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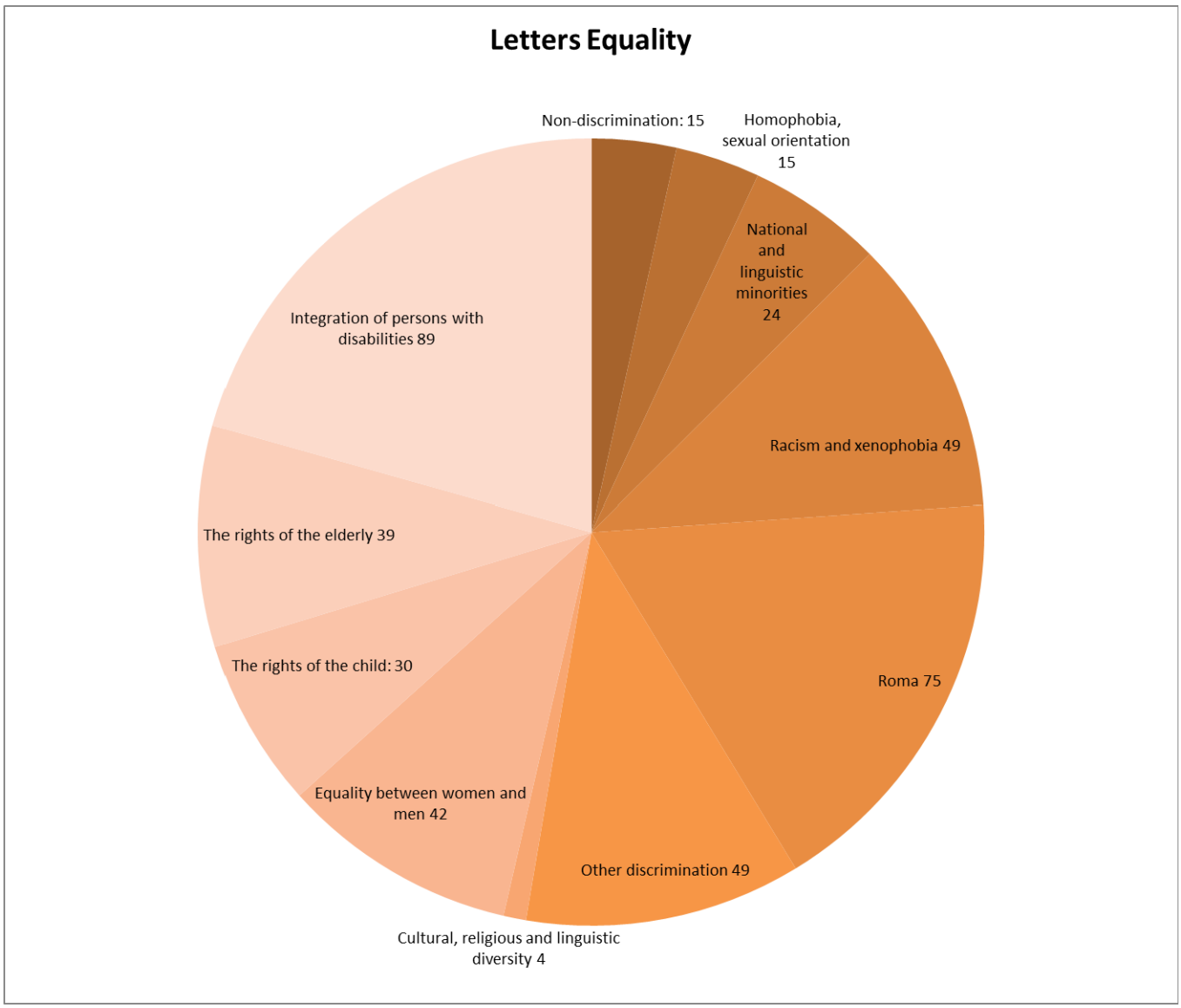
Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions

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

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



Article 24: The rights of the child

With respect to Article 24 of the Charter on the rights of the child, progress was made in the completion of the actions[1] set out in the **EU Agenda for the rights of the child[2].**

Legislation

The European Commission's proposal for a **Directive on procedural safeguards for children suspected or accused in criminal proceedings[3]** will ensure that children have mandatory access to a lawyer at all stages. This means that children cannot waive their right to be assisted by a lawyer, to ensure that a lacking understanding of the consequence of their actions does not lead them to waive their rights. Children are also set to benefit from other safeguards such as being promptly informed about their rights, being assisted by their parents (or other appropriate persons), not being questioned in public

[1] On the state of play of the 11 actions taken to implement the EU Agenda for the Rights of the Child, see http://ec.europa.eu/justice/fundamental-rights/files/eu_agenda_state_of_play_2013_en.pdf

[2] European Commission Communication: An EU Agenda for the Rights of the Child, COM(2011) 60 final. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52011DC0060:en:NOT

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

hearings, having the right to receive a medical examination and being kept separate from adult inmates if deprived of liberty.[4]

In conjunction with Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime of 2012[5], and the 2011 legislation on child sexual abuse and exploitation and trafficking in human beings, this proposal will contribute to creating a more child-friendly justice system for all children involved in judicial proceedings.

Technical amendments to the Schengen Borders Code were adopted by Regulation 610/2013[6] which foresees, among others, that training curricula for the border guards shall include specialized training for detecting and dealing with situations involving vulnerable persons, such as unaccompanied minors and victims of trafficking.

In December 2013, the deadline for the transposition of the **Directive on combating the sexual abuse and sexual exploitation of children and child pornography**[7] had lapsed. To date 5 Member States (Luxembourg, Estonia, Croatia, France and Sweden) have notified full transposition and 10 Member States (Bulgaria, Czech Republic, Germany, Latvia, Lithuania, Austria, Poland, Slovenia, Slovakia and Finland) partial transposition. In January 2014, 11 infringement cases were launched for non-communication of the measures transposing Directive 2011/93/EU on sexual abuse and sexual exploitation of children. The letters of formal notice were sent to those Member States which did not communicate any measures of transposition.

Policy

The **8th European Forum on the rights of the child** focused on **supporting integrated child protection systems through the implementation of the EU Agenda**[8]. Representatives of a wide range of organisations involved in the national child protection systems from all Member States, including justice, social affairs, health and education authorities, as well as Members of the European Parliament, NGOs, experts and professionals working with and for children exchanged good practices and provided input for future European guidelines on child protection systems. The Forum highlighted the importance of integrated child protection systems to effectively address the diverse protection needs of children in all circumstances. To achieve this, good cooperation among all actors and the need for multidisciplinary teams of specially trained professionals were seen as essential components of any child protection system, as well as the appropriate collection and sharing of data and information. While maintaining the need for a comprehensive approach to child protection, the Forum featured specific sessions on ensuring the best interests of the child in cases of cross-border parental child abduction, meeting the needs of children on the move, protecting children from bullying and cyber bullying and protecting girls from female genital mutilation (FGM).

In January 2013, the European Commission established an informal **Member State expert group on the rights of the child.**[9] This is a further step towards enhanced cooperation and dialogue with stakeholders, besides the annual European Forum on the rights of the child. Through the expert group,

[4] See also the on-going FRA research on forms of child participation in criminal and civil judicial proceedings. Practices of child participation in justice proceedings vary considerably across EU Member States. There are gaps in relation to clear, consistent standards and guidelines on how and when children should be involved. In 2011, the European Commission highlighted in the EU Agenda for the Rights of the Child that promoting child-friendly justice is at the center of its actions. Therefore, in close cooperation with the European Commission, FRA is engaging in research to examine practices and procedures of child participation in justice proceedings which should conform to the Council of Europe's guidelines on child-friendly justice. More information on the research project is available at http://fra.europa.eu/en/project/2012/children-and-justice.

[5] Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012.

[6] Regulation No 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council, OJ L 182, 29.06.2013.

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

[8] For more information on the 8th Forum of the Rights of the Child, see http://ec.europa.eu/justice/events/child-forum-2013/index_en.htm

[9] See also the Member State expert group on Early Childhood Education and Care, which is working on a proposal for an Early Childhood Education and Care European Quality Framework.

the European Commission seeks to continue to support Member States' efforts by promoting exchange of best practice, cooperation and communication with and among national authorities responsible for protecting and promoting the rights of the child. The group met three times in 2013 and the European Commission presented new legal instruments and policies connected to the Rights of the child in areas such as Justice, Home affairs, Employment and Education. The wider international context was also discussed, including the United Nations Convention on the Rights of the Child third optional protocol[10] (allowing children to file individual complaints) and the Committee on the Rights of the Child's – General comment No. 14[11] (the right of the child to have his or her best interests taken as a primary consideration).

Regarding trafficking in human beings, in May 2013 an **EU Civil Society Platform against Trafficking in Human Beings** was launched, to bring together more than hundred civil society organisations, including organisations promoting the rights children from EU MS and third countries. This is one of the latest actions delivered under the **"EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016"**[12] which complements the **Directive 2011/36/EU on preventing and combating trafficking in human beings.** The Directive adopts an integrated, holistic, and human rights-based approach, with special attention to the rights of the child.[13]

In 2012, the European Commission adopted the **European Strategy Better Internet for Children**[14] setting out a plan to give children the digital skills and tools they need to use the Internet to their advantage, safely and responsibly. The strategy advocates for a multi-stakeholder approach. A range of industry players have been engaged throughout 2013 to make devices and services appropriate for children and youth in the CEO Coalition to make the Internet a better place for kids. The European Commission aims to engage industry further, also aligning with existing initiatives as well as developing partnerships with industry and third party stakeholders. The Safer Internet Programme running between 2009 and 2013 has been the main instrument for implementing the Better Internet for Children strategy. Future actions will be funded under the Connecting Europe facility which will support the set up and operation of a Digital Services Infrastructure for Safer Internet Centers.

The European Commission published a large-scale **study on missing children in the EU**[15] in December 2013**.** The study maps the situation of and responses to children going missing for the period 2009-2012 in 27 EU Member States. It reveals a variety of definitions and procedures used by the Member States as well as greatly varying degrees of data available. It highlights the magnitude of the problem with a quarter of a million cases of missing children officially reported in 2011. The study concludes that there is a strong case for improving data collection, including using common definitions, reporting of cases and coordinating the actions taken by the different services in the national child protection systems. Furthermore, it makes recommendations to broaden the type of data recorded to understand underlying causes for disappearances, allow targeted prevention and adequate follow-up to the cases, and to raise awareness about the services available, including the 116 000 hotlines for missing children.

The European Commission stepped up its efforts to **support the setting up of the remaining 116 000 hotlines for missing children.** To this effect and to improve the quality of existing hotlines, the European Commission awarded a total of €4.5 million through the Daphne III Programme to

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[10] Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, available at https://treaties.un.org/doc/source/signature/2012/ctc_4-11d.pdf.

[11] UN Committee on the Rights of the Children, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), see http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

[12] European Commission Communication: The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016, COM(2012) 286 final, 19.06.2012.

[13] On trafficking in human beings, see above under Article 5 on the Prohibition of slavery and forced labour.

[14] Communication on a European Strategy Better Internet for Children, COM(2012) 196 final. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0196:FIN:EN:PDF

[15] The study on missing children in the EU is available at http://ec.europa.eu/justice/fundamental-rights/files/missing_children_study_2013_en.pdf

organisations in 18 Member States. After four new hotlines were launched in 2013, the hotline was available in 26 Member States at the end of the year.[16]

The **Recommendation Investing in Children: breaking the cycle of disadvantage**;[17] calls on Member States to step up social investment targeted towards children and explains how EU financial instruments can be better mobilised to ensure that children are given the best start in life and to make sure that children are not locked into a life of disadvantage. The Recommendation is embedded in a rights-based approach, drawing on the founding values of fundamental rights of the European Union in its first article. It recommends Member States to address child poverty and social exclusion from a children's rights approach, to refer to the Charter and the UN Convention on the Rights of the Child, and to make sure that these rights are respected, protected and fulfilled. The Recommendation is centred on three pillars, covering access to adequate resources (access to labour market for parents, income support), access to affordable quality services (such as childcare, education, healthcare, housing, social services) and the children's right to participate. The Recommendation focuses on prevention measures, with a particular focus on children who are more at risk because they face multiple disadvantages, for example Roma children[18] or migrant children.[19]

Children are placed at the centre of the EU's efforts to eliminate female genital mutilation (FGM). On 25 November, the European Commission announced through its **Communication: "Towards the elimination of female genital mutilation"**[20] a new push to eliminate female genital mutilation in the EU and beyond. The practice, internationally recognised as a violation of women's human rights and as a form of child abuse, is thought to have affected 500,000 victims in the EU alone, and more than 125 million worldwide. To fight female genital mutilation, the European Commission will make full use of future EU funding to help preventing the practice; improve support for victims; support health practitioners, as well as national enforcement of anti-FGM laws; and improve protection under EU asylum rules for women at risk. The European Commission and the European External Action Service have also committed to promoting worldwide elimination of FGM through bilateral and multilateral dialogue. Finally, the European Commission will encourage more research into the number of women and girls at risk. In order to exchange best practices the European Commission organised a specific session at the 8th Forum on the Rights of the Child focusing on the role of child protection systems in protecting children from female genital mutilation.

Case law

In *MA and others v Secretary of State for the Home Department*[21], the CJEU held that, when interpreting the provisions of the Dublin II Regulation[22] on the Member State which is responsible for examining an asylum application made in more than one Member State by an unaccompanied minor, the responsible State should be the State in which the minor is present after having lodged an application there. The relevant provision of the Dublin II Regulation merely states that the Member State responsible for examining the application is to be that where the minor has lodged his applications for asylum, but it does not specify whether that is the first application which the minor lodged in a Member State, or the most recent application lodged in another Member State. The CJEU in its judgment stresses that this provision has to be interpreted in the light of Article 24 of the

[16] More information on the 116 000 hotlines is available at http://ec.europa.eu/justice/fundamental-rights/rights-child/hotline/index_en.htm

[17] European Commission Recommendation of 20 February 2013 Investing in Children: breaking the cycle of disadvantage, OJ L 59, p. 5, 2.3.2013.

