference in May 2019 to wrap up the projects' conclusions.

Case law

In 2018, the Court of Justice handed down two important judgments on **EU law on judicial independence**. In *Associação Sindical dos Juizes Portugueses*³⁷⁵, the Court clarified the scope of Article 19(1) TEU, underlining that Member States must ensure that their courts meet the requirements of effective judicial protection and that the independence of national courts is essential to ensure such judicial protection.

In the *LM* case³⁷⁶ on the **European Arrest Warrant**, the Court recalled that a refusal to execute a European arrest warrant is an exception to the principle of mutual recognition underlying the European arrest warrant mechanism, and that exception must accordingly be interpreted strictly. However, a judicial authority called upon to execute a European arrest warrant must refrain from enforcing it if it considers that there is a real risk that the individual concerned would suffer a breach of their fundamental right to an independent tribunal and, therefore, of the essence of their fundamental right to a fair trial on account of deficiencies liable to affect the independence of the judiciary in the issuing Member State.

The Court also clarified in *Donnellan*³⁷⁷, that Article 14(1) and (2) of Council Directive 2010/24/EU concerning **mutual assistance for the recovery of claims relating to taxes, duties and other measures**, read in the light of Article 47 of the Charter, must be interpreted as not precluding an authority of a Member State from refusing to enforce a request for recovery concerning a claim relating to a fine imposed in another Member State, on the ground that the decision imposing that fine was not properly notified to the person concerned before the request for recovery was made to that authority pursuant to that directive.

The Court also delivered three judgments on the **right to an effective remedy** concerning **appeals against decisions refusing international protection**. In *Alheto*³⁷⁸, the Court ruled that Article 46(3) of Directive 2013/32/EU on common procedures for granting and withdrawing international protection, read in conjunction with Article 47 of the Charter, must be interpreted as meaning that a court or tribunal of a Member State seized at first instance of an appeal against a decision relating to an application for international protection must examine both facts and points of law which the administrative authority that took that decision took into account or could have taken into account, and those which arose after the adoption of that decision. The court explained

³⁷⁵ Judgment of 27 February 2018, in case C-64/16, *Associação Sindical dos Juizes Portugueses*.

³⁷⁶ Judgment of 25 July 2018, in case C-216/18 *PPU, LM*.

³⁷⁷ Judgment of 26 April 2018, in case C-34/17, *Donnellan*.

³⁷⁸ Judgment of 25 July 2018, in case C-585/16, *Serin Alheto v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*.

that this provision does not establish common procedural standards in respect of the power to adopt a new decision following the annulment, by the court hearing the appeal, of the initial decision taken on that application by the administrative authority. However, the need to ensure that Article 46(3) has a practical effect and to ensure an effective remedy in accordance with Article 47 of the Charter requires that, in the event that the file is referred back to the administrative authority, a new decision must be adopted within a short period of time and must comply with the assessment contained in the judgment annulling the initial decision.

In *Belastingdiens v Toeslagen* and *X and Y*³⁷⁹, the Court ruled on the issue of whether EU law requires that second instance appeals against decisions rejecting an application for international protection and imposing an obligation to return have an **automatic suspensory effect**. The Court concluded that Article 39 of Directive 2005/85/EC and Article 13 of Directive 2008/115/EC, read in the light of Articles 18, 19(2) and 47 of the Charter, must be interpreted as not precluding national legislation which, while making provision for appeals against judgments delivered at first instance upholding a decision rejecting an application for international protection and imposing an obligation to return, does not confer on that remedy automatic suspensory effect even in the case where the person concerned invokes a serious risk of infringement of the principle of non-refoulement.

In its order in case *FR*³⁸⁰, the Court ruled that Directive 2013/32/EU, read in the light of Article 47 of the Charter, must be interpreted as not precluding national legislation which provides for an **appeal procedure** against a first-instance judgment confirming a decision of the administrative authority which rejects an application for international protection, without granting it automatic suspensory effect, but which allows the court which has handed down that judgment to order, upon application by the person concerned, the suspension of its enforcement. This, after having assessed whether or not the grounds raised in the appeal brought against that judgment are well founded, but not whether or not there is a risk of serious and irreparable damage for that applicant as a result of the enforcement of that judgment.

