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

Accompanying the document

Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions

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

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

Data protection

The fundamental right of everyone to the protection of personal data is now explicitly recognised by Article 8 of the Charter. It is also explicitly stated in Article 16 of the Treaty on the Functioning of the European Union. This gives the EU new responsibilities to protect personal data in all areas of EU law, including police and judicial cooperation. Technological progress and globalisation have profoundly changed the way personal data is collected, accessed and used. In addition, the 27 EU Member States have implemented the 1995 EU Data Protection Directive[23] differently, resulting in divergences in enforcement.

Reform of EU data protection rules

The Commission proposed a **major reform of the EU's rules on the protection of personal data**. The Commission's proposals update and modernise the principles enshrined in the 1995 EU Data Protection Directive to guarantee the right of personal data protection in the future. They include a policy Communication setting out the Commission's objectives[24] and two legislative proposals: a Regulation setting out a general EU framework for personal data protection[25] and a Directive[26] on protecting personal data processed for the purposes of prevention, detection, investigation or prosecution of criminal offences and related judicial activities[27]. The Commission's proposals have been passed on to the European Parliament and EU Member States (meeting in the Council of Ministers) for discussion. Upon request of the European Parliament, the EU Agency for Fundamental Rights presented an expert opinion on the proposal[28]

Key changes in the reform proposed by the Commission include

- A single set of rules on data protection, valid across the EU. Unnecessary administrative requirements, such as notification requirements for companies, will be removed. This will save businesses around €2.3 billion a year.
- Instead of the current obligation of all companies to notify all data protection activities to data protection supervisors – a requirement that has led to unnecessary paperwork and costs businesses €130 million per year, the Regulation provides for increased responsibility and accountability for those processing personal data. For example, companies and organisations must notify the national supervisory authority of serious data breaches as soon as possible (if feasible within 24 hours).
- Organisations will only have to deal with a single national data protection authority in the EU country where they have their main establishment. Likewise, people can refer to the data protection authority in their country, even when their data is processed by a company based outside the EU.
- Wherever consent is required for data to be processed, it is clarified that it has to be given explicitly, rather than assumed.

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

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

[25] Proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)', COM (2012) 11 final. Available at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=52012PC0011

[26] Proposal for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data', COM (2012) 10 final. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012PC0010:en:NOT

[27] The Commission's package also includes the following other documents: Report from the Commission based on Article 29 (2) of the Council Framework Decision of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (including annex), COM (2012) 12 final, Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0012:FIN:EN:PDF
Impact assessment (including annexes) accompanying the proposed Regulation and the proposed Directive, SEC (2012) 72 final, Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0011:FIN:FR:PDF
Executive summary of the impact assessment, SEC (2012) 73 final, Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2012:0073:FIN:FR:PDF

[28] Available at: http://fra.europa.eu/sites/default/files/fra-opinion-data-protection-oct-2012.pdf

- People will have easier access to their own data and be able to transfer personal data from one service provider to another more easily (right to data portability). This will improve competition among services.
- A 'right to be forgotten' will help people better manage data protection risks online: people will be able to delete their data if there are no legitimate grounds for retaining it.
- EU rules must apply if personal data is handled abroad by companies that are active in the EU market and offer their services to EU citizens.
- Independent national data protection authorities will be strengthened so they can better enforce the EU rules at home. They will be empowered to fine companies that violate EU data protection rules. This can lead to penalties of up to €1 million or up to 2% of the global annual turnover of a company.

Google's new privacy policy

Google announced on March 1st a new privacy policy, which raised doubts throughout the EU and beyond about its compliance with EU data protection rules. The European Data Protection Authorities undertook a thorough investigation – under the auspices of the French Data Protection Supervisory Authority - and concluded that Google provides insufficient information to its users on its personal data processing operations and is not transparent about retention periods of personal data. The data protection authorities recommended clearer information for the users, asked Google to offer improved control of data across its numerous services, and requested some modification to the tools Google set in place to avoid an excessive collection of data. These recommendations were addressed to Google in a letter of 16.10.2012 which was made public[29].

EU cloud computing strategy

Many of citizens are using '**cloud computing**' without even realising it. Web based email, social platforms and music streaming services all use the technology to store data such as pictures, videos and text files. The files are stored in massive data centres containing hundreds of servers and storage systems that are compatible with very nearly all computer software. When you wish to access your information, you simply connect to the 'cloud' from your PC, smartphone or tablet. The advantages are numerous – users don't have to buy or maintain expensive servers and data-storage systems – but many businesses and citizens are put off by uncertainties over data security or moving data between different cloud providers.