[18] On Roma children see above under Article 21 non-discrimination, under 'EU Framework for National Roma Integration Strategies'.

[19] Please also note the references to children's rights in the other communications which are part of the Social Investment Package, such as the Communication from the European Commission: Towards Social Investment for Growth and Cohesion – including implementing the European Social Fund 2014-2020, COM (2013) 83, which highlights the importance of targeting funds to invest in children, and the accompanying European Commission Staff Working Document Confronting Homelessness in the European Union, SWD(2013)42 which draws special attention to the situation of homeless children.

[20] European Commission Communication: Towards the elimination of female genital mutilation, COM(2013) 833, 25.11.2013, available at http://ec.europa.eu/justice/gender-equality/files/gender_based_violence/131125_fgm_communication_en.pdf

[21] CJEU, case C-648/11 *MA, BT, DA v Secretary of State for the Home Department*, 6.6.2013.

[22] For an analysis of the adopted recast Dublin II Regulation and the Dublin system from the angle of the prohibition of torture and inhuman or degrading treatment or punishment, see above under Article 4.

Charter, which states that in all actions related to children, the child's best interests must be a primary consideration. As unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than it is strictly necessary the procedure for determining the Member State responsible, which means that unaccompanied minors should not be transferred to another Member State. The Charter friendly interpretation of the said provision of the Dublin II Regulation leads thus to the Member State in which the minor is present after having lodged an application there to be responsible for examining an asylum application, even if an earlier application was lodged in another Member State.

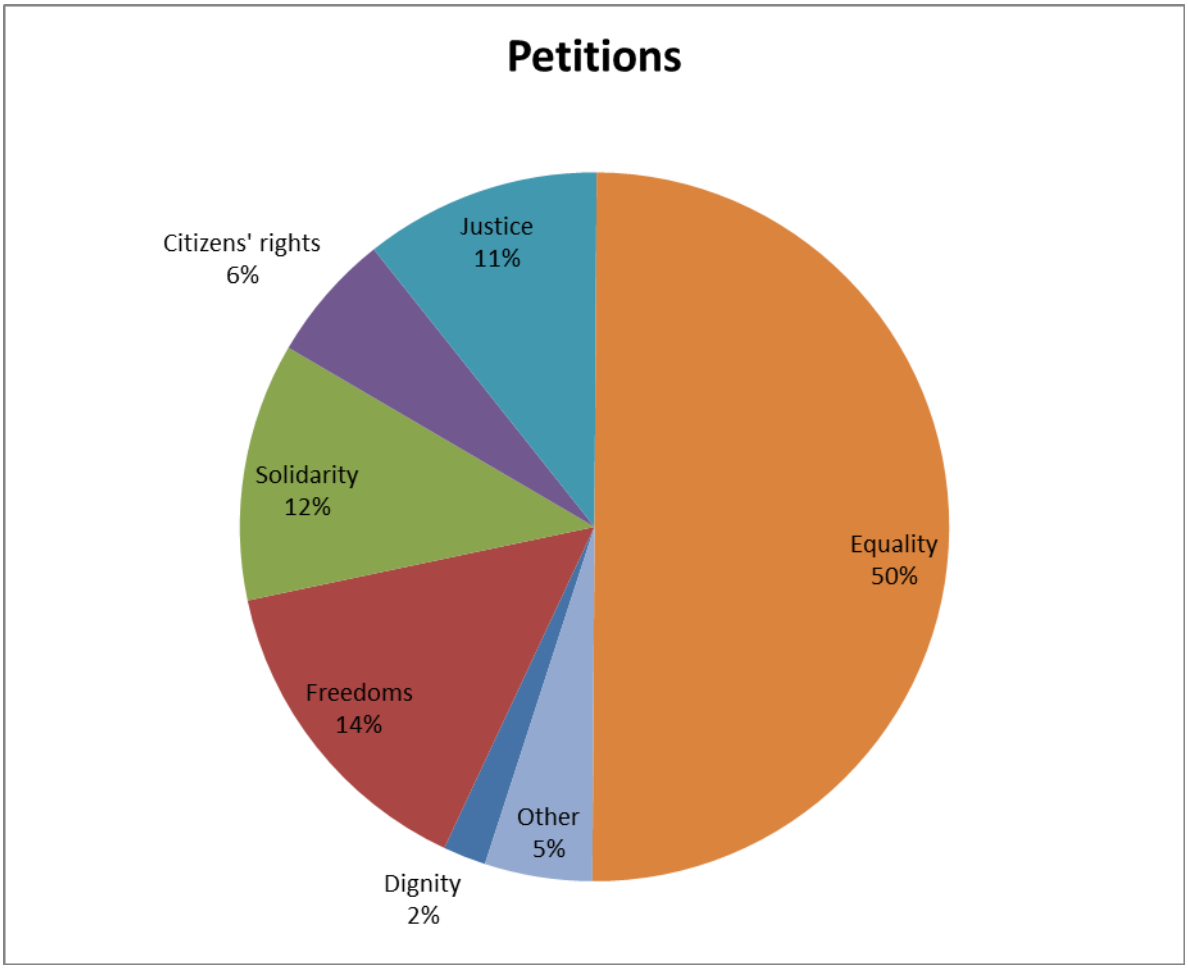
This judgment is a nice illustration of the obligation on both national judges and the CJEU to adopt a 'Charter-friendly' interpretation in cases where there are several possibilities to interpret EU law.

Ruling of the Supreme Court of the Czech Republic[23]

A Czech district court decided to deprive a father of his parental rights and responsibilities after he was found guilty of murder. This decision was confirmed by the appellate court. In appeal the father argued that the courts had not interrogated his daughter. The Supreme Court referred to CJEU case law[24] on Council Regulation No 2201/2003 and Article 24 of the Charter and concluded that although it is a right of every child to express opinions and to be heard, an interrogation cannot be compulsory in every case, but has to be considered with respect to the inherent interest of every child. The Supreme Court decided that the courts' decision not to interrogate the children, considering their age and the harmfulness to their mental health of the interrogation, was not contrary to Article 24 of the Charter.

[23] Supreme Court of Czech Republic (Nejvyšší soud), case 30 Cdo 1376/2012, Municipality of Olomouc v. Regional Attorney's Office, 22.5.2013

[24] CJEU, Case C-491/10 PPU, Aguirre Arraga, 22.12.2010.


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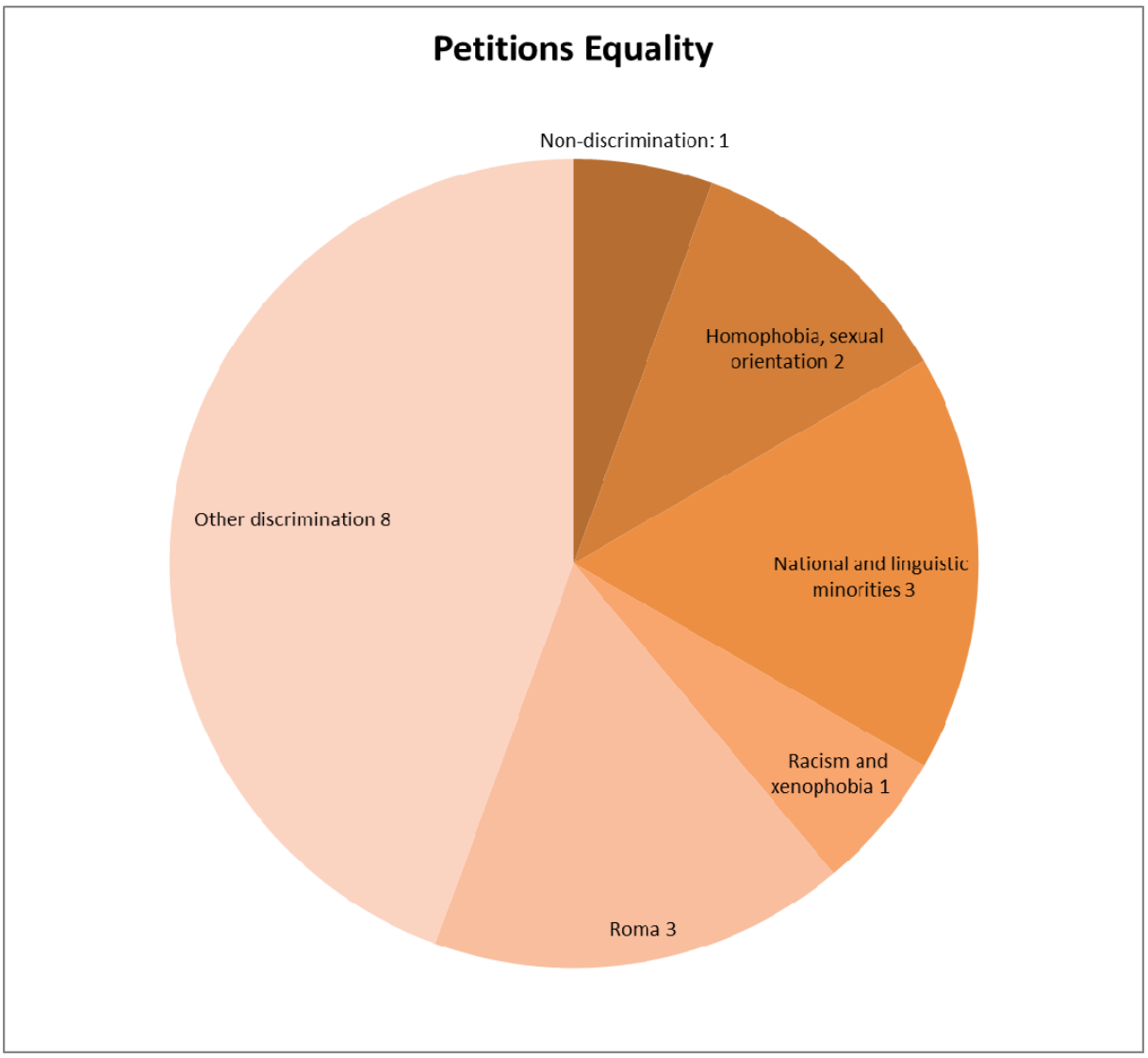
Dignity
2%


Petitions Equality
Non-discrimination: 1
Homophobia, sexual orientation 2
National and linguistic minorities 3
Racism and xenophobia 1
Roma 3
Other discrimination 8

Article 26: Integration of persons with disabilities

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

International agreements

The EU became a party to the **UN Convention on the Rights of Persons with Disabilities** ('the UN Convention') on 22 January 2011 by virtue of Council Decision 2010/48/EC. This implies that the rights enshrined therein need to be implemented and respected by the EU in its legislative actions as well as its policy-making, to the extent of its competences.

The UN Convention provides that its parties shall maintain, strengthen, designate or establish a framework including at least one independent mechanism to promote, protect and monitor the implementation of the UN Convention (Article 33.2). To that end, and in accordance with paragraph 13 of the Code of Conduct between the Council, the Member States and the European Commission setting out the intra-EU arrangement for the implementation of the UN Convention, the European Commission proposed in 2012 that the following five entities jointly form "**the EU Framework**":

- the European Parliament's Petitions Committee;

- the European Ombudsman;

- the EU Agency for Fundamental Rights;

- the European Disability Forum, and

- the European European Commission.

The Council endorsed the European Commission's proposal on 29 October 2012.[25]

The EU Framework's activities concern the implementation of the Convention:

(i) with respect to EU legislation and policy in those areas where the Member States have transferred competences to the EU; and

(ii) within the EU institutions themselves as public administration, for example in relation to interaction with citizens and the public, and staff matters.

The EU Framework complements the national frameworks and independent mechanisms which bear the main responsibility for the promotion, protection and monitoring of the UN Convention in the Member States.

During its initial meetings in 2013 (in January and May) the EU Framework agreed on a number of organisational issues like the role of the Secretariat, of the Chairperson and the Framework's working methods. The European Commission was appointed to perform the function of Framework Secretariat for a period of two years after which this appointment would be reviewed. For the same duration, the European Disability Forum will perform the role of Chair of the Framework's meetings. In 2013 the European Commission organized the **fourth Work Forum** on the implementation of the UN Convention with a focus on the reporting to and examination by the CRPD Committee, on the protection of the rights of persons with disabilities and the individual communication procedure under the Optional Protocol to the Convention, and on the complementarity and cooperation between the EU-level Framework and frameworks established by the EU Member States.

In addition, Article 35 of the UN Convention provides that each (State) Party shall submit to the Committee on the Rights of Persons with Disabilities a comprehensive **report on measures taken to give effect to its obligations under the Convention**, and on the progress made in that regard. The

[25] Council of the European Union, Press Release, 3196th, Transport, Telecommunications and Energy, Transport Items, Luxembourg, 29 October 2012,, 15491/12, available at http://register.consilium.europa.eu/pdf/en/12/st15/st15491.en12.pdf - see p. 20 under "foreign affairs" for rights of persons with disabilities – EU level framework.

European Commission, as focal point for the implementation of the Convention by the EU, has been preparing the EU report in 2013. This will addresses matters governed by the Convention falling under EU competence. Focusing on EU competences, it will examine the use of EU legislation, policies and other measures and their impact on the realisation of the rights enshrined in the Convention. It will also identify challenges in the implementation process. The report is meant to be underpinned by available statistical data.