The CJEU delivered a judgment in *Hasan*³⁸¹, on the effective protection of individuals in the context of the **Dublin III Regulation**. The Court ruled that Article 27(1) of Regulation (EU) No 604/2013, read in the light of recital 19 of the Regulation and Article 47 of the Charter, must be interpreted as not precluding a legislative provision that may lead the court or tribunal hearing an action brought against a transfer decision to take into account circumstances that are subsequent not only to the adoption of that decision but also to the transfer of the person concerned.

In the *Gnandi* case³⁸² on the application of Directive 2008/115/EC, the Court ruled that the adoption of a return decision, under Article 6(1) of the **Return Directive**, in respect of a third-country national who has applied for international protection, immediately after the rejection of that application by the determining authority or together in the same administrative act, and thus before the conclusion of any appeal proceedings brought against that rejection, is not precluded provided, *inter alia*, that: i. the Member State concerned ensures that all the legal effects of the return decision are suspended pending the outcome of the appeal; ii. the applicant is

³⁷⁹ Judgment of 26 September 2018, in cases C-175/17 and C-180/17, *X v Belastingdiens/Toeslagen* and *X and Y v Staatssecretaris van Veiligheid en Justitie*.

³⁸⁰ Order of 27 September 2018 in case C-422/18 PPU, *FR v Ministero dell'interno — Commissione Territoriale per il riconoscimento della Protezione Internazionale presso la Prefettura U.T.G. di Milano*.

³⁸¹ Judgment of 25 January 2018 in case C-360/16, *Bundesrepublik Deutschland v Aziz Hasan*.

³⁸² Judgment of 19 June 2018 in case C-181/16, *Sadikou Gnandi v État belge*.

entitled, during that period, to benefit from the rights arising under Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; and iii. they are entitled to rely on any change in circumstances that occurred after the adoption of the return decision which may have a significant bearing on the assessment of their situation under Directive 2008/115, and in particular under Article 5 thereof, those being matters for the referring court to determine.

In *Profi Credit Polska*³⁸³ and *PKO*³⁸⁴, the CJEU assessed the compatibility of national rules of civil procedure with the right to an effective remedy resulting from Article 7 of the **Unfair Contract Terms Directive** 93/13/EEC and enshrined in Article 47 of the Charter. The CJEU confirmed its case law on effective remedies against unfair contract terms and found – in relation to payment order proceedings, based on a promissory note or a bank ledger excerpt, directed against consumers – that, where there is a significant risk that consumers will not object to a payment order, national rules that prevent national courts from assessing the unfairness of relevant contract terms of their own motion before issuing the payment order do not comply with Directive 93/13/EEC. Such significant risk can be created by procedural obstacles, for instance, a time-limit of only 2 weeks in order to present all necessary factual and legal elements, or rules on court fees that may deter consumers from lodging an objection, or the limited knowledge and information of consumers.

In *Azarov v Council*³⁸⁵, the CJEU ruled on the application of the Charter in the field of **restrictive measures** in the context of a proceeding where those measures were applied to persons subject to criminal proceedings in a third country for the misappropriation of public funds or assets. As regards Article 47 of the Charter, the Court affirmed that, if restrictive measures are applied to persons listed for that purpose, the EU institution taking the decision to list a person acting on the basis of a decision of an authority of a third State to initiate and conduct criminal investigation proceedings against that person, is required to verify beforehand whether that foreign decision was adopted in accordance with the rights of the defence and the right to effective judicial protection. The EU institution should also inform the listed person of the reasons why it considers that the decision of the third State on which it intends to rely has been adopted in accordance with the rights of the defence and the right to effective judicial protection.