The **European Commission proposed a strategy to facilitate a faster adoption of cloud computing throughout all sectors of the economy.** The strategy takes into account the right of freedom of expression of the citizens and their right to information. It aims at enhancing trust in innovative computing solutions and boost a competitive digital single market where Europeans feel safe and where their fundamental rights are preserved. The Commission cloud strategy addresses some specific aspects of legal fragmentation in the field of data protection, contracts and consumer protection or criminal law and contains an action plan aimed at facilitating safe access to cloud computing for all European individuals.

Case law of the ECJ on the independence of data protection authorities

Under the EU Data Protection Directive each Member State has to establish a supervisory body which acts completely independently, to monitor the application of the Directive. The independence of data protection authorities is also explicitly required by the Treaty on the Functioning of the Union (Article 16) and by the Charter (Article 8).

The **CJEU** upheld its case law[30]confirming that the mere risk of an external influence is sufficient to conclude that the data protection authority cannot act with complete independence in its ruling on the

[29] Available at: http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/index_en.htm
[30] CJEU, Case C-518/07, *European Commission v. Federal Republic of Germany*, 9.10.2010

case brought by the Commission against Austria[31]. The Court clarified, in particular, that the mere functional independence of the data protection supervisory authority does not suffice in order to ensure the "complete independence" required by the EU Data Protection Directive (Article 28 (1)). The Court found that the Austrian regulatory framework violated the EU requirements on three grounds. Firstly, that the managing member of the Data protection authority (*Datenschutzkommission*) is a federal official subject to supervision. Secondly, that the office of the data protection authority is integrated with the departments of the Federal Chancellery. Thirdly, that the Federal Chancellor has an unconditional right to information covering all aspects of the work of the data protection authority. By contrast, the Court rejected a submission made by the European Data Protection Supervisor (EDPS) to the effect that the Supervisory Authority should dispose of its own budget line.

The Commission submitted an application to the CJEU against **Hungary** for violating the independence of the data protection supervisory authority[32]. With the creation of the National Agency for Data Protection, Hungary had at the same time prematurely ended the six-year term of the former Hungarian Data Protection Commissioner, who was appointed in September 2008 and whose term of office would have ended in September 2014 only. The personal independence of a national data protection supervisor, which includes protection against removal from office during the term of office, is a key requirement of EU law. The re-organisation of a national data protection authority is not a reason for deviating from this requirement.

Scope of application of EU data protection rules

The *Audiencia Nacional* of Spain submitted a request for preliminary ruling on the interpretation of the Data Protection Directive[33]. The questions to the CJEU included the interpretation of the criteria laid down in that Directive to define the territorial scope of the national implementing legislation. The Spanish Court asked whether the fundamental right of everyone to the protection of personal data enshrined in Article 8 of the Charter requires the taking into account of the Member State where the centre of gravity of the conflict is located and more effective protection of the rights of European Union citizens is possible, regardless of the criteria set out in the Data Protection Directive. The remaining questions are related on one hand, to the obligations of search engines like Google, and on the other to the powers of the national supervisory authorities as regards the extent of the data subjects' right to control the information disseminated on them through the internet.

Legal challenges against EU rules on Data retention

A case brought by the group Digital Rights Ireland at the High Court of Ireland was referred to CJEU, in order to obtain a preliminary ruling on the compatibility of the Data Retention Directive with the rights to privacy, data protection, freedom of expression, free movement and good administration.

In Slovakia, a complaint has been filed by a group of 30 Members of Parliament against the national laws implementing the EU's Data Retention Directive. The complaint asks the Slovak Constitutional Court to examine whether the laws are compatible with constitutional provisions on proportionality; the rights to privacy and protection against unlawful data collection; the right to private correspondence; and the provision granting freedom of speech.

International agreements

The Convention of the Council of Europe for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108) was the first legally binding international instrument in the field of data protection. In order to respond to the rapid technological developments and

[31] CJEU, Case C-614/10 European Commission v. Republic of Austria, 16.10.2012.
[32] CJEU, Case C-288/12, *European Commission v. Hungary*, action brought on 08.06.2012.

globalisation trends that have brought new challenges for the protection of personal data, the Council of Europe has begun discussions on the modernisation of Convention 108. The modernisation of the Council of Europe's rules coincides with the comprehensive reform of the European Union's laws on data protection. The negotiation is an opportunity to export the EU's standards of data protection beyond the borders of the Member States.