The European Commission also participated in the **6th Session of the UNCRPD Conference of State Parties** which took place in New York in July 2013. The main theme of the Conference was "Ensuring adequate standard of living: empowerment and participation of persons with disabilities within the framework of the CRPD". At this occasion, the European Commission made a statement on behalf of the Union and stressed the importance of cooperation and coordination between the Union and the Members States in line with the duty of sincere cooperation.

Every year, the European Commission presents a **Disability High Level Group Report on the Implementation of the UNCRPD**. This report, prepared on the basis of submissions received from the 28 EU Member States, Norway and various EU-level civil society organisations and DPOs, gives an overview of progress made in ratifying and implementing the Convention in the EU and its Member States. In 2013, the report also included a thematic chapter specifically dedicated to disability and development cooperation, providing detailed information on the implementation of Article 32 of the UN Convention.[26] The European Commission also hosted a European regional consultation meeting in preparation for the High Level Meeting of the UN General Assembly on Disability and Development that took place in New York on 23 September 2013. The report of the meeting contains very supportive suggestions to better take care of the needs of persons with disabilities in the post-2015 development agenda.

Hungary: EU Funds and the deinstitutionalisation process

In its concluding observations on the initial periodic report of Hungary, the **UN Committee on the Rights of Persons with Disabilities**, the body of independent experts which monitors implementation of the UN Convention on the Rights of Persons with Disabilities (UN CRPD) by the States Parties, criticized the fact that Hungary uses **EU funds** to build large social institutions for persons with disabilities in community-based settings. This is not in line with the aim of deinstitutionalisation as stipulated in the UN CRPD. The UN Committee noted with concern that Hungary "has set a 30-year time frame for its plan for deinstitutionalization. It is furthermore concerned that the State party has dedicated disproportionally large resources, including regional European Union funds, to the reconstruction of large institutions, which will lead to continued segregation, in comparison with the resources allocated for setting up community-based support service networks." The Committee is concerned "that Hungary fails to provide sufficient and adequate support services in local communities to enable persons with disabilities to live independently outside a residential institutional setting." The European Commission has received several complaints in 2013 from NGOs on the fact that Hungary uses EU funds to construct large institution leading to segregation of the disabled. Actions are taken to ensure that Structural Funds support the deinstitutionalisation process in the best way possible under the next programming period 2014-2020.

Legislation

As regards the Accessibility objective, the European Commission continued to explore the possibility of proposing a **European Accessibility Act**. Such a business friendly initiative, addressed from an internal market perspective and dealing with issues of market fragmentation, would aim at improving the market of goods and services that are accessible for persons with disabilities and elderly persons, based on a “design for all” approach.

[26] The full report is available at: http://ec.europa.eu/justice/discrimination/document/index_en.htm#h2-5

The European Commission also followed up the development of the discussions on the proposal for a **Web-Accessibility Directive** at the European Parliament and the Council. The proposal, which is based on an internal market legal basis, establishes a harmonised set of accessibility requirements for a set of public sector bodies' websites which would result in an increase in the overall accessibility of public sector's websites across the EU. The European Commission also followed up the development of the discussions on the proposal for a Web-Accessibility Directive[27] at the European Parliament and the Council. The proposal, which is based on an internal market legal basis, establishes a harmonised set of accessibility requirements for a set of public sector bodies' websites which would result in an increase in the overall accessibility of public sector's websites across the EU.

The European Commission invited Member States to provide information on the measures they undertook in order to ensure that disabled end-users enjoy tailored solutions for equal access to the emergency number 112, taking into account aspects such as speed, mobility, reliability, coverage or language handling. Art 26 (4) of the **Universal Service Directive**[28] includes measures in favour of persons with disability which are an expression of Article 26 of the Charter. The provision provides for the obligations on Member States to ensure that disabled end-users enjoy equivalent access to 112. Out of the 27 replies received, 11 Member States mentioned the existence of alternative means to voice as a means to access emergency services.[29]

Policy

In 2013, the European Commission also pursued the implementation of the **European Disability Strategy** which covers the period from 2010 to 2020[30]. This Strategy aims to empower women and men with disabilities so they can enjoy their full rights and benefit fully from their participation in society and the economy on an equal basis with others. The Strategy also aims to facilitate the implementation of the UN Convention at EU level and support the Members States in their implementation process. It includes a list of actions for 2010-2015 in eight main areas: accessibility, participation, equality, employment, education and training, social protection, health and EU external action.

The European Parliament Committee on Civil Liberties, Justice and Home Affairs has commissioned a study in 2013 on Member States' policies for children[31] with disabilities.[32] The study identified a broad recognition of the rights of children with disabilities under national legal systems either through general or specific legislation. However, their practical implementation revealed to be problematic in most Member States resulting in obstacles faced by children with disabilities in their day to day life.

Case law

Worth nothing is the new CJEU jurisprudence with regard to the **definition of disability**. In the joined cases *Ring and Skouboe Werg*[33] the CJEU interpreted Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation in the light of Article 1

[27] Proposal for a Directive on the accessibility of public sector bodies' websites COM(2012) 721 final

[28] Directive 2002/20/EC of 7 March 2002 on on the authorisation of electronic communications networks and services, as amended by Directive 2009/139/EC, OJ L 108, 24.04.2002, p. 21.

[29] In Denmark, Spain, Luxembourg, Austria, Sweden, Slovenia, the United Kingdom, France and Iceland 112 services can be contacted by means of SMSs. Finland will introduce 112 SMS in 2015. Germany, Spain (partially), Belgium , France and Luxembourg mentioned fax.

In the following Member States, other means of access are available: Spain has chat; the Netherlands have real time texting; the United Kingdom and the Czech Republic have text relay using appropriate terminals; Slovenia has WAP. France, Hungary and Austria provide non-voice access to emergency services to another number than 112. 7 Member States mentioned that there are either plans or on-going trials to introduce in the near future alternative means for disabled end-users (such as SMS or video).

[30] Communication from the European Commission: European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, COM(2010) 636 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0636:FIN:EN:PDF

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

[32] European Parliament, Member States' Policies for Children with Disabilities, 2013, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474416/IPOL-LIBE_ET(2013)474416_EN.pdf

[33] CJEU, Joined cases C-335/11 and C-337/11, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab* (C-335/11) and *HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening acting on behalf of Pro Display A/S* (C-337/11), 11.04.2013.

UNCRPD and the concept of disability provided therein. In its judgement, the CJEU established that Council Directive 2000/78/EC precludes a national provision under which an employer is entitled to dismiss an employee with a shortened period of notice on account of absences due to sickness where such sickness is the result of a disability. Hereby the notion of disability is interpreted in a broad way, covering a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life. The CJEU thus moved away from the restrictive definition of the previous Chacón Navas judgement[34]. It clearly stated that an employee unable to work for a long period of time due to his or her disability cannot be dismissed without considering the possibility of providing reasonable accommodation for that employee and re-integrating the person in the workplace.

This jurisprudence was confirmed in a case regarding **infringement procedures against Italy** a few months later. The European Commission has brought an action for failure to fulfil obligations before the CJEU against Italy[35], claiming that Italy has transposed Directive 2000/78 into its national law without ensuring that the guarantees and adjustments provided for regarding the treatment of persons with disabilities in the workplace are to apply to all persons with disabilities, all employers, and all aspects of the employment relationship. Furthermore, application of the Italian legislation on that subject is dependent on the adoption of further measures by the local authorities or the conclusion of special agreements between those authorities and employers and thus does not confer upon persons with disabilities rights which could be directly relied on before a court. In its judgment, the CJEU adopted the same broad definition of 'disability' as in the joined cases *Ring and Skouboe Werg,* referring to the concept of disability under the UN Convention. It also referred to UN Convention for the interpretation of the concept of 'reasonable accommodation', which are the adjustments to be made, where needed in a particular case, to ensure to a person with disabilities the enjoyment or exercise of all human rights and fundamental freedoms on an equal basis with other workers. In order to comply with the requirement of reasonable accommodation, Member States must create an obligation for employers to adopt effective and practical measures (adapting premises, equipment, patterns of working time, the distribution of tasks), taking into account each individual situation, which will enable any person with a disability to have access to, participate in, or advance in employment, and to undergo training, without imposing a disproportionate burden on the employer. The CJEU emphasised that that obligation covers all employers. It is not sufficient for Member States to provide support and incentives: they must require all employers to adopt effective and practical measures, where needed in particular cases.

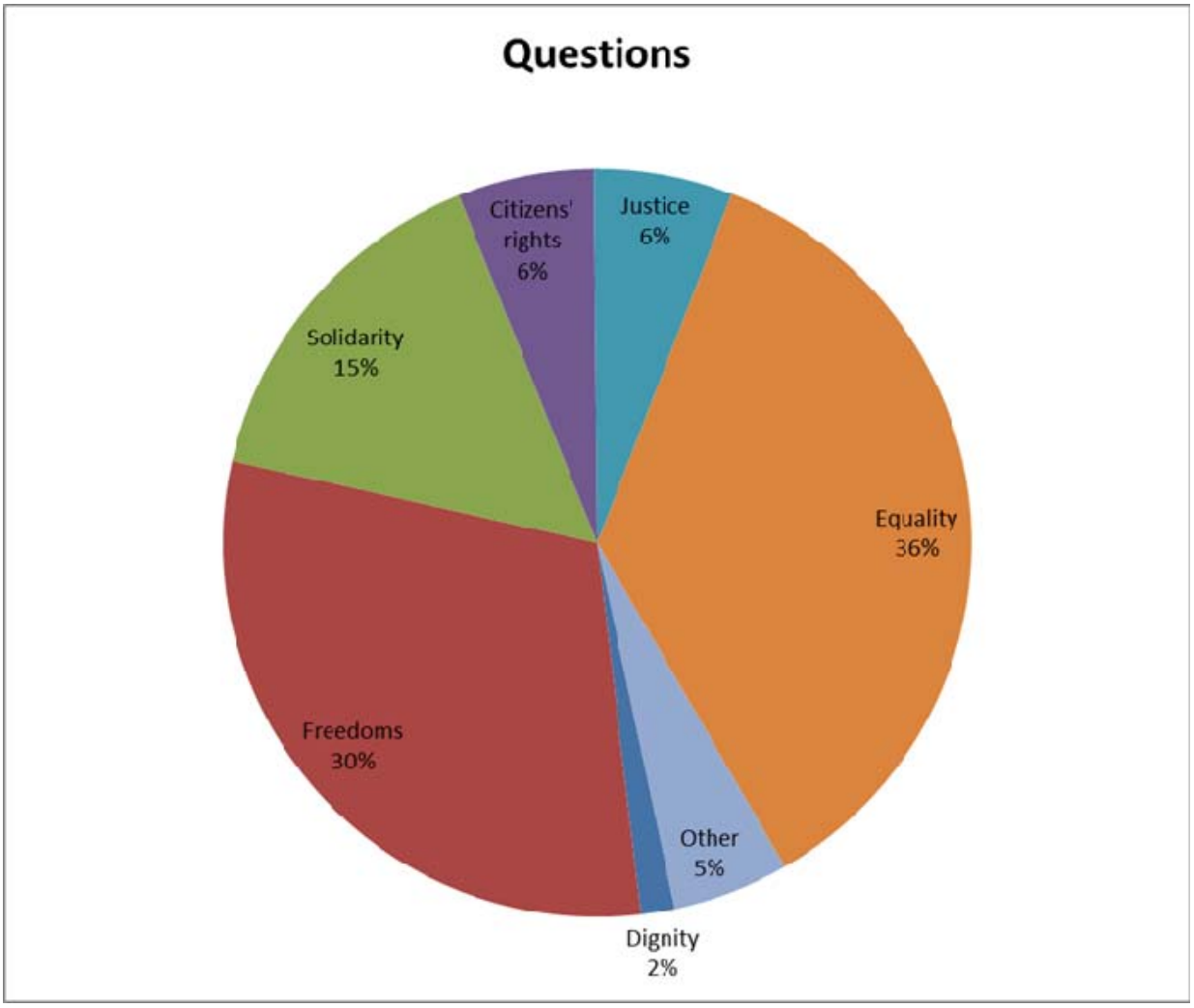
Upon examining the various measures adopted by Italy for the integration of persons with disabilities into the labour force, the CJEU found Italy had failed to fulfil its obligation, as those measures, even when assessed as a whole, did not require all employers to adopt effective and practical measures, where needed in particular cases, for all persons with disabilities, covering different aspects of work and enabling them to have access to, participate in, or advance in employment, and to undergo training.

A mutually-recognized EU-model disability card scheme

The 2013 European Commission's citizenship report includes an action specifically dedicated to citizens with disabilities. This action (No. 6) aims at facilitating the mobility of persons with disabilities within the EU. To that end, the European Commission will launch a pilot initiative, planned for the 3rd and 4th quarter of 2014, in view of developing a mutually-recognized EU-model disability card scheme that will allow persons with disabilities who travel to other EU countries to be treated in the same way as nationals, when it comes to access to culture, tourism, transport and leisure.

[34] CJEU, C-13/05. *Sonia Chacón Navas v Eurest Colectividades SA*, 11.07.2006.