Application by Member States

On 24 September 2018, the Commission decided to refer Poland to the Court of Justice for violations of **the principle of judicial independence** by the new law on the Supreme Court and asked the Court of Justice to order interim measures until a final judgment on the case is made. The Commission considers that the retirement regime in the Polish law on the Supreme Court is incompatible with EU law as it undermines the principle of judicial independence, including the irremovability of judges, and that thereby Poland fails to fulfil its obligations under Article 19(1) TEU read in connection with Article 47 of the Charter. In that respect, the Commission referred to the two important judgments³⁸⁶ of the Court of Justice, regarding EU law on judicial independence. On 19 October 2018, the Vice-President of the Court of Justice issued a provisional order on interim measures, granting

³⁸³ Judgment of 13 September 2018 in case C-176/17, *Profi Credit Polska S.A. w Bielsku Białej v Mariusz Wawrzosek*.

³⁸⁴ Judgment of 28 November 2018, in case C-632/17, *Powszechna Kasa Oszczędności (PKO) Bank Polski S.A. w Warszawie v Jacek Michalski*.

³⁸⁵ Judgment of 19 December 2018, in case C-530/17 P, *Mykola Yanovych Azarov v Council of the European Union*.

³⁸⁶ Judgment of 27 February 2018, in case C-64/16, *Associação Sindical dos Juizes Portugueses* and judgment of 25 July 2018, in case C-216/18 PPU, *LM*.

all the Commission's requests. On 17 December 2018, the Court of Justice issued a final order on interim measures, ordering the implementation of the retirement regime of the Supreme Court law to be stopped. Following the order of the Court of Justice, a new law amending the law on the Supreme Court was signed by the President of the Republic and published. As regards the pending infringement procedure on the Supreme Court law, the Commission considers that there is an overriding interest in having a final judgment of the Court of Justice on this matter, in view of the remaining legal uncertainty as well as of its fundamental importance for the principle of judicial independence and the EU legal order.

NATIONAL CASE LAW BOX

In **Czechia**³⁸⁷, the Supreme Administrative Court ruled that paragraph 171(a) of the Act on the Residence of Foreign Nationals, according to which the refusal to grant a visa cannot be challenged before a court, violates Article 47 (Right to an effective remedy and to a fair trial) of the Charter.

In **Portugal**³⁸⁸ the Constitutional Court reviewed Article 7(3) of the Law 34/2004 governing the access to courts, which prohibits the granting of legal aid to entities operating for profit. The Constitutional Court declared the norm unconstitutional and stressed that the right to effective judicial protection guaranteed by Article 47 of the Charter may require the granting of legal aid for profit making legal persons.

'Although the Constitution constitutes the decision parameter for the Constitutional Court [...], the Court should consider, in light of a systemic view of the legal system applicable in Portugal and its importance for the interpretation of precepts relating to fundamental rights, the case law of the European Court of Human Rights in relation to Article 6 (1) of the European Convention on Human Rights, as well the interpretation of the Court of Justice in the DEB case, concerning article 47 of the Charter [...]. The right to effective judicial protection guaranteed by article 47 of the Charter may require, depending on the circumstances of the specific case, the granting of legal aid to legal persons operating for profit, without this being considered as a dysfunctional competition rule in an efficient market'.

In a case concerning the payment of social insurance by a Polish citizen working in Slovakia, the Constitutional Court of **Poland**³⁸⁹ questioned the compatibility of the Law on the Supreme Court lowering the retirement age of judges, with Article 47 (Right to an effective remedy and to a fair trial) of the Charter. The question was referred to the Court of Justice of the European Union for a preliminary ruling.

Article 48 — Presumption of innocence and right of defence

Article 48 of the Charter provides that everyone who has been charged is to be presumed innocent until proven guilty according to the law. It further stipulates that a person's right to defence must be guaranteed.

³⁸⁷ Czechia, Supreme Administrative Court, case 6 Azs 253/2016 – 49, 4 January 2018.

³⁸⁸ Portugal, Constitutional Court, case 242/2018, 8 May 2018.

³⁸⁹ Poland, Supreme Court, case III UZP 4/18, 2 August 2018.