The Commission recommended starting negotiations on the modernisation of Convention 108, in order to provide for a high level of protection of fundamental rights and freedoms with respect to processing of personal data, which reflects the EU's internal rules. In the new digital era, data knows no national borders – these negotiations are an opportunity to enhance the data protection standards across the globe."

Two agreements on the exchange of **Passenger Name Record (PNR)** data were concluded following a renegotiation of existing ones. On 1 June 2012, the new agreement with **Australia**[34] entered into force, as did the new agreement with the **US**[35] on 1 July 2012. The agreements allow the Australian Customs and Border Protection Service and the US Department of Homeland Security respectively, to collect and analyse PNR data on flights to and from Australia and, in the case of the US, to prevent, detect, investigate and prosecute terrorism and other serious transnational crime. The use of PNR provides a tool for a proactive, rather than solely reactive approach to combatting terrorism and serious transnational crime effectively. These PNR data should assist the Australian and US authorities amongst others in detecting persons using air travel to traffic human beings into their countries. The use of this data also assists in better protecting the rights of the child since many of the victims of trafficking of human beings are children.

At the same time, account had to be taken of the impact of the collection, analysis and exchange of PNR data on the protection of private life, the protection of personal data and on avoiding any discrimination between air travellers. In order to duly protect these rights, the agreements contain a non-discrimination clause as well as other guarantees on the use of the data, such as passengers' rights to access their data, request rectification, erasure or blocking, as well as redress.

Mainstreaming of data protection requirements in EU policies and legislation

The Commission routinely checks its legislative proposals and the acts it adopts to ensure that they are compatible with the Charter. The roll out of new innovative **smart metering systems** technology illustrates very well the requirement that particular attention is paid to fundamental rights in the development of policies related to new technologies. Smart meters record the consumption of electric energy and communicate this information to the consumer, to the grid operator and to the energy supplier. This technology raises issues of security and protection of the personal data processed by smart metering systems. This is why the Commission recommended that data protection and information security features should be built into smart metering systems before they are rolled out and used extensively[36].

The Commission further sought to ensure that specific implementation measures duly take the Charter into account. In this vein, clear provisions have been introduced to stress the applicability of the data protection rules to the proposed **new rules on Clinical Trials**[37] that test new medicines and medical treatments on humans. In particular, the database that will be established to facilitate the application of the new rules will be publicly accessible unless confidentiality is justified for reasons of protection of personal data, commercially confidential information or ensuring effective supervision of the conduct of a clinical trial by Member States. It shall contain personal data only insofar as this is necessary for the purposes of the future Regulation. No personal data of subjects shall be publicly accessible.

[34] Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service OJ L 186, 14.7.2012

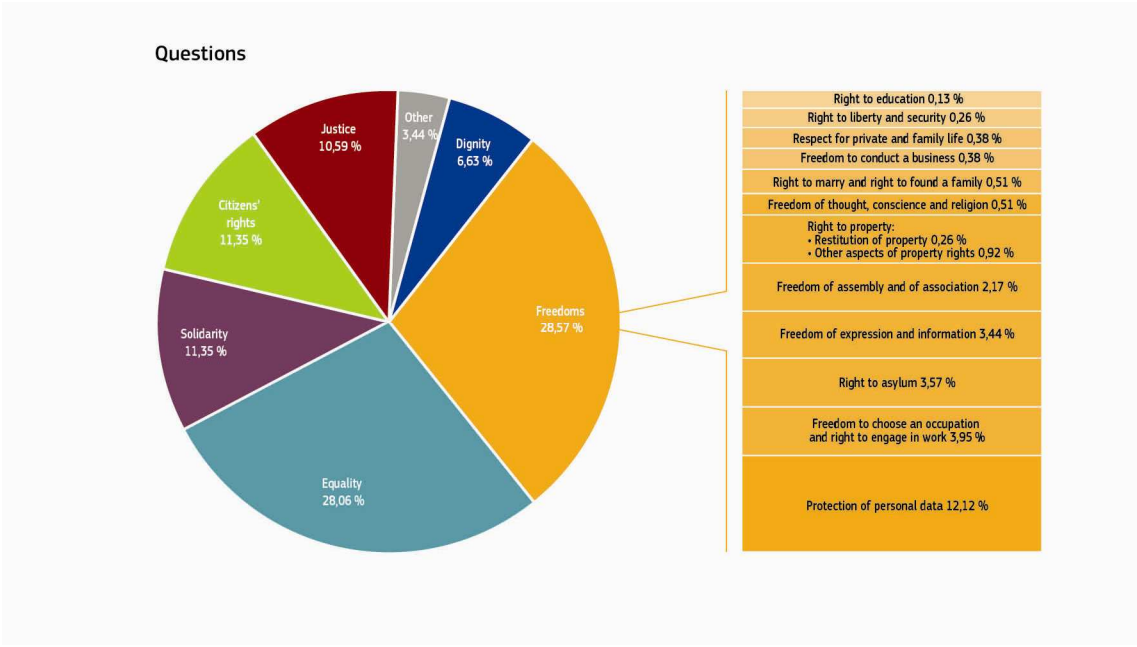
[35] Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security, OJ L 215, 11.8.2012