[35] CJEU, C-312/11, *European Commission v Italy*, 4.07.2013.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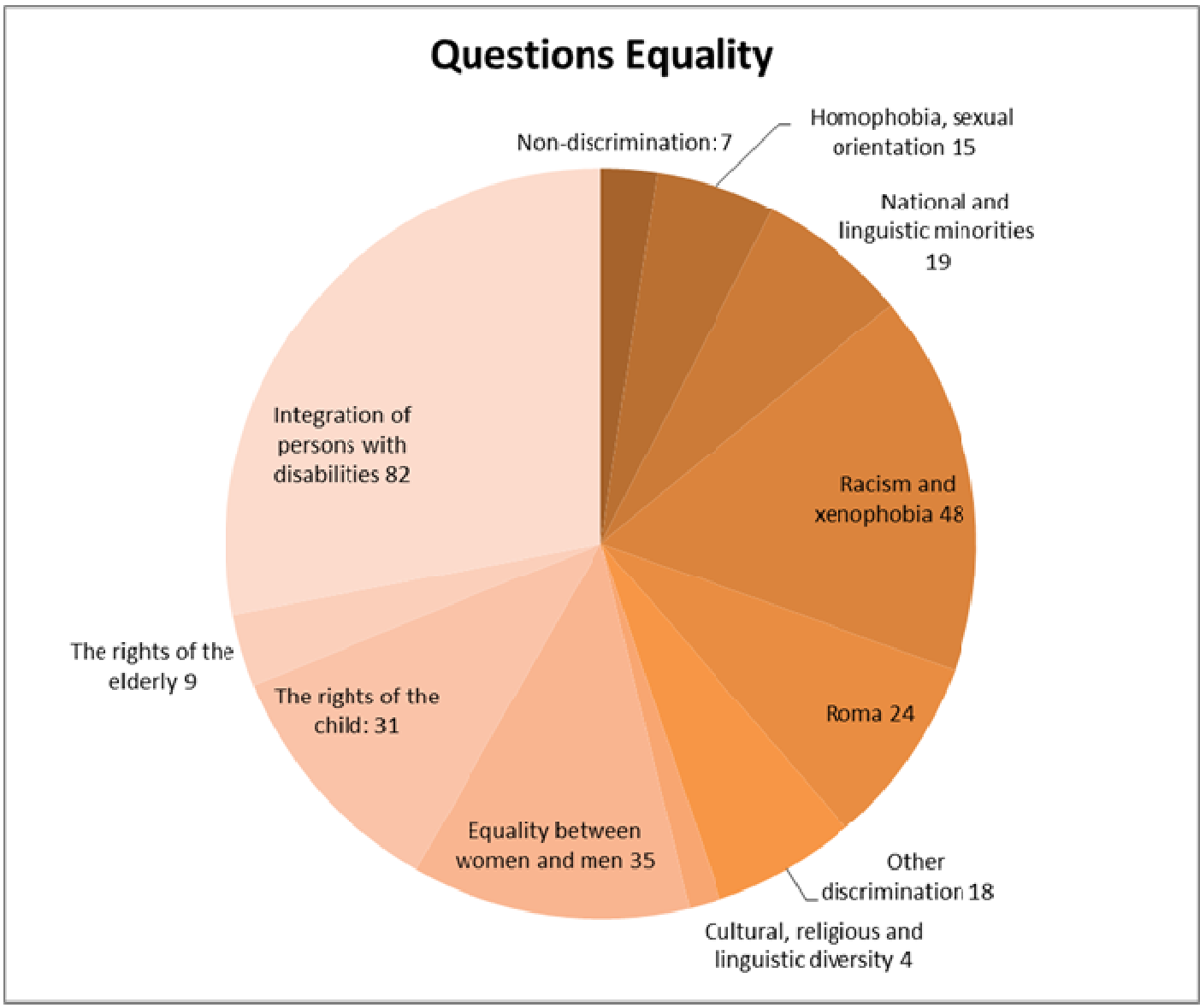

Questions Equality
Non-discrimination: 7
Homophobia, sexual orientation 15
National and linguistic minorities 19
Racism and xenophobia 48
Roma 24
Other discrimination 18
Cultural, religious and linguistic diversity 4
Equality between women and men 35
The rights of the child: 31
The rights of the elderly 9
Integration of persons with disabilities 82

4. Solidarity

Workers' right to information and consultation within the undertaking

The European Commission presented **proposals requiring Member States to establish collective redress mechanisms**. These proposals make it possible for consumers to bring to court similar claims in one legal action.

Right of collective bargaining and action

The **Market Surveillance and Product Safety Package** has been adopted by the European Commission. The package ensures a high level of human health and consumer protection by strengthening the means to tackle unsafe and non-compliant products.

Right of access to placement services

Protection in the event of unjustified dismissal

In 2013 the deadline for the **transposition of the Consumer Rights Directive** has lapsed. This means that all Member States must now have transposed the new rules into their national laws. The Consumer Rights Directive protects consumers, especially those buying on the internet. The Directive guarantees, amongst others, the right to return goods within a period of 14 days.

Fair and just working conditions

Prohibition of child labour and protection of young people at work

The deadline for the transposition of Council Directive 2010/32/EU of 10 May 2010 implementing the Framework Agreement on **prevention from sharp injuries in the hospital and healthcare sector** concluded by HOSPEEM and EPSU has also expired in 2013. The purpose of this directive is to implement the above mentioned Framework Agreement aiming notably at preventing workers' injuries caused by all medical sharps (including needle-sticks),

Family and professional life

Social security and social assistance

Health care

The EU adopted a new directive to address the **protection of workers exposed to electromagnetic fields**.[36] The directive covers all known direct biophysical effects and other indirect effects caused by electromagnetic fields. Further to this directive, the employer shall notably eliminate or reduce to a minimum the risks that arise from electromagnetic fields at the workplace in line with the principles of the Framework Directive[37]. Transposition into national law by all Member States is strived for by July 2016.

Access to services of general economic interest

Environmental protection

In the course of 2013, the EU Charter of Fundamental Rights was directly or indirectly invoked in a number of parliamentary questions enquiring about possible breaches of fundamental rights, notably economic and social rights, by austerity measures passed in response to the economic and financial crisis, in particular in Member States with an Economic Adjustment Programme.

Consumer protection

[36] Directive 2013/35/EU on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) (20th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) and repealing Directive 2004/40/EC. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:179:0001:0021:EN:PDF.

[37] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1989:183:0001:0008:EN:PDF.

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

The Charter in Article 47 provides that workers or their representatives must, at the appropriate levels, be guaranteed information and consultation, in good time, in the cases and under the conditions provided for by EU law and national laws and practices.

Legislation

The European Commission carried out an ex-post **evaluation of three directives in the area of employees' information and consultation** at national company level. The evaluation aimed to identify excessive burdens, overlaps, gaps or inconsistencies which may have appeared since the adoption of the Collective Redundancies Directive[38], the Transfer of undertakings Directive[39] and the Information and Consultation Directive[40]. The European Commission published the results of this so called 'fitness check' on 26 July 2013[41]. The report finds that the three EU Directives are generally relevant, effective, efficient, coherent and mutually reinforcing. The 'fitness check' brought also to light, however, a number of gaps and shortcomings. As a follow up, the European Commission announced that it would, among others, consider a possible consolidation of the three directives on information and consultation, subject to the results of a consultation of social partners[42].

The European Commission on 18 November 2013 presented a legislative proposal for a directive on seafarers[43] aiming to **lift the exclusion of seafaring workers from the personal scope of application of a number of EU labour law directives** (the Works Council Directive[44], the Insolvency Directive[45], the Information and Consultation Directive, the Transfer of undertakings Directive and the Collective Redundancies Directive mentioned above).

[38] Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.8.1998, p. 16.

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

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

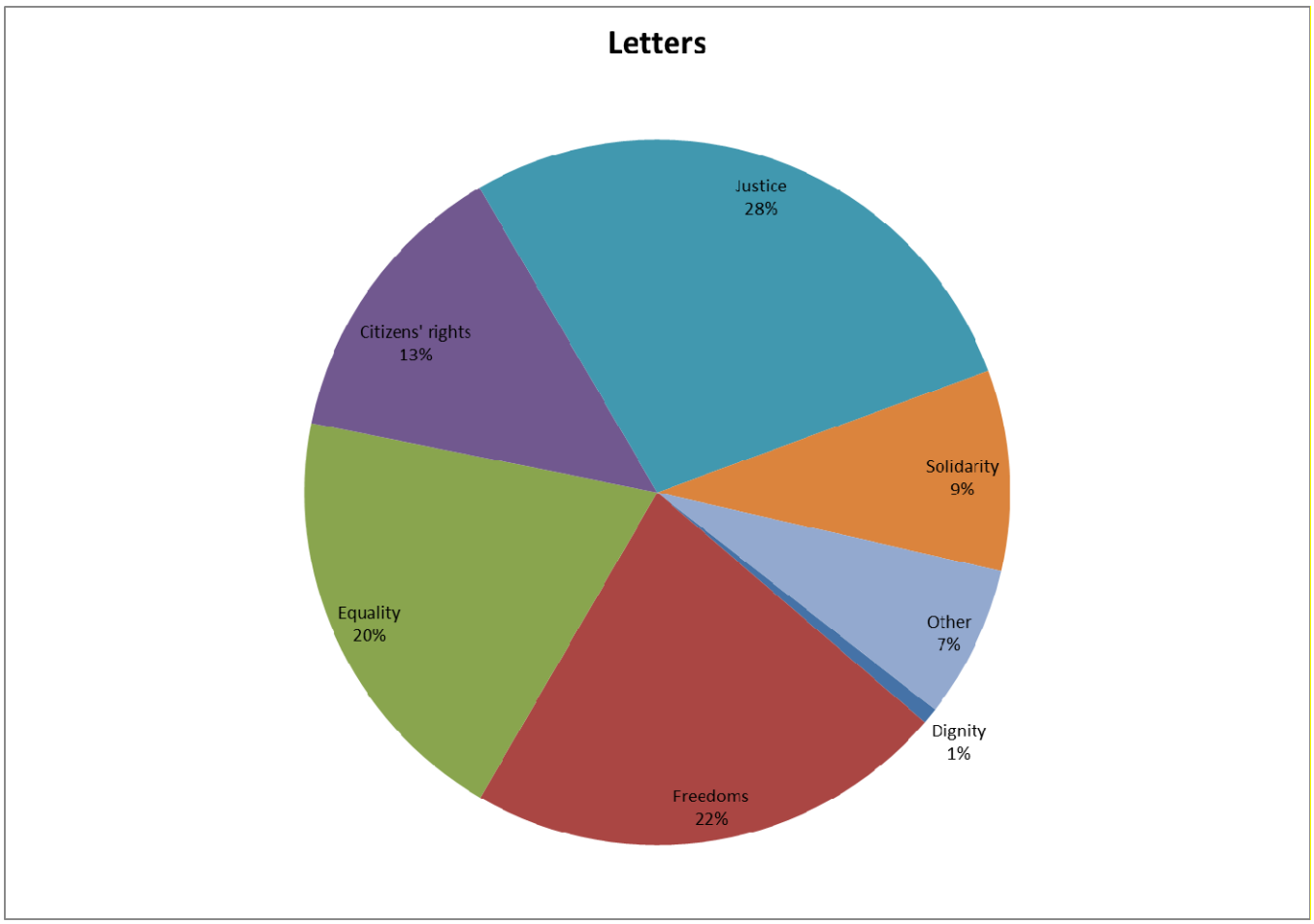
[41] European Commission Staff Working Document 'Fitness check' on EU law in the area of Information and Consultation of Workers, SWD(2013) 293 final. Available at: http://ec.europa.eu/social/BlobServlet?docId=10415&langId=en

[42] See European Commission communication on '*Regulatory Fitness and Performance (REFIT): Results and Next Steps*' (COM(2013) 685 final)

[43] Proposal for a Directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC, COM(2013) 798 final. Available at: http://ec.europa.eu/social/BlobServlet?docId=11129&langId=en

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

[45] Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer, OJ L 283, 28.10.2008, p. 36.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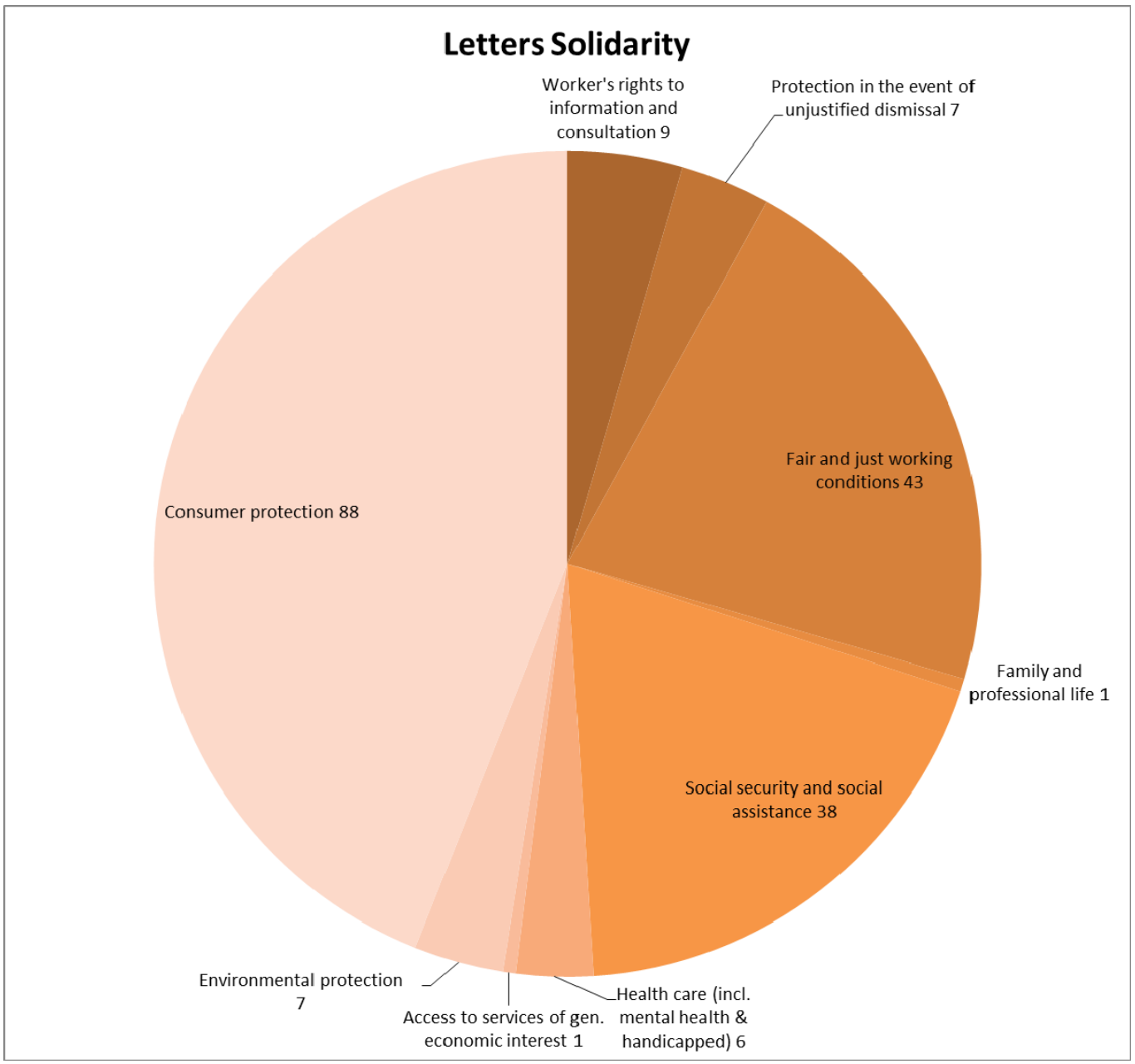

Article 28: Right of collective bargaining and action

Article 28 of the Charter provides that workers and employers, or their respective organisations, have, in accordance with EU law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action. There is no specific EU law regulating the conditions and consequences of the exercise of these rights at national level[46]. Member States remain, of course, bound by the provisions of the Charter, including the right to strike, in instances where they implement EU law.