Legislation

Following the entry into force of Council Regulation 2017/1939 implementing enhanced cooperation on the establishment of the **European Public Prosecutor's Office (EPPO)** on 20 November 2017, the Office is being set up with a view to take up its investigative and prosecutorial role by the end of 2020. According to Article 41 of the Regulation, the Office's activities must fully respect the rights of suspects and accused people enshrined in the Charter, including the right to a defence. The Commission has put in place a regular and constructive dialogue with the relevant European bar associations to ensure that defence practitioners are fully aware of the Regulation's requirements.

On 23 May 2018, the Commission adopted a **proposal** to amend the Regulation on **investigations conducted by the European Anti-Fraud Office (OLAF)**³⁹⁰. The proposal constitutes a targeted amendment to adapt OLAF's operations in light of the establishment of EPPO and to increase the effectiveness of OLAF's investigative role. Fundamental rights are protected under OLAF investigations, in particular by specific provisions on procedural guarantees³⁹¹. One of the proposed amendments to reinforce the effectiveness of OLAF's investigations is to further strengthen the procedural guarantees of people involved in the investigations by clarifying the procedural guarantees applicable to on-the-spot checks and inspections carried out by OLAF³⁹². The amendments will help reinforce the right of defence, set out in Article 48 of the Charter, of the economic operators subject to the on-the-spot checks and inspections, for example by expressly providing for the application of the right against self-incrimination and of the right to be assisted by a person of choice³⁹³.

Application by Member States

On 1 April 2018, the **Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings**³⁹⁴ entered into force. This Directive guarantees the presumption of innocence of anyone accused or suspected of a crime by the police or justice authorities. It also ensures that everyone can benefit from the right to be present at their trial. It is the fourth Directive to enter into force out of a total of six adopted directives that form part of the ambitious legislative programme on **procedural rights for suspects and accused persons in criminal proceedings** which directly contributes to the right to a fair trial, including notably the rights enshrined in Article 48 of the Charter. The six directives cover:

³⁹⁰ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations, COM/2018/338 final, 23.5.2018.

³⁹¹ Article 9 of Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, OJ L 248, 18.9.2013, p. 1.

³⁹² On-the-spot checks and inspections are carried out by OLAF on the basis of a combined legal framework consisting of Regulation (EU, EURATOM) No 883/2013 and of Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, OJ L 292, 15.11.1996, p. 2.

³⁹³ Proposed amendments to Article 3 of Regulation (EU, EURATOM) No 883/2013.

³⁹⁴ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, p. 1–11.

- the right to interpretation and translation³⁹⁵;
- the right to information³⁹⁶;
- the right of access to a lawyer³⁹⁷;
- the presumption of innocence and the right to be present at the trial³⁹⁸;
- the procedural safeguards for children³⁹⁹; and
- legal aid⁴⁰⁰.

The Commission also issued Recommendations on safeguards for vulnerable people⁴⁰¹ and the right to legal aid for suspects or accused people in criminal proceedings⁴⁰².

On 18 December 2018, the Commission adopted two reports on the implementation of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings⁴⁰³, and on Directive 2012/13/EU on the right to information in criminal proceedings⁴⁰⁴.

Case law

In *Kolev*⁴⁰⁵, the CJEU ruled on the interpretation of the **Directive on the right to information in criminal proceedings**. The Court underlined that the objective and the proper conduct of proceedings presuppose, as a general rule and without prejudice, in some cases, to special or simplified procedures, that the disclosure on the charges, and that the opportunity to have access to the case materials should be afforded, no later than the point in time when the hearing of argument on the merits of the charges in fact commences before the court that has jurisdiction to give a ruling on the merits. This is essential for the accused person, or their lawyer, to be able to participate properly in that argument with due regard for the adversarial principle and equality of arms, so that they are able to state their position effectively.

³⁹⁵ Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1–7, to be transposed by 27 October 2013.

³⁹⁶ Directive 2012/13/EU on the right to information in criminal proceedings, OJ L 142, 1.6.2012, p. 1–10, to be transposed by 2 June 2014.

³⁹⁷ Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty OJ L 294, 6.11.2013, p. 1–12, to be transposed by 27 November 2016.

³⁹⁸ Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, p. 1–11, to be transposed by 1 April 2018.