[36] Commission Recommendation on preparations for the roll-out of smart metering systems, OJ L 73, 13.3.2012, p. 9

[37] Proposal for a Regulation on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC, COM(2012) 369 final. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0369:FIN:EN:PDF

Ruling of the Administrative Law Chamber of the Supreme Court of Estonia[38]

This case concerned an appeal brought before the Supreme Court by a public company (EMT) against the order issued by the national data protection authority for transmitting to third parties information concerning payments overdue for the purpose of assessing data subjects' solvency under the so-called 'legitimate interests' clause. When interpreting the relevant provisions of the Estonian Data Protection Act, which implements Directive 95/46/EC[39] the Court referred to the case-law of the CJEU and to the rights recognised by Articles 7 and 8 of the Charter to maintain that such order was lawful insofar as it aimed at protect the data subjects' fundamental rights, which were therefore deemed to prevail over the controller's and third parties' legitimate interests.



Freedom of expression

The Charter guarantees the right to freedom of expression for everyone. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The **EU rules on Audiovisual Media Services**[40] are an expression of the right to freedom of expression. The country of origin principle, which is at the core of this Directive, ensures that audiovisual services are regulated in their Member State of establishment and can then freely circulate in the European Union without a second control by the receiving Member State. There are a number of limited restrictions, notably the possibility to apply stricter rules to the providers under their jurisdiction (Article 4(1)), which are subject to close scrutiny by the Commission in its examination of the transposition measures at Member States level. Some specific provisions of the Audiovisual Media Services rules are more specifically linked with fundamental rights such as the prohibition of incitement to hatred based on race, sex, religion or nationality or the prohibition of discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation. Furthermore, the Commission has a right to closely scrutinise national measures restricting certain types of editorial content for justifications that would constitute an element of discrimination. Furthermore, the provisions on the right to information on events of major importance for society and shorts extracts from news report

[38] Administrative Law Chamber of the Supreme Court of Estonia (Riigikohtu Halduskolleegium), case 3-3-1-70-11, EMT v. Data Protection Inspectorate, 12.12.2011

[39] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31-50

[40] Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L95, 15.4.2010, p.1 – 22.

implement the right to receive and impart information and ideas without interference by public authority and regardless of frontiers.

These considerations formed the basis for the action of the Commission as regards the **new Hungarian media legislation**, which contains the obligation to balance coverage and rules on offensive content. Some modifications were already agreed between the Commission and the Hungarian authorities in 2011, on other provisions which could constitute an infringement of the rules on free circulation of services and establishment provided by the Audiovisual Media Services Directive. In 2012, the Commission supported the recommendations issued by the Council of Europe that were calling for amendments to the Hungarian Media Law and monitored their implementation.

Commission actions to promote media freedom, pluralism and independent governance

Members of the European Parliament raised concerns on the issue of media freedom, pluralism and independent governance. The Commission considers that media pluralism is an essential condition for preserving the right to information and freedom of expression that underpins the democratic process. The Commission took several actions in 2012, but, Member States retain competence to confer, define and organise the remit of public service broadcasting and to provide the financing necessary for its execution.

To safeguard a free and independent media and its particular role in a democratic society, a solid economic basis for a sustainable media sector in the EU is essential. In 2011, Vice-President Kroes set up the EU Media Futures Forum - a group of personalities from across the media industry value-chain - to reflect on the impact of the digital revolution on European media industries. They presented in September 2012 their final report, which highlights key trends, opportunities and challenges of the sector, as well as possible solutions to overcome them in order for the European media industry to thrive in the digital world. The Commission is currently analysing this report.