Legislation

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

The European Commission proposed in 2012 a number of specific rules and obligations in order to enhance the implementation, application and **enforcement of the Posting of Workers Directive**[47]. The proposal for the Enforcement Directive[48] contains provisions improving the effectiveness of controls and sanctions and possibilities given to posted workers to defend their rights better. Furthermore the proposal introduces solutions to effectively prevent abuses, circumvention or disrespect of law. In 2013 the proposal was extensively discussed in the Council, and discussions are still ongoing.

Article 29: Right of access to placement services

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

Policy

On 4 December 2013 the European Commission presented a **proposal for a quality framework for traineeships**[49]. The quality framework sets out the main features of high quality traineeships in terms of protecting trainees' rights and helping them make the most of their working experience. The quality framework will enable young people to find quality work experience in another EU country under safe and fair conditions.

EURES provides information, advice and recruitment/placement (job-matching) services for the benefit of workers and employers as well as any citizen wishing to benefit from the principle of the free movement of persons. A **modernisation of EURES** should make it more suitable to the real needs of the labour market by enhancing job matching services. The European Commission will, in addition, launch a pilot initiative with some Member States to improve the EURES information exchange about traineeships and apprenticeships with a view to further facilitating the transition to work for young people.

Article 31: Fair and just working conditions

The Charter guarantees that every worker has the right to working conditions which respect their health, safety and dignity. Every worker has the right to a limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave. There is a substantial body of EU law in this area concerning, in particular, health and safety at work[50].

Legislation

The EU adopted a new directive to address the **protection of workers exposed to electromagnetic fields**[51]. The European Commission will publish practical guidelines to assist employers in meeting their obligations. Transposition into national law by all Member States is strived for by July 2016.

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[47] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18 , 21.1.1997, p. 1. Available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1997:018:0001:0006:EN:PDF

[48] Proposal for a Directive on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, COM(2012) 131 final. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0131:FIN:EN:PDF

[49] Proposal for a Council Recommendation on a Quality Framework for Traineeships, COM(2013) 857 final. Available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0495:FIN:EN:PDF

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

[51] Directive 2013/35/EU on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields) (20th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) and repealing Directive 2004/40/EC. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:179:0001:0021:EN:PDF

The European Commission presented a proposal for a Council Decision authorising Member States to **ratify the International Labour Organisation 2011 Convention concerning decent work for domestic workers** (Convention No. 189)[52]. Member States ratifying the ILO Convention agree to ensure fair and decent conditions for domestic workers by protecting their fundamental labour related rights, preventing abuse and violence and establishing safeguards for young domestic workers. The Convention contains provisions that ensure equal payment of domestic workers, decent living conditions and access to complaint mechanisms.

Following the failure of the negotiations between the social partners at the end of 2012 on the review of the **Working Time Directive**[53], the European Commission is currently working on a detailed Impact Assessment. The European Commission is assessing a range of possible options before deciding on future action.

Policy

The European Commission has taken action to address, within the scope of its mandate, the social consequences of the economic crisis.

On 22 April 2013 the Council adopted the **Youth Guarantee Recommendation**[54]. The Youth Guarantee aims to tackle youth unemployment by ensuring that all young people under 25 get a good-quality, concrete offer for a job, apprenticeship, traineeship, or continued education within 4 months of them leaving formal education or becoming unemployed. The European Commission is helping Member States to develop a national Youth Guarantee Implementation Plan and set up the Youth Guarantee scheme. The European Commission also facilitates the sharing of best practices between governments.

The European Commission contributed to the debate on the deepening of the Economic and Monetary Union and adopted a Communication on **strengthening the social dimension** of the Economic and Monetary Union[55]. In the European Commission's view surveillance of employment and social policies under the European Semester should be strengthened and national trade unions and employers' organisations should be more involved.

Ruling of the Constitutional Court of Poland[56]

When answering a legal question arising from a labour dispute, regarding an unjustified dismissal and the right to remuneration for the period of unemployment, the Constitutional Court of Poland referred to the Charter. The Constitutional Court was asked to judge on the constitutionality of Article 57 of the Polish Labour Code, which sets a ceiling for compensation in the event of unjustified dismissal and which prevents the application of the general rules contained in the Civil Code relating to compensation for a damage caused by improper performance of obligations. The applicant claimed that he had a right to continue to receive his wage during the entire period while waiting to take up his job again after the unjustified dismissal. The Constitutional Court cited article 30 of the Charter and determined that it is clear that the protection of the right to work also entails the fact that a person cannot be deprived of his work without a good reason or in violation of the law. It thus referred to the

[52] Proposal for a Council Decision authorising Member States to ratify, in the interests of the European Union, the Convention concerning decent work for domestic workers, 2011, of the International Labour Organisation (Convention No 189), COM(2013) 152 final.

Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0152:FIN:EN:HTML

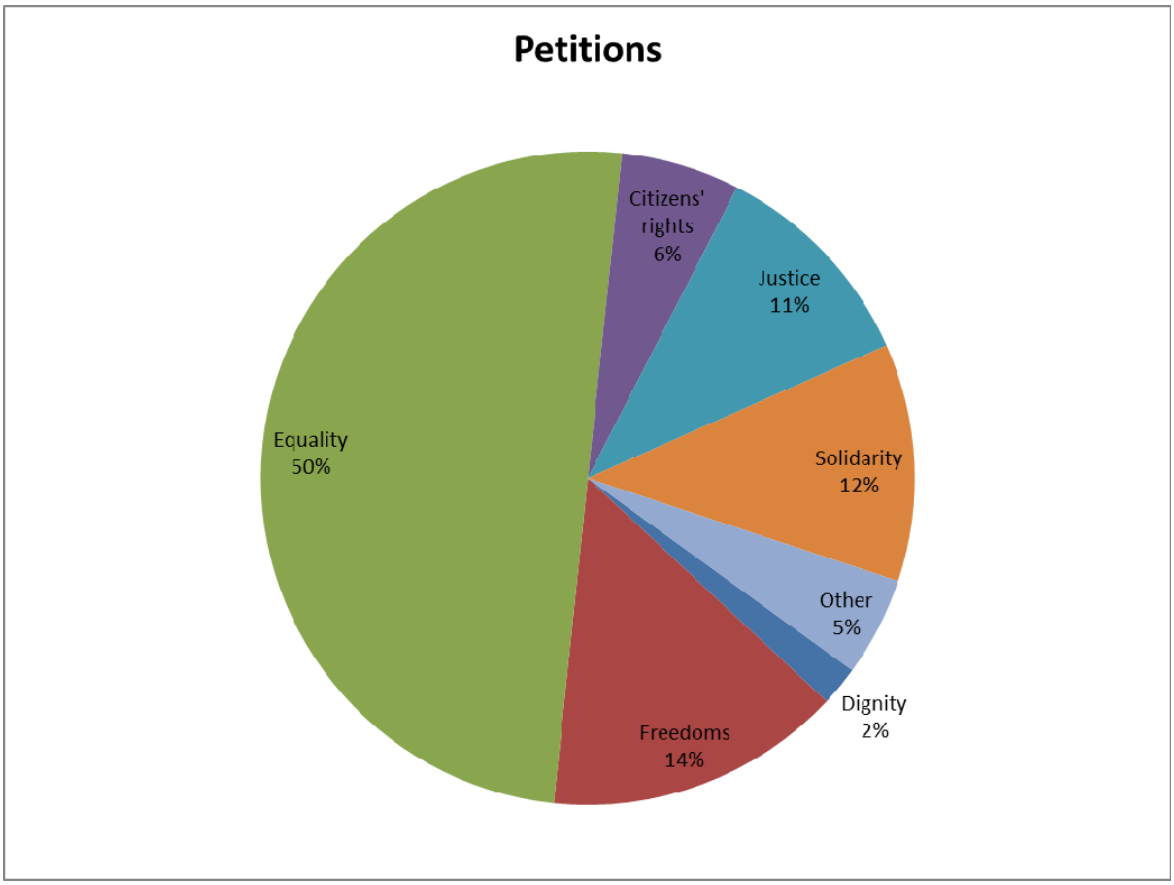
[53] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9.

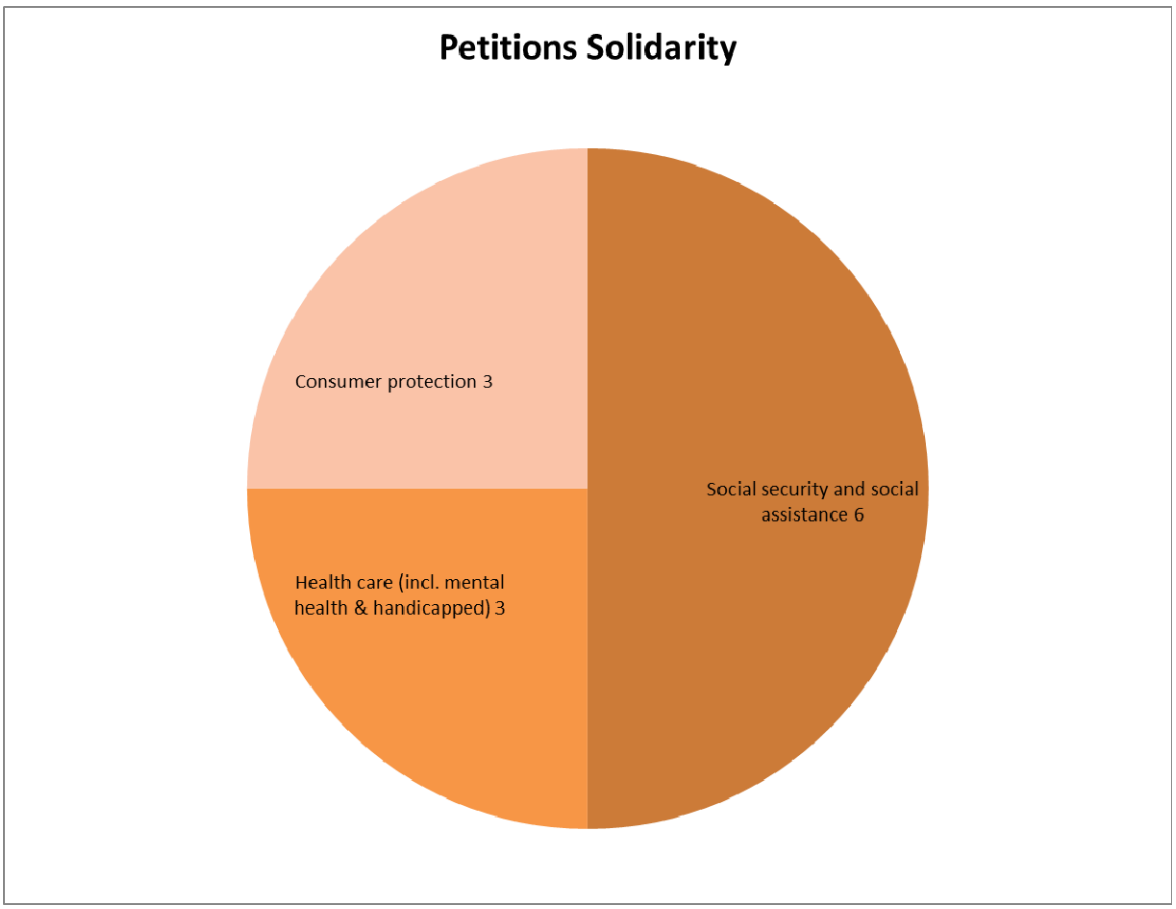
[54] Council Recommendation of 22 April 2013 on establishing a Youth Guarantee, OJ C 120, 26.4.2013, p. 1. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32013H0426(01):EN:NOT

[55] European Commission Communication: Strengthening the Social Dimension of the Economic and Monetary Union, COM(2013) 690,. available at: http://ec.europa.eu/European Commission_2010-2014/president/news/archives/2013/10/pdf/20131002_1-emu_en.pdf

[56] Constitutional Court of Poland (Trybunał Konstytucyjny), case P 46/11, District Court in Gliwice, Parliament and the Prosecutor General, 22.5.2013.