³⁹⁹ Directive (EU) 2016/800 on procedural safeguards for children who are suspects and accused in criminal proceedings OJ L 132, 21.5.2016, p. 1–20, to be transposed by 11 June 2019.

⁴⁰⁰ Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings OJ L 297, 4.11.2016, p. 1–8, to be transposed by 25 May 2019.

⁴⁰¹ Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings OJ C 378, 24.12.2013, p. 8–10

⁴⁰² Commission Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings OJ C 378, 24.12.2013, p. 11–14.

⁴⁰³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1545146756295&uri=COM:2018:857:FIN>

⁴⁰⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1545146756295&uri=COM:2018:858:FIN>

⁴⁰⁵ Judgment of 5 June 2018 in case C-612/15 *Criminal proceedings against Nikolay Kolev and Others*.

In *Milev*⁴⁰⁶, the Court ruled that Article 3 and Article 4(1) of the **Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings** must be interpreted as not precluding the adoption of preliminary decisions of a procedural nature, such as a decision taken by a judicial authority that pre-trial detention should continue, which are based on suspicion or on incriminating evidence, provided that such decisions do not refer to the person in custody as being guilty. However, the Court considered that the Directive does not govern the circumstances in which decisions on pre-trial detention may be adopted.

Article 49 — Principles of legality and proportionality of criminal offences and penalties

Article 49 of the Charter provides that no one can be found guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor must a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

Some fundamental rights are guaranteed in absolute terms and cannot be subject to any restrictions. Interferences with other rights may be justified if, subject to the principle of proportionality, they are necessary and genuinely serve to meet objectives of general interest recognised by the EU.

Case law

The **principle of the retroactive application of the more lenient criminal law** was the object of the ruling in *Clergeau and others*⁴⁰⁷ where the Court of Justice affirmed that the principle enshrined in the third sentence of Article 49(1) of the Charter must be interpreted as not precluding a situation in which a person is convicted on the ground that they wrongfully obtained special export refunds provided for in Commission Regulation (EEC) No 1964/82 of 20 July 1982, by means of deceitful practices or the making of false statements as to the nature of the goods in respect of which the refunds were requested, although, as a result of changes in those rules which occurred subsequent to the acts complained of, the goods that were exported by that person have since become eligible for those refunds.

⁴⁰⁶ Judgment of 19 September 2018 in case C-310/18 PPU, *Criminal proceedings against Emil Milev*.

⁴⁰⁷ Judgment of 7 August 2018 in case C 115/17, *Clergeau and Others*.

NATIONAL CASE LAW BOX

In **Cyprus**,⁴⁰⁸ an appellant was convicted under the Law on the actions of persons in possession of confidential information and on actions of market manipulation, transposing Directive 2003/6/EC (Market Abuse Directive). This legislation provided stricter criminal provisions than those introduced by Directive 2014/57/EU (Market Abuse Directive II) so the appellant claimed that the lighter penalty should be applied. The Supreme Court explicitly stated that the Charter was applicable since the legal act was transposing EU legislation. The judges referred to Article 49 (Principles of legality and proportionality of criminal offences and penalties) of the Charter and considered that the 'legislation aimed at fulfilling obligations arising from EU law and, consequently, [...] Article 49 of the Charter is applicable'.

Article 50 — Right not to be tried or punished twice in criminal proceedings for the same criminal offence

The *ne bis in idem* principle is one of the cornerstones of criminal law and is based on the principle that no-one can be held liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted (the double jeopardy principle). Article 50 provides that criminal laws should respect this.

Case law

In four cases involving the **VAT Directive** and the **Directive concerning the financial markets**, the Court considers that the *ne bis in idem* principle may be limited for the purpose of protecting the financial interests of the EU. The objective of ensuring the collection of all the VAT due in the territories of the Member States is capable of justifying a duplication of proceedings and penalties of a criminal nature. However, such a limitation must not exceed what is strictly necessary to achieve those objectives⁴⁰⁹.