Freedom to conduct a business

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

The **Commission proposed to modernise the current rules on cross border insolvency,** which date from 2000 and are liquidation oriented. The aim is to shift towards a rescue approach as a contribution to Justice for Growth. The new rules will help viable businesses overcome financial difficulties, whilst protecting creditors' rights to get their money back. On the latter, the reduction in abusive forum shopping combined with a right to judicial review for all creditors, will considerably improve the protection of the creditor's right to property and right to an effective remedy. Promoting pre-insolvency proceedings will facilitate the rescue of businesses at an early stage thereby significantly increasing the recovery rate for creditors in collective proceedings. The EU-wide recognition of personal insolvency schemes and ensuing debt discharge will impact positively on the freedom to conduct business and right to engage in work in the EU as it facilitates the possibility of a second chance for debt-discharged entrepreneurs and natural persons.

The revision of the EU Insolvency Regulation will also increase legal certainty, by providing clear rules to determine jurisdiction, and ensuring that when a debtor is faced with insolvency proceedings in several Member States, the courts handling the different proceedings work closely with one another. Information to creditors will be improved by obliging Member States to publish key decisions – about the opening of insolvency proceedings, for example, while strictly respecting the data protection rules All in all, these changes will improve the efficiency and effectiveness of cross-border insolvency proceedings.

The EU adopted **new rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (also known as the "Brussels I reform"**)[41], which will make it easier for business and consumers to resolve cross-border legal disputes. Following this reform, judgements

[41] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM/2010/748.
Available at: http://ec.europa.eu/justice/policies/civil/docs/com_2010_748_en.pdf

issued in another Member State in civil and commercial matters will be treated as domestic judgements. Under the current EU rules, a judgment given in one Member State does not automatically take effect in another Member State. In order to be enforced in another country, a court in that country first has to validate the decision and declare it enforceable. This is done in a special procedure ("exequatur") that takes place after the judgment has been obtained and before concrete measures of enforcement can be taken. The new rules will apply from 10 January 2015.

The Commission outlined a series of **actions to tackle marketing scams affecting businesses**, such as those of misleading directory companies. The aim is to better protect businesses, professionals and NGOs across Europe from rogue traders who do not play by the rules and use misleading marketing practices, such as sending out forms asking businesses to update details in their directories, seemingly for free, and then charging them annual fees. Small and new companies are particularly vulnerable to fraudsters when doing business in other EU countries. The Commission therefore announced that it plans to revise the existing legislation (the Misleading and Comparative Advertising Directive 2006/114/EC) to explicitly ban practices such as concealing the commercial intent of a communication, while at the same time stepping up enforcement of the rules in cross-border cases.

Right to property

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

The EU adopted **new rules to simplify the settlement of international successions**[42]. With this new instrument, the right to property referred to in Article 17 of the Charter is strengthened. The common rules and their predictability on the law applicable to the succession will enable heirs to exercise their property rights cross border more fully. Parallel proceedings and conflicts of jurisdictions among Member States will be avoided. Under the new EU rules there is a single criterion for determining both the jurisdiction of the authorities and the law applicable to a cross-border succession: the deceased's habitual place of residence. People living abroad will, however, be able to opt to have the law of their country of nationality apply to the entirety of their succession. Moreover, the European Certificate of Succession will allow people to prove that they are heirs or administrators of a succession without further formalities throughout the EU. This will represent a considerable improvement from the current situation in which people sometimes have great difficulty exercising their rights. The result will enable faster, cheaper procedures. To help citizens become better informed about these laws, the Council of Notaries of the EU has created a website (www.successions-europe.eu), with the support of the European Commission, in 22 EU languages plus Croatian.

A few months after its ruling in the *Scarlet v. SABAM* case[43], the **CJEU** had the occasion to refer to the **relationship, in an on-line environment, between the protection of intellectual property rights and other fundamental rights, such as the freedom to conduct a business and the protection of personal data**. In the *SABAM v. Netlog* case[44] the Court ruled on the incompatibility with the rights recognised in the Charter, of an injunction sought by SABAM (an association of authors, composers and publishers) against Netlog (an on-line social networking platform) requiring the instalment of a general and open-ended filtering system aimed at identifying copyrighted material. In particular, the CJEU found that the injunction requested against Netlog would not be compatible with the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct a business, the right to protection of personal data and the freedom to receive or impart information, on the other.