Charter to interpret the scope of the right to work in a broad way, also including protection in the event of unjustified dismissal. It held, however, that Article 57 of the Polish Labour Code was in line with the provisions of the Polish Constitution and that the provisions of the Labour Code and the Civil Code are different in nature and purpose.





Article 34: Social security and social assistance

Article 34 of the Charter recognises citizens' entitlement to social security benefits and social services providing protection in cases of maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices. Member States are free to determine the details of their social security systems, including which benefits shall be provided, the conditions of eligibility, how these benefits are calculated, as well as how much contribution should be paid, provided it complies with applicable EU law. European rules ensure that the application of the different national legislations respects the basic principles of equality of treatment and non-discrimination. They guarantee that migrant EU workers are treated in the same way as national workers and that the application of the different national legislations does not adversely affect them.

Legislation

The European Commission continued **negotiations on EU legislation on seasonal workers and intra-corporate transferees**. The extent of the rights that should be granted to the third-country nationals is an important element of the discussions in the Council and in the European Parliament. Upon suggestion by the European Commission the co-legislators agreed to strengthen the reference to the Charter in a recital of the **Seasonal Workers Directive**[57]. Moreover, agreement has been reached as regards the equal treatment of third-country national seasonal workers in respect of working

[57] Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010) 379 final. Available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0379:FIN:EN:PDF

conditions. Discussions on the **Directive on Intra-Corporate Transferees**[58] are on-going, yet an explicit reference to the Charter has been included.

The 2013 **Portability on Pensions Directive** safeguards the supplementary pension rights of employed and self-employed persons moving within the Community and sets out certain rights and obligations for members of supplementary pension schemes in order to safeguard their entitlements and help to ensure the adequacy of their retirement income.

Policy

In 2013 the European Commission adopted the **Social Investment Package**[59], which provides social policy guidance to Member States to address increasing levels of poverty and social exclusion. The Package specifically stresses the importance of improving the adequacy of social assistance so that benefits better reflect the costs of living, and integrating benefits with quality social services and inclusive labour market measures. The package also includes several staff working documents on different thematic areas of social policy, including a **Staff Working Document on Confronting Homelessness in the European Union**[60], encouraging Member States to implement integrated, preventative, long-term housing-led homeless strategies to reduce the number of people living in this extreme form of social exclusion. The Staff Working Document emphasizes that imposing penalties on homeless people seems inefficient, costly and stigmatising. It also highlights that having a basic bank account, an address, ID card and a passport are necessary preconditions for allowing homeless people to exercise certain fundamental rights. The package also provides policy advice on how to achieve efficiency gains in social protection systems whilst ensuring the adequacy of benefits and services. For instance, the package provides guidance on reducing administrative inefficiencies through streamlining benefits and services and creating 'one stop shops' to claim support, which can also make access easier and less time-consuming for beneficiaries. Further to this, the European Commission has worked together with Member States on a methodology to assess the efficiency and effectiveness of social policies. The concept is introduced in detail in the report on Employment and Social Developments in Europe 2013, published on 21 January 2014 (see IP/14/43). The methodology can spot key social challenges in the European Semester, the EU's yearly cycle for coordinating economic, employment and social policies.

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58 Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, COM(2010) 378 final. Available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0378:FIN:EN:PDF

59 Towards Social Investment for Growth and Cohesion – including implementing the European Social Fund 2014-2020 COM(2013) 83 final

Available at: http://ec.europa.eu/social/BlobServlet?docId=9761&langId=en

60 European Commission Staff Working Document Confronting Homelessness in the European Union SWD(2013) 42 final. Available at:

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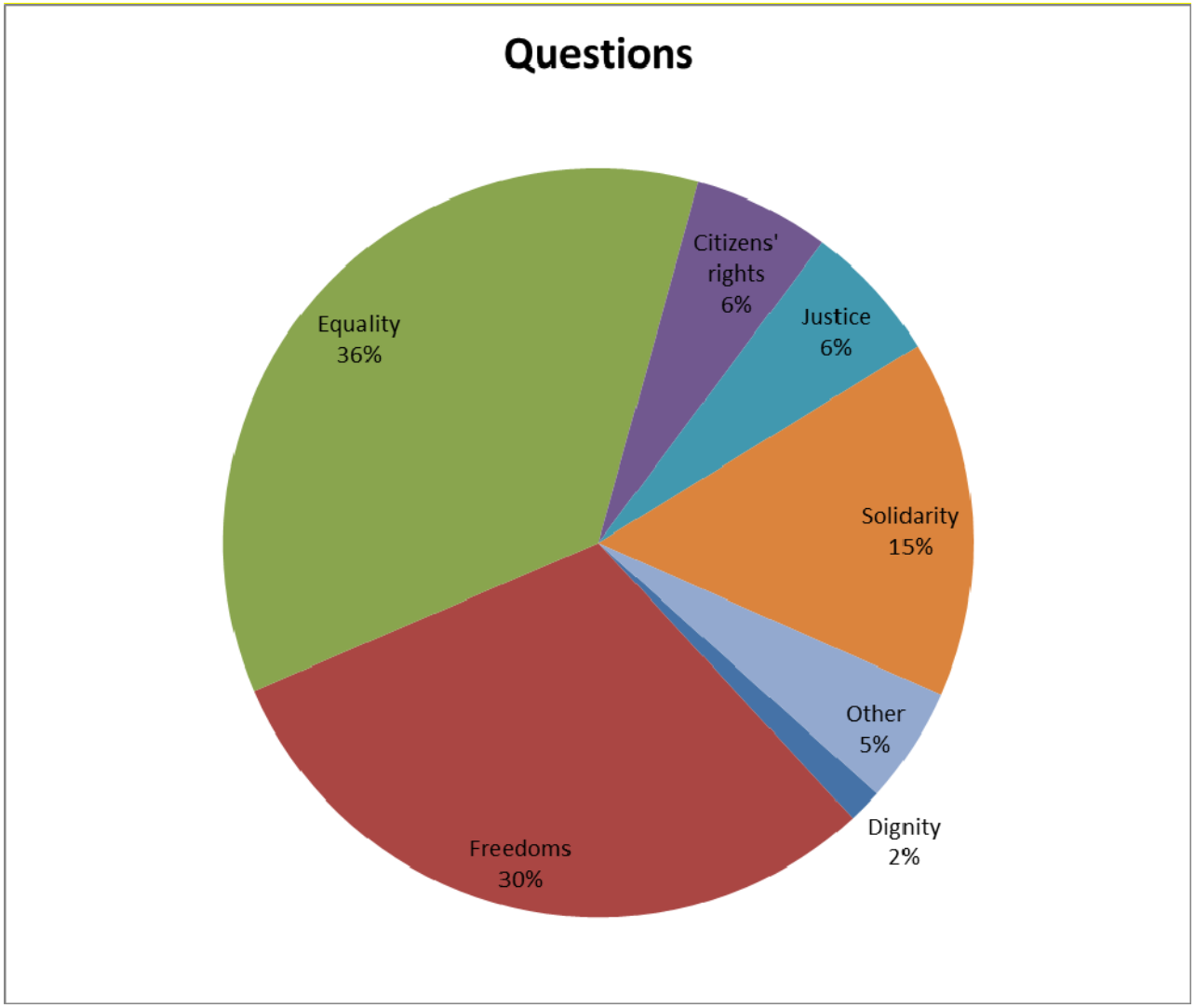
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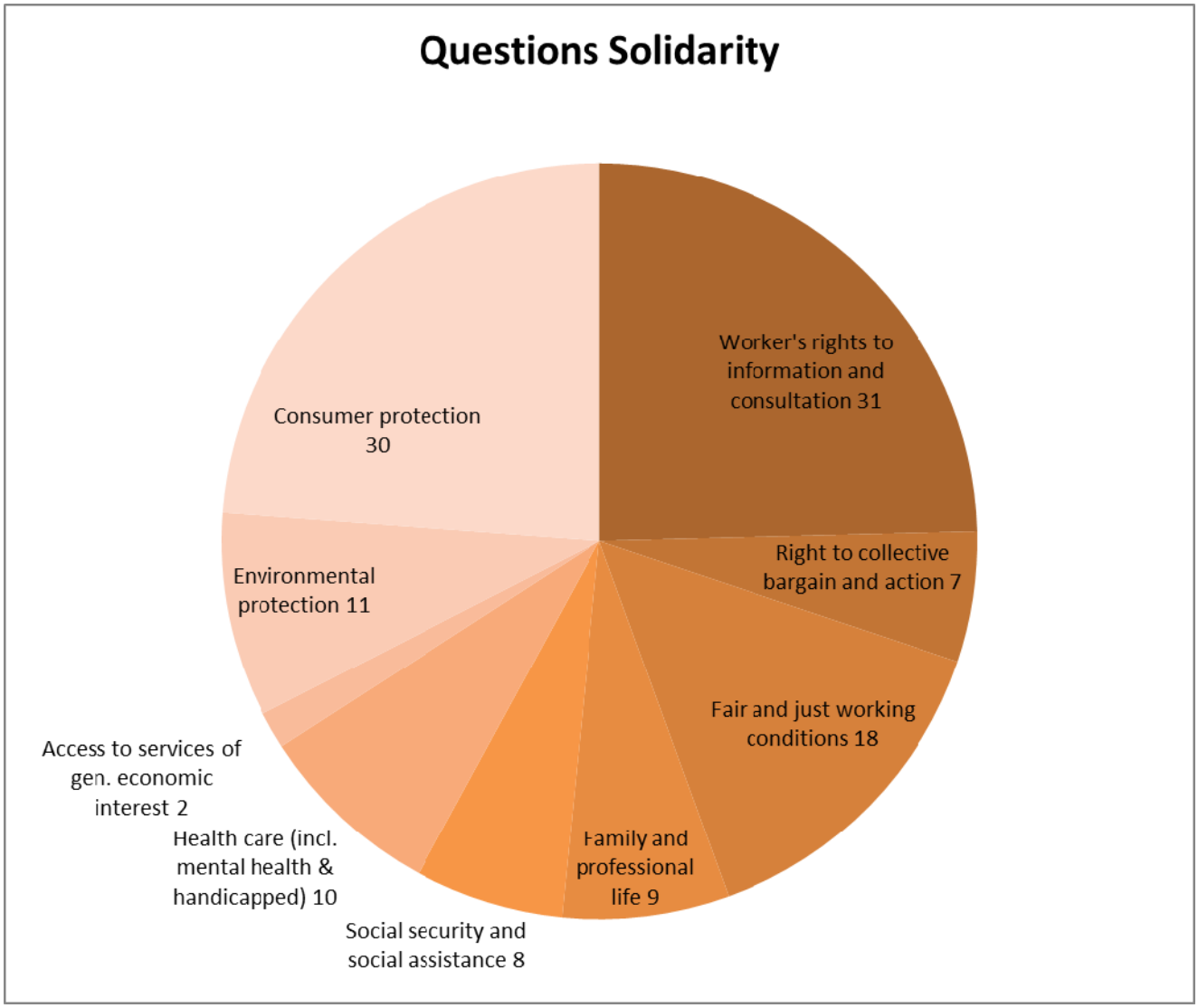
Questions Solidarity
Worker's rights to information and consultation 31
Right to collective bargain and action 7
Fair and just working conditions 18
Family and professional life 9
Social security and social assistance 8
Health care (incl. mental health & handicapped) 10
Access to services of gen. economic interest 2
Environmental protection 11
Consumer protection 30

Article 35: Health care

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

Legislation

After the adoption of the European Commission's proposal on **Tobacco Products Directive**[61] at the end of 2012, negotiations have started in 2013. In its proposal the European Commission gives concrete effect to the obligation to guarantee a high level of human health protection and of consumer protection, while placing a proportionate restriction on other fundamental rights. Both the European Parliament and the Council have raised their concerns with regard to the European Commission's proposal to require a health warning covering 75% of the package. The Parliament and Council have proposed to reduce this in order to strike a right balance between health protection and the right to property, freedom of expression and information and freedom to conduct business. The Committee of the Regions and the European Economic and Social Committee both adopted an opinion[62]. They welcomed the European Commission's proposal and underlined the importance of a high level of human health protection.

In February 2013 the European Commission adopted the **Market Surveillance and Product Safety Package**[63]. The package imposes a number of obligations on businesses and it provides market surveillance authorities with the possibility to take measures against unsafe or non-compliant products. The package seeks to ensure a high level of human health protection and consumer protection. The legislative process before the European Parliament and the Council is on-going.

On 6 November 2013 the European Commission's **Decision on serious cross-border threats to health**[64] entered into force. The decision improves preparedness across the EU and strengthens the capacity to coordinate response to health emergencies. It will help Member States prepare for and protect citizens against possible future pandemics and serious cross-border threats caused by communicable diseases, chemical, biological or environmental events.