In the context of the execution of the **European arrest warrant**, the Court, in case AY⁴¹⁰, affirmed that Article 3(2) and Article 4(3) of Framework Decision 2002/584, must be interpreted as meaning that a decision of the Public Prosecutor's Office, which terminated an investigation opened against an unknown person, during which the person who is the subject of the European arrest warrant was interviewed as a witness only, without criminal proceedings having been brought against that person and where the decision was not taken in respect of that person, cannot be relied on for the purpose of refusing to execute that European arrest warrant pursuant to either of those provisions.

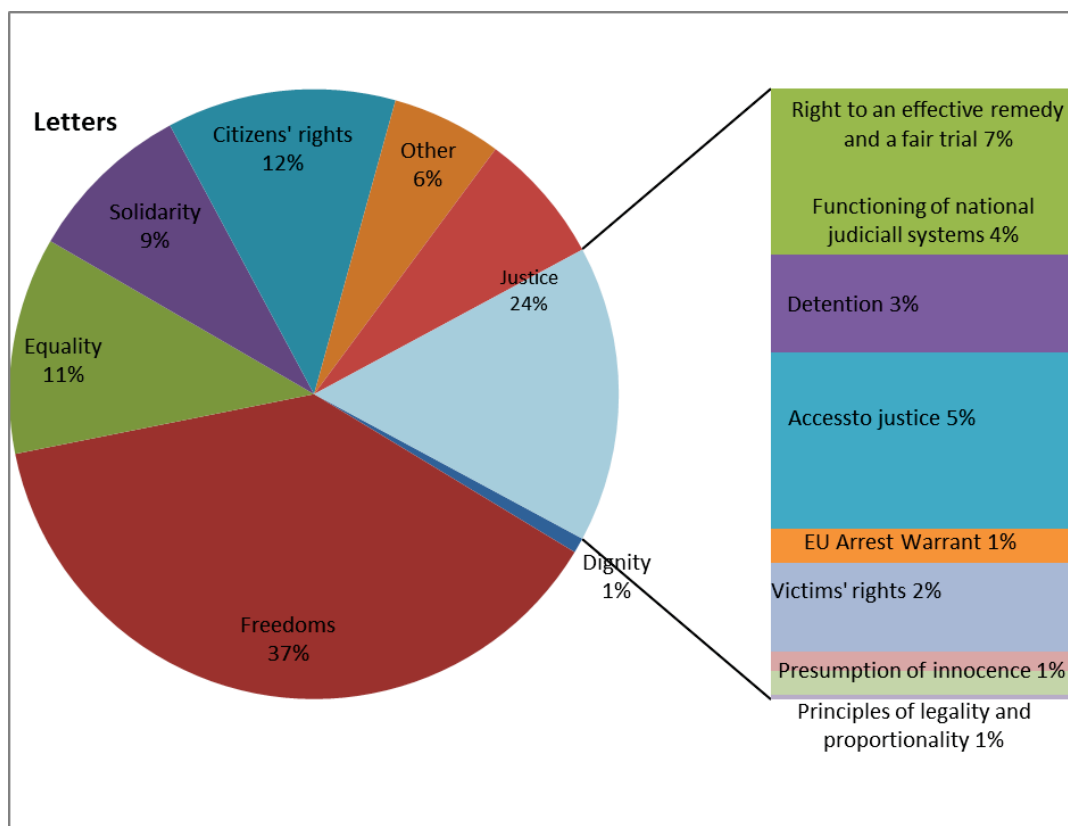
⁴⁰⁸ Cyprus, Supreme Court, cases 2/2018 and 3/2018, 12 September 2018.

⁴⁰⁹ Judgment of 20 March 2018 in cases C-524/15, *Luca Menci*; C-537/16 *Garlsson Real Estate SA and Others v Commissione Nazionale per le Società e la Borsa (Consob)*; and joined cases C-596/16 and 297/16, *Enzo Di Puma v Commissione Nazionale per le Società e la Borsa (Consob)* and *Commissione Nazionale per le Società e la Borsa (Consob) v Antonio Zecca*.