The **CJEU** specified the **conditions under which personal data may be disclosed for the purposes of protecting intellectual property rights in the context of civil proceedings**[45]. In the main proceedings before the Swedish courts, publishing companies, holding the copyrights of certain audio books,

[42] Regulation N° 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L201, 27.07.2012, p.107-134.
[43] CJEU, Case C-70/10, *Scarlet v. SABAM*, 24.11.2011.
[44] CJEU, Case C-360/10, *SABAM v. Netlog*, 16.2.2012.
[45] CJEU, Case C-461/10, *Bonnier Audio AB, Earbooks AB, Norstedts Förlagsgrupp AB, Piratförlaget AB, Storyside AB v. Perfect Communication Sweden AB*, 19.4.2012

applied to the court for an order against an internet service provider for the disclosure of the identity of a natural person using an IP (internet protocol) address allegedly involved into illegal file-sharing. The Court confirmed its previous jurisprudence[46] that the Intellectual Property Rights Enforcement Directive[47] and the e-privacy Directive[48] do not preclude Member States from imposing an obligation to disclose to private persons personal data in order to enable them to bring civil proceedings for copyright infringements, but nor do they require those Member States to lay down such an obligation. The Court re-emphasized that the Member States must ensure that they rely on an interpretation of those directives which allows a fair balance to be struck between the various fundamental rights protected by the European Union legal order (i.e., in particular, the protection of personal data and the protection of property rights, including IPRs) and that they also respect general principles of EU law, such as the principle of proportionality.

Polish State owned agricultural estate management

In 2012 the Commission received 15 identical complaints against a new legislation in Poland on the state owned agricultural estate management, which introduced limitations on the size of agricultural land leased to farmers and an obligation for leaseholders to purchase farms within a certain timeframe. These complaints were based on the claim that the new legislation is contrary to the freedom to choose an occupation and the right to engage in work, the right to property and equality before the law as provided by the Charter.

After the examination of the complaints, the Commission services concluded that it was not possible, at this stage, to identify an infringement of the Charter in this case. According to its Article 51(1), the Charter applies to Member States only when they are implementing European Union law. On the basis of the information provided and in the light of the analysis performed by the Commission services, it did not appear that the matter to which the complaints referred was related to the implementation of European Union law. The Treaty on the Functioning of the European Union EU Treaties (Article 345) empowers the Member States to define the system of property ownership within their territories. This also applies to leaseholders' rights to lease or to purchase agricultural land. The Commission has, thus, no authority to act in this field.

Further to the examination of the complaints it was decided to close them and to publish a notice in the Official Journal of the European Union with these explanations.

Spanish Coastal Law

In view of the number of complaints received from non-Spanish EU citizens concerning the **Spanish** coastal law, the Commission has pursued its contacts with the Spanish authorities.

This Spanish coastal law aims to protect the coast from abusive constructions. It applies to private projects which run the risk of being demolished as they are located in areas regulated by the coastal law. The Spanish coastal law does not provide for a *financial compensation* for property losses that may result from the demarcation of the maritime-terrestrial public domain. It provides instead for a special form of compensation consisting of the granting of an administrative concession. The question of whether this special form of compensation is in line with the case law of the ECtHR should be examined by national courts and, after having exhausted domestic legal remedies, by the Strasbourg Court itself.

In October 2012, the Spanish government approved draft amendments to the coastal law.[49] . The most relevant measures were the (i) extension of the concessions from 30 years to 75 years and (ii) increasing the opportunity to transmit and sell the property (subject to prior

[46] See for example: CJEU, Case C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, 29.1.2008.
[47] Directive 2004/48/EC on the enforcement of intellectual property rights, OJ L 195, 2.6.2004, p.16 – 25.
[48] Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L201, 31.7.2012, p. 37 – 47.
[49] "Proyecto de Ley de Protección y Uso Sostenible del Litoral y de modificación de la Ley de Costas", http://www.magrama.gob.es/es/costas/temas/anteproyecto.aspx

authorisation). The law aims also at improving transparency and legal certainty, by introducing an obligation for the administration to register the demarcation line in the property register.

In July, Vice-President Reding welcomed the announcement of the new draft law presented by the Spanish Government, and encouraged those concerned to comment underlining that protecting the environment is a legitimate concern of Spanish authorities, but that this should be done in a way that improves legal certainty and due process for citizens who own property on the Spanish coast or who are thinking of doing so.

Right to asylum

The right to asylum is guaranteed by the Charter.