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[61] 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 concerning the manufacture, presentation and sale of tobacco and related products, COM(2012) 788 final. Available at: http://ec.europa.eu/health/tobacco/docs/com_2012_788_en.pdf

[62] Opinion of the Committee of the Regions on Manufacture, presentation and sale of tobacco and related products. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:280:0057:0065:EN:PDF; Opinion of the European Economic and Social Committee on the 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 concerning the manufacture, presentation and sale of tobacco and related products. Available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:327:0065:0081:EN:PDF

[63] The package includes: Communication on More Product Safety and better Market Surveillance in the Single Market for Products, COM(2013) 74 final. Available at: http://ec.europa.eu/consumers/safety/psmsp/docs/psmsp-communication_en.pdf; Proposal for a Regulation on consumer product safety and repealing Council Directive 87/357/EEC and Directive 2001/95/EC, COM(2013) 78 final. Available at: http://ec.europa.eu/consumers/safety/psmsp/docs/psmsp-act_en.pdf; Proposal for a Regulation on market surveillance of products and amending Council Directives 89/686/EEC and 93/15/EEC, and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 1999/5/EC, 2000/9/EC, 2000/14/EC, 2001/95/EC, 2004/108/EC, 2006/42/EC, 2006/95/EC, 2007/23/EC, 2008/57/EC, 2009/48/EC, 2009/105/EC, 2009/142/EC, 2011/65/EU, Regulation (EU) No 305/2011, Regulation (EC) No 764/2008 and Regulation (EC) No 765/2008 of the European Parliament and of the Council, COM(2013) 75 final. Available at: http://ec.europa.eu/consumers/safety/psmsp/docs/psmsp-surveillance_en.pdf; Communication on 20 actions for safer and compliant products for Europe: a multi-annual action plan for the surveillance of products in the EU, COM(2013) 76 final. Available at: http://ec.europa.eu/consumers/safety/psmsp/docs/psmsp-communication-actions_en.pdf; Report on the implementation of Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, COM(2013) 77 final. Available at: http://ec.europa.eu/consumers/safety/psmsp/docs/psmsp-implementation-report_en.pdf

[64] European Commission Decision No 1082/2013/EU on serious cross-border threats to health and repealing Decision No 2119/98/EC, OJ L 293, 5.11.2013, p.1. Available at:
http://ec.europa.eu/health/preparedness_response/docs/decision_serious_crossborder_threats_22102013_en.pdf

Policy

An **EU Action Plan on Drugs**[65] has been adopted for the period 2013 – 2016. The plan focuses on improving coordination and cooperation, contributing to a measurable reduction in the use of illicit drugs and its availability and supply and contributing to a better understanding of all aspects of the drugs phenomenon.

Article 37: Environmental protection

The Charter in Article 37 establishes that everyone has the right to access preventive health care and the right to benefit from medical treatment under the conditions established by national law and practices. A high level of human health protection shall be ensured in the definition and implementation of the Union's policies and activities.

Legislation

The European Commission adopted a proposal for a **revised Nuclear Safety Directive**[66] which in the European Commission's view would have a potential beneficial impact on environmental protection, as well as fundamental rights related to fair and just working conditions and health care. In its proposal the European Commission introduces more stringent EU-wide safety rules. Primary responsibility for the safety of nuclear power plants lies with their operators who are supervised by national regulators. The revised Nuclear Safety Directive strengthens the role and independence of these national regulators. The proposal also establishes a mechanism for developing EU-wide harmonised nuclear safety guidelines and includes new provisions for on-site emergency preparedness and response.

Dropping of blocks in Algeciras Bay

MEPs have raised several questions concerning landfill practices in Gibraltar. MEPs pointed out that blocks have been dumped in Algeciras Bay by Gibraltar, which will have a major environmental impact. This matter was also brought to the attention of the European Commission by Spain. While the EU law on the Common Fisheries Policy does not apply to Gibraltar[67], the European Commission has started assessing those parts of the claims that pertain to applicable EU law (i.e. environmental law).

Article 38: Consumer protection

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

Legislation

13 December 2013 was the deadline for **transposing into national laws the Consumer Rights Directive**[68]. The new Directive strengthens consumer protection in particular when buying on the Internet. The new rules will, amongst others, eliminate hidden charges and costs on the Internet and ban pre-ticked boxes that offer additional options. Furthermore, consumers can return goods within a period of 14 days and they have better refund rights. In the course of 2013, the European Commission continued assisting Member States in the transposition of the Consumer Rights

[65] EU Action Plan on Drugs 2013 – 2016. Available at:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:351:0001:0023:en:PDF

[66] Final proposal for a Council Directive amending Directive 2009/71/EURATOM establishing a Community framework for the nuclear safety of nuclear installations, COM(2013)715 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0715:FIN:EN:PDF

[67] Treaty of Accession of the United Kingdom to the European Communities.

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

Directive. The European Commission also worked on guidance for the national enforcement authorities, which will be issued in 2014. The national measures will apply as from 13 June 2014, so that the European Commission will now check if all Member States have implemented the rules correctly.

National consumer law enforcement authorities continued to check, coordinated by the European Commission, if traders of websites selling digital content (i.e. games, e-books, videos and music), complied with EU consumer law. As of October 2013, 80% of the 330 websites checked, which cover a large share of the market, were found to be in line with EU consumer law.

On 14 March 2013, the European Commission adopted a **Report[69] and a Communication[70] on the Functioning of the Unfair Commercial Practices Directive.** This Directive[71] provides the legal basis to tackle misleading and aggressive commercial practices across the EU, such as fake 'free' offers, 'bait' advertising for products which cannot be supplied, and direct targeting of children. It appears that the directive helps restraining unfair business practices. However, it also emerged that further enforcement efforts should be made, especially at cross-border level. The European Commission will take a more prominent role in this process. The European Commission continued a pre-infringement dialogue with 25 Member States regarding the correct transposition of the Directive. Whilst a number of cases could be closed and/or the necessary legislative amendments were tabled by the Member State concerned, the European Commission also opened a number of infringement procedures for incorrect transposition.

The European Commission completed the **transposition conformity check of the Timeshare Directive**[72]. It opened the pre-infringement dialogue with 19 Member States. The Timeshare Directive ensures consumer protection by imposing more stringent rules related to the information the trader has to provide to the consumer. It also safeguards the consumer's right to withdraw from a contract.

In 2013, the European Commission also worked actively to ensure full and correct implementation of other existing consumer protection directives.

Two new EU legislative acts, aiming to promote consumer rights, were adopted on 21 May 2013. The **Directive on alternative dispute resolution for consumer disputes**[73] ensures that for resolving consumer disputes, consumers have access to alternative dispute resolution entities and procedures that respect a number of binding requirements. The **Regulation on online dispute resolution for consumer disputes**[74] provides for the establishment of a European Online platform that facilitates the resolution of consumer disputes arising from online transactions.

On 9 July 2013 the European Commission adopted a **proposal to reform the Package Travel Directive**[75]. The reform proposal responds to changes in the travel market. The proposal extends the protection granted to traditional pre-arranged package holidays also for customised holidays. The

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

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

[71] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149, 11.6.2005, p. 22.

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

[73] Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.6.2013, p. 63.

[74] Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L 165, 18.6.2013, p. 1.

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

reform further increases transparency and strengthens consumer protection in case something goes wrong.

The European Commission also presented a **legislative package on payment accounts**[76]. Consumers will have to be provided by transparent and comparable information concerning financial products. In addition the proposal contains a specific provision on non-discrimination, requiring Member States to ensure that consumers are not discriminated against when applying for or accessing a payment account. The package is currently under consideration by the European Parliament and the Council.

In September 2013, the European Commission adopted a proposal for a Regulation on indices used as benchmarks in financial instruments and financial contracts[77]. The proposal aims to **subject benchmarks as provided by market players in the financial sector to clearer standards and supervision**. It envisaged giving competent authorities powers of control and enforcement, including e.g. access to data transfers upon request. The European Commission assessed the potential impact of the proposal on the right to the protection of personal data, the right to freedom of expression and information and the freedom to conduct a business.[78]

Negotiations on the **Directive on credit agreements relating to residential immovable property**[79] have continued in 2013. The level of consumer protection has been duly taken into consideration during the discussions with the Council and European Parliament, by for instance the introduction of a ban on tying practices.

Policy

Collective redress is one of the mechanisms that has been analysed since several years by the EU institutions as to its capacity to contribute to the development of the European area of justice to ensure a high level of consumer protection. On 11 June 2013 the European Commission adopted instruments[80] inviting Member States to establish collective redress mechanisms in cases of infringements of rights granted under Union law. Collective redress allows similar legal claims to be bundled into a single court action. It is expected that consumers will be the main beneficiary group of the introduction of collective redress at national level.

76 Proposal for a Directive on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, COM(2013) 266 final. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0266:FIN:EN:PDF

77 Proposal for a Regulation on indices used as benchmarks in financial instruments and financial contracts, COM(2013) 641 final. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0641:FIN:EN:PDF

78 See 2013 Report on the Application of the Charter of Fundamental Rights, under 3.1.1 Legislative proposals as well as Chapter 2 of this report.

79 Proposal for a Directive on credit agreements relating to residential property, COM(2011) 142 final. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0142:FIN:EN:PDF

80 European Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013, p. 60; European Commission Communication: 'Towards a European Horizontal Framework for Collective Redress', COM(2013) 401/2. Available at: http://ec.europa.eu/justice/civil/files/com_2013_401_en.pdf

5. Citizens' rights

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

Right to vote and to stand as a candidate at municipal elections

Right to good administration

Right of access to documents

European Ombudsman

Right to petition

Freedom of movement and of residence

Diplomatic and consular protection

The European Commission adopted its **2013 EU Citizenship Report** putting forward new actions in key areas to ensure that citizens can fully enjoy their EU rights in their everyday life**.**

In order to make it less burdensome for EU citizens to participate in the European elections, the procedure for EU citizens to **stand as candidates for the European Parliament** when residing in an EU Member State of which they are not nationals was simplified.

The European Commission made **recommendations to further enhance the transparency and efficiency of the European elections**, such as the recommendation that European and national political parties make known their preferred candidate for President of the European Commission and inform citizens about that candidate's programme.

The European Commission pursued a rigorous enforcement policy with a view to achieving the **full and correct transposition and application of the EU free movement rules** across the EU. Following the action announced in its 2010 EU Citizenship Report, the European Commission pursued a dialogue with several Member States to ensure that EU citizens can found and become members of political parties in the Member State in which they reside.

Article 39: Right to vote and stand as a candidate at elections

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

Legislation

In January 2013 a directive[81] adopted on a proposal by the European Commission entered into force. It simplifies the procedure for EU citizens to stand as candidates for the European Parliament when residing in an EU Member State of which they are not nationals and hence contributes to **mobilizing citizens' participation in the democratic life of the EU**. The European Commission is following the transposition of this Directive in the national legislation of the Member States for which the deadline is 28 January 2014.

Policy

On 12 March 2013, the European Commission adopted a **Communication**[82] and a **Recommendation**[83] for further **enhancing the democratic and efficient conduct of the European Parliament elections**. The European Commission called on national political parties, European political parties and the Member States to take measures to promote the transparency of the European Parliament elections and encourage genuine pan European debates to help stimulate voter interest and ultimately reinforce the democratic legitimacy of the EU decision-making process.

The European Commission recommended notably that:

- Voters are informed of the affiliation between national parties and European parties;
- European and national political parties make known their preferred candidate for President of the European Commission and inform citizens about that candidate's programme;
- Member States should agree on a common day for the European elections, with polling stations closing at the same time.

The European Commission will report on the implementation of these recommendations after the 2014 European elections.

Reform of the Bulgarian electoral legislation

The Bulgarian legislation provided additional requirements on non-Bulgarian EU citizen asking them to submit the number of their residence certificate and date of registration as a condition for their inclusion on the electoral rolls or for standing as candidates.

The European Commission considered that such requirements went beyond what national authorities could require under EU law (Directive 94/80/EC on municipal elections and Directive

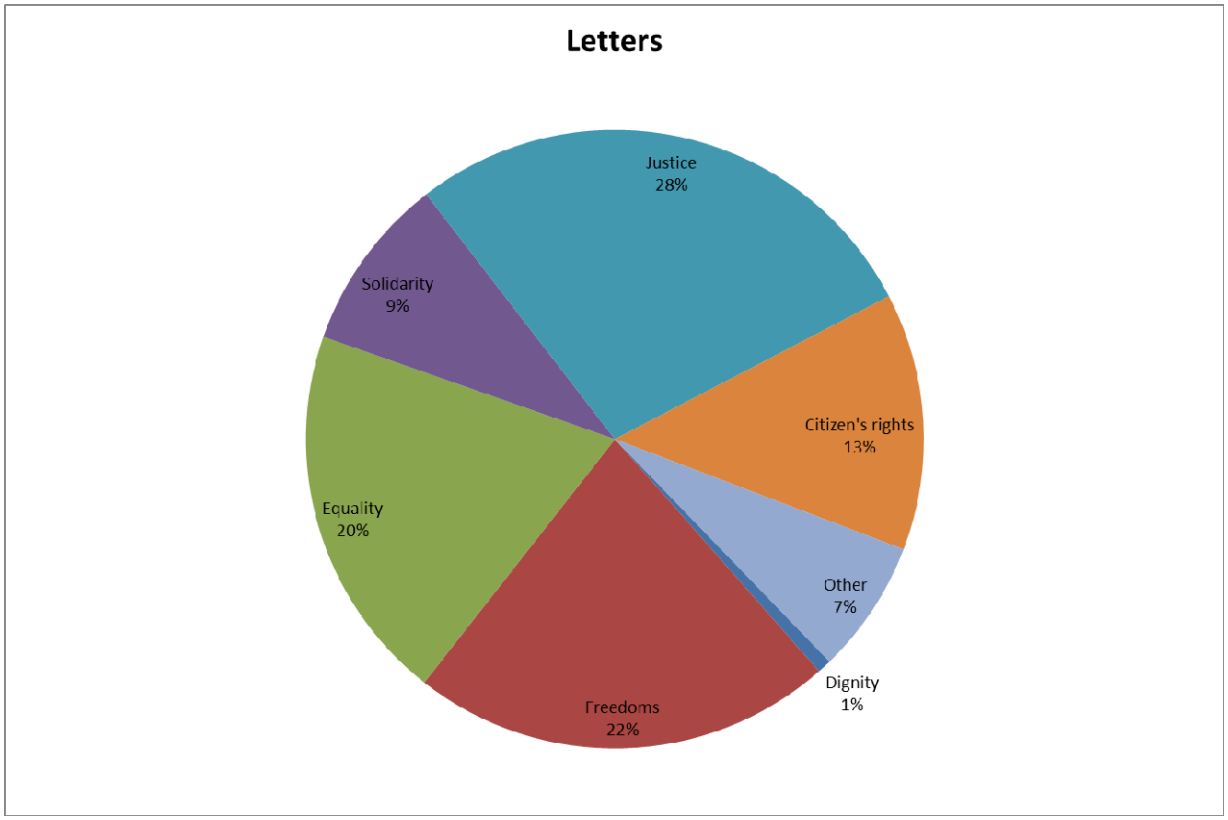
[81] Directive 2013/1/EU amending Directive 93/109/EC as regards certain detailed arrangements for the exercise of the right to stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals. OJ L 26, 26.1.2013, p. 27.

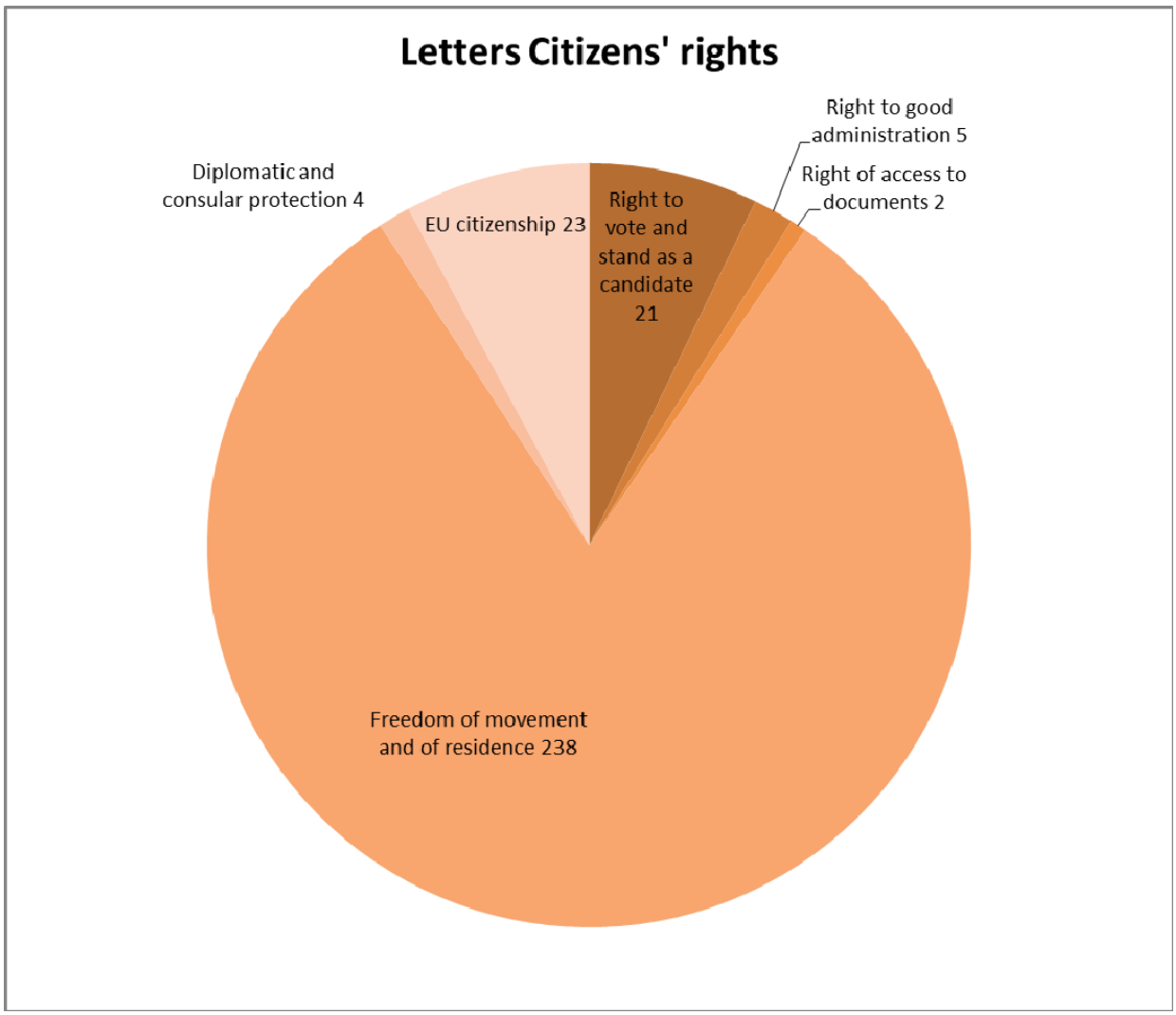
[82] European Commission Communication: 'Preparing for the 2014 European elections: further enhancing their democratic and efficient conduct', COM(2013) 126 final. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0126:FIN:EN:PDF.

[83] European Commission Recommendation on enhancing the democratic and efficient conduct of the elections to the European Parliament, OJ L 79, 21.3.2013, p. 29.

93/109/EC on European Parliament elections) and launched an infringement proceeding against Bulgaria. On 25 February 2013, the Bulgarian authorities announced that the Electoral Code had been amended to remove the additional requirements.

Following the action announced in its 2010 EU Citizenship Report (action 18), the European Commission pursued a dialogue with Member States to ensure that EU citizens can found and become members of political parties in the Member State in which they reside. Four cases were successfully clarified. Two Member States provided satisfactory explanations on the domestic legislation. Two further Member States modified their legislations by removing the restrictions identified by the European Commission. The European Commission launched infringement procedures against seven other Member States.





Article 41: Right to good administration

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

Policy

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

Ruling of the Spanish Supreme Court[84]

In this case the Regional Council of Alava decided to recover an amount of tax benefits of the applicant, a company. The decision of the Regional Council of Alava implemented a decision of the European Commission (Decision 2002/820/EC) in which the European Commission declared the tax benefits to constitute unlawful and incompatible State aid. The Regional Council of Alava took its decision without the hearing of the applicant. The applicant brought the case to court and claimed that there had been a violation of its right to be heard. The Supreme Court determined that the provisions of the Charter are also addressed to the Member States while applying EU law and that this was the case at stake since Spain was implementing a European Commission Decision. The Supreme Court thus ruled that Article 41(2) of the Charter, which guarantees "the right of every person to be heard, before any individual measure which would affect him or her adversely is taken", must be taken into account. Despite the principle of procedural autonomy and that European Commission Communication 2007/C272/05 states that Member States should use fast-track procedures where possible, these procedures must be in accordance with the fundamental rights laid down in the Charter. The Supreme Court decided that the procedure to recover unlawful State aid must always respect the right to be heard.

[84] Judgment 4968/2013 and Appeal 361/2012, El Coto de Rioja, S.A v. Foral Diputation of Alava, 14.10.2013. Available at: www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=6865959&links=%22361/2012%22&optimize=20131029&publicinterface=true .

Article 42: Right of access to documents

The Charter in Article 42 guarantees that any EU citizen and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the EU institutions, bodies, offices and agencies. This right is subject to certain exceptions.[85] In particular, the institutions refuse access where disclosure would undermine the protection of the public interest and the lawful exercise of their duties.

In 2012, the European Commission registered 6525 requests for access to documents, which is about 500 more than in 2012. As in the past, 4 out of 5 requests were granted at the initial stage. In 2013, the European Commission received 237 confirmatory applications, a slight increase compared to 2012. Such applications are reassessed by case handlers acting independently from the ones that handled the initial application. This review has led to wider access being granted in around half the cases. In 2013 the European Commission received by the European Ombudsman 21 cases concerning the fundamental right of access to documents, of which 15 cases were strictly related to access to documents, and in 6 cases access to documents was a subsidiary concern.

Case law

In 2013, the CJEU delivered several interesting judgments concerning access to documents. In the first case[86] concerning transparency and access to documents the CJEU confirmed the judgment of the General Court[87] which gave **access to a document of the Council including the identities of the Member States which had intervened during a meeting of a Council Working Group** concerning the proposal for a new regulation regarding public access to EP, Council and European Commission documents. The Council had justified its refusal to disclose the identities of those Member States on the ground that disclosure of those identities would have seriously undermined its decision-making process and there was no overriding public interest in such disclosure.[88]

In another case concerning the right of access to **documents containing environmental information**, the Court[89] decided that a document where the information requested relates to emissions into the environment **must be disclosed, even if such disclosure is liable to undermine the protection of the commercial interests of a particular natural or legal person, including that person's intellectual property**. The Court added that this interpretation cannot be called into question under the pretext of an interpretation that is in conformity with Articles 16 and 17 of the Charter which enshrine, respectively, the freedom to conduct a business and the right to property.

Furthermore, the *Besselink* case[90] needs to be pointed out, where the **General Court annulled in part the Council decision refusing access to a document concerning the accession of the EU to the ECHR**. The Court held that the Council made an error of assessment in refusing access to one of the negotiating directives it had adopted when authorising the European Commission to open the accession negotiations. The position reflected in this directive had already been communicated to the negotiating partners and therefore the disclosure of that document could not jeopardise the climate of confidence between the negotiating parties.

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

[86] CJEU, Case C-280/11 P, *Council v Access Info Europe,* 17.10.2013.

[87] General Court (GC), Case T-233/09 *Access Info Europe v Council*, 22.3.2011.

[88] Exception provided for in the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and European Commission documents, OJ L 145, 31.5.2001, p. 43.

[89] General Court, Case T-545/11, *Stichting Greenpeace Nederland and PAN Europe v European Commission*; 8.10.2013

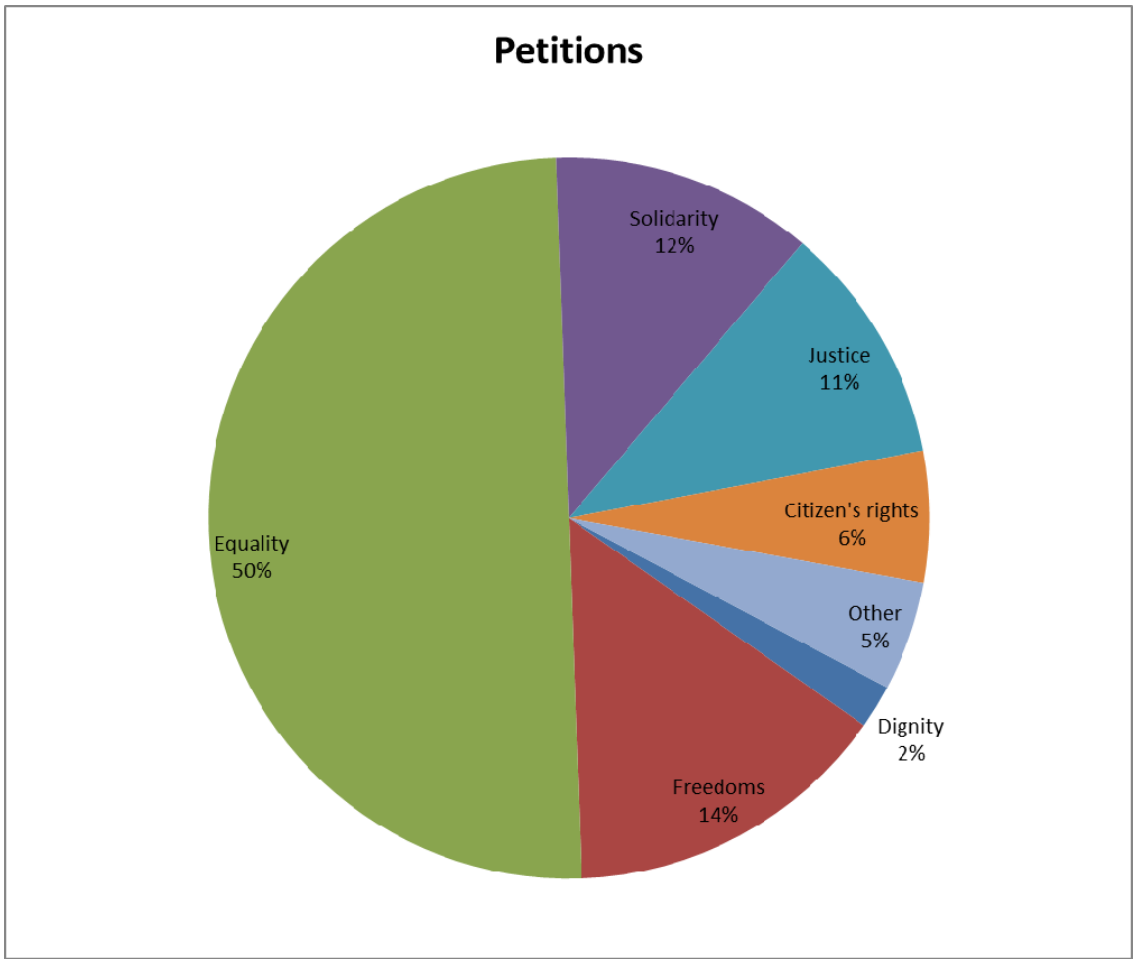
[90] General Court, Case T-331/11, *Besselink v Council*, 12.9.2013 – see 2013 Report on the Application of the Charter of Fundamental Rights, under 3.4 Control of the Court over the EU institutions.

Article 43: European Ombudsman