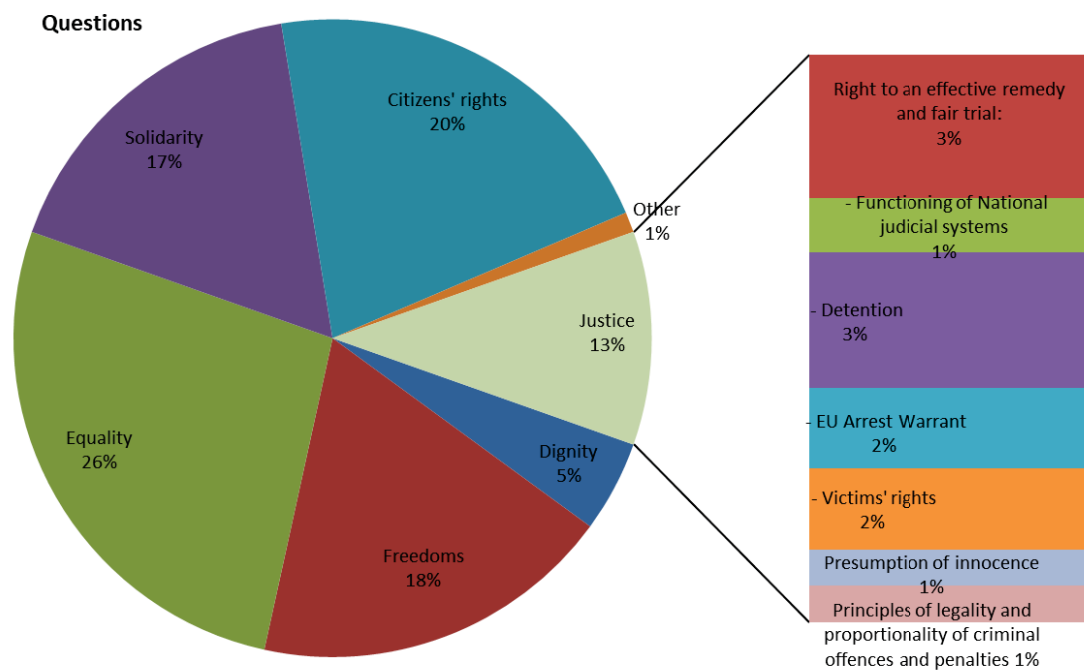
⁴¹⁰ Judgment of 25 July 2018 in case C-268/17, AY.