The three institutions (EP, Council and Commission) took an important step in safeguarding fundamental rights as part of the **new Dublin Regulation on the conditions for the transfer of asylum seekers in the EU**[50]. The agreement between the three institutions provides for the incorporation of the judgment of the CJEU in the joint cases of *N.S. and M.E. v UK*[51], according to which asylum seekers cannot be sent back to a Member State where there is a serious risk of violation of their fundamental rights. In such cases, another Member State has to assume responsibility on the basis of the criteria established by the Dublin Regulation, within the shortest delay, in order not to jeopardize their quick access to an asylum procedure.

The new rules also provide effective guarantees to applicants as regards appeals against transfer decisions, thus ensuring full effect of the right to remain on the territory and reducing the risk of "chain *refoulement*". Substantial provisions on detention have been agreed in the text, limiting it to cases of established risk of absconding, restricting it to a maximum of three months, and providing that the detention conditions and guarantees applicable to asylum seekers under this procedure are the ones foreseen by the Reception Conditions Directive[52] (thus ensuring the same level of rights as for any other asylum applicant). Additionally, the agreement provides for enlarged rules of reunification for unaccompanied minors, guarantees the right to a guardian, the right of all applicants to detailed information on the functioning of the Dublin system including, for the minors, in a manner adequate for their understanding.

The Commission proposed an improvement to the overall efficiency of the **EURODAC** system for collecting asylum seekers' fingerprints. The Commission's proposal provides clearer deadlines for transmission of data and ensures full compatibility with the latest asylum legislation. The proposal provides for more effective and less intrusive measures for competent law enforcement authorities to determine if another Member State holds data on an asylum seeker. The Commission's proposal also foresees the possibility of national law enforcement authorities to consulting the EURODAC database under strictly defined circumstances for the purpose of prevention, detection and investigation of terrorist offences and other serious criminal offences, as requested by Member States. The use of EURODAC data for law enforcement purposes implies a change of purpose of the data processed and constitutes an "interference" with the right to data protection[53]. In its proposal the Commission assessed whether this interference complies with Charter obligation (Article 52(1)) stating that any limitation of rights respects the essence of the right, is necessary to achieve an objective of general interest recognised by the Union or to protect the rights and freedoms of others, and is proportionate, i.e. appropriate for attaining the objective pursued and not going beyond what is necessary to achieve it.

The co-legislators have agreed to amend the current **Reception Conditions Directive**, aiming to address problems identified in its implementation by Member States, notably divergent practices which sometimes led to an inadequate level of material reception conditions for asylum seekers. In

[50] Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, COM(2008) 820 final. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0820:FIN:EN:PDF.

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

[52] Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers, OJ L 31, 6.2.2003, p. 18 – 25.

[53] See the reference to "interference" in Judgment of the CJEU of 20 May 2003, *Österreichischer Rundfunk and Others*. Joined cases C-465/2000, C-138/01 and C-139/01, ECR [2003], p. I-4989, paragraph 83

this respect, the revised Directive will ensure better as well as more harmonised standards of reception conditions throughout the Union.

The final text includes among others an exhaustive list of detention grounds that will help to avoid arbitrary detention practices and limits detention to as short a period of time as possible. Furthermore it restricts the detention of vulnerable persons in particular minors, includes important legal guarantees such as access to free legal assistance and information in writing when lodging an appeal against a detention order. Access to employment for an asylum seeker must be granted within a maximum period of 9 months. Furthermore Member States are obliged to ensure the identification of special reception needs of asylum applicants, especially victims of trafficking and persons with mental health problems.

The Commission proposal to revise the **Asylum Procedures Directive**[54] is aimed at ensuring that asylum decisions are made more efficiently and more fairly, and in line with the case-law of the European courts. Negotiations on this proposal are still on-going.

The **Qualification Directive** contributes to the respect of the right to asylum enshrined in the Charter by strengthening the criteria for qualification as a beneficiary of international protection, notably the notions of actors of protection and internal protection, as well as the provisions related to the best interests of the child and to gender. It further approximates the rights granted to refugees and to beneficiaries of subsidiary protection as regards access to employment, recognition of professional qualifications and health care.

The **CJEU** analysed the **rules on minimum EU standards for the qualification as refugees[55] in the light of the right to freedom of religion in the Charter** (Article 10(1)) in its ruling on a preliminary reference introduced by two German Courts[56]. The applicants, two Pakistani nationals, claimed that their membership to a religious community had forced them to leave their country of origin, but were not granted asylum by the German administration. The CJEU clarified that the authorities responsible for granting refugee status, cannot expect the applicant to abstain from those religious practices which would expose them, upon their return to their country of origin, to a real risk of persecution, especially when the public practice of the applicant's faith plays a central role in his religious identity.