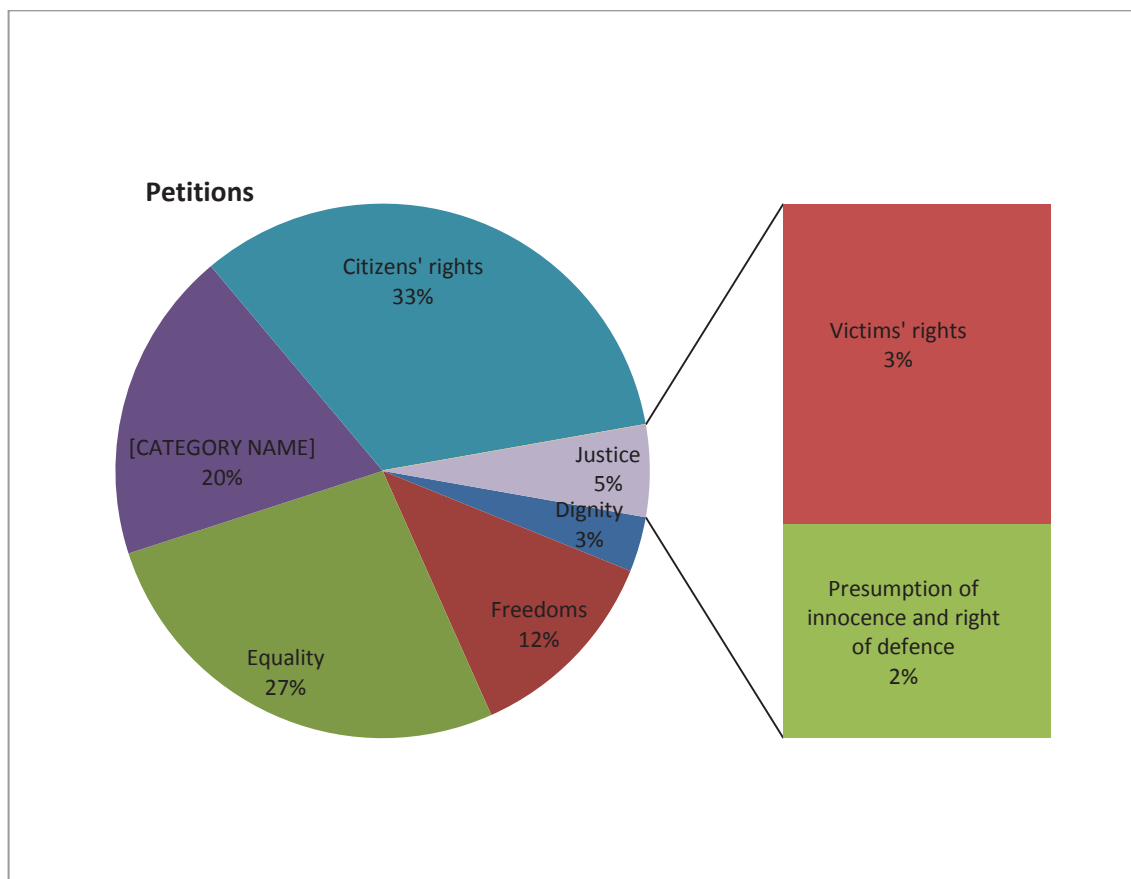
NATIONAL CASE LAW BOX

In **Denmark**⁴¹¹, a citizen's driving licence was suspended after he drove a car while a high level of alcohol level in Germany, where his licence had already been suspended for the first time. The claimant argued the suspension of his licence by the Danish authorities violated Article 50 (Right not to be tried or punished twice in criminal proceedings for the same criminal offence) of the Charter. The Supreme Court thus interpreted Article 11 of the Danish Criminal Code in light of Article 52 (Scope and interpretation of rights and principles) of the Charter. The Court decided that it was not contrary to Article 50 to file a case on the suspension of a driving licence in Denmark. It underlined that the judgment of the Danish court *'only concerns a geographic extension of the German suspension, and the Danish judgment on suspension takes into consideration the protection of Danish road users, and thus has a different protection interest than the German suspension. It can therefore not be considered as a new criminal case within the meaning of Article 50'*.



⁴¹¹ Denmark, Supreme Court, case 108/2017, 17 August 2018.





Title VII

General provisions governing the interpretation and application of the Charter

Article 51 — Field of application

The scope of the Charter is defined in Article 51, which states clearly that it applies to all EU institutions, bodies, offices and agencies, and to the Member States where they are implementing EU law. It further clarifies that the Charter cannot extend the field of application of EU law or any competences of the EU as defined in the EU Treaties.

Article 52 — Scope and interpretation of rights and principles

Article 52 of the Charter lays down general provisions on the scope and interpretation of rights and principles. Its first paragraph defines the stringent conditions under which the rights set out in the Charter can be limited. The article also explains how the Charter relates to the European Convention on Human Rights, the aim being to

secure the highest possible level of protection for fundamental rights (paragraph 3). It also clarifies that the principles set out in the Charter may be implemented by the EU institutions in their legislative and executive acts — and similarly by the Member States when implementing EU law (paragraph 5). However, these principles can be invoked in court only for the purpose of interpreting such acts. This means that the principles do not confer subjective rights on the individual.

Article 53 — Level of protection

Article 53 of the Charter guarantees that nothing in the Charter will be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised by EU law, international law and international agreements to which the EU or all the Member States are party, including the European Convention on Human Rights. Its main aim is thus to provide the minimum standard of fundamental rights protection, allowing for more extensive protection under instruments other than the Charter where they are applicable.

Article 54 — Prohibition of abuse of rights

Article 54 of the Charter provides a safeguard against abuse of the Charter rights. It states that nothing in the Charter can be interpreted as implying any right to engage in activities aimed at destroying rights or freedoms recognised in the Charter or at limiting them beyond the extent envisaged by the Charter.