Finnish Supreme Administrative Court

In two cases concerning the situation of asylum seekers[57], the Finnish Supreme Administrative Court made references to the Charter to interpret provision of EU secondary law. In a case concerning the permit application of an asylum seeker, the Court relied on Article 47 of the Charter (right to an effective remedy) to interpret Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status2005/85/EC [58] and relevant implementing national laws (Administrative Judicial Procedure Act 586/1996 and Alien Act 301/2004).

In the second case, the Court suspended the deportation of an asylum seeker by relying on the right to life, right to asylum and the protection in the event of removal, expulsion or extradition (Articles 2, 18 and 19 of the Charter) to interpret the relevant provisions of Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection[59].

Austrian Asylum Court

[54] COM(2011) 319 final ANNEX. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SPLIT_COM:2011:0319(01):FIN:EN:PDF

[55] Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304 , 30.9.2004, p.12 - 23

[56] CJEU, Joined cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, 05.9.2012.

[57] Claimant v the Supreme Administrative Court, case no. 2011:98, 7.12.2011; The Finnish Immigration Service, case KHO:2011:25, 18.3.2011

[58] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326 , 13.12.2005, p.13 - 34

[59] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.09.2004, p.12 - 23

In an number of cases the Austrian Asylum Court[60] considered that the limitation of the right to a public hearing in asylum cases is allowed as established by law and respecting the essential content of the right to an effective remedy and to a fair trial (Article 47 (2) of the Charter). The Court explained that fairly quick decisions on asylum applications are a goal of the Union and that the omission of oral hearings can help in reaching this goal. However, the Court specified that this can only by applied in those cases where the actual situation can be established and the omission of the oral hearing does not diminish the quality of the decision.

Protection in the event of removal, expulsion or extradition

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

The **CJEU annulled Council Decision 2010/252/EU on the surveillance of the sea external borders** which had been adopted under the comitology procedure, following a challenge by the European Parliament. The Court found that some of the rules contained in the challenged legal act concerned essential elements related to external maritime border surveillance and, thus, entailed political choices which have to be made by the EU legislature following the ordinary legislative procedure. The Court noted in particular that those rules were likely to affect individuals' personal freedoms and fundamental rights to such an extent that the involvement of the EU legislature is required. The Court indicated that the decision shall remain in force until replaced within a reasonable time by new rules.

The **case *Hirsti Jamaa and Others v. Italy*, concerned the transfer to Libya of about 200 migrants intercepted on the high seas by Italian authorities**[61]. The Italian Coastguard returned the migrant under an agreement concluded between Italy and Libya, without recording their names or nationalities. The ECtHR considered that, when the applicants were removed, the Italian authorities knew or should have known that, as irregular migrants in Libya, they would run the risk of being exposed to treatment in breach of the ECHR and that they were not likely to be given protection in that country. The ECtHR also considered that the Italian authorities knew, or should have known, that there were insufficient guarantees protecting the applicants from the risk of being arbitrarily returned to their countries of origin, which were later found to include Somalia and Eritrea, having regard in particular to the lack of any asylum procedures and the impossibility of making the Libyan authorities recognise the refugee status granted by the UNHCR. The ECtHR affirmed that Italy was not exempt from complying with its obligations to prevent torture and ill-treatment (Article 3 ECHR) because the applicants failed to ask for asylum or to describe the risks they would face as a result of the lack of an asylum system in Libya. It noted that the Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees, and that an assessment of each individual's situation should have been made. Consequently, the ECtHR found that Italy violated Article 3 of the Convention because it exposed the applicants to the risk of *refoulement*. It also found Italy to be in violation of Article 4 of Protocol No. 4 on the prohibition of collective expulsion for transferring the applicants to Libya without an examination of each individual situation and Article 13 of the Convention on the right to an effective remedy.

National laws criminalising irregular stays in Italy and France were amended further to the ruling of the CJEU declaring these laws incompatible with EU rules on return of irregular migrants[62]. The Commission is currently examining the correct legal transposition of these rules in all Member States and has sought clarifications with regard to each Member State, including France and Italy.

[60] See e.g. Austrian Asylum Court (Asylgerichtshof), case B3 259443-5/2008, decision of 23.10.2012

[61] ECtHR, *Hirsi Jamaa and Others v. Italy* [GC] no. 27765/09, 23 February 2012.

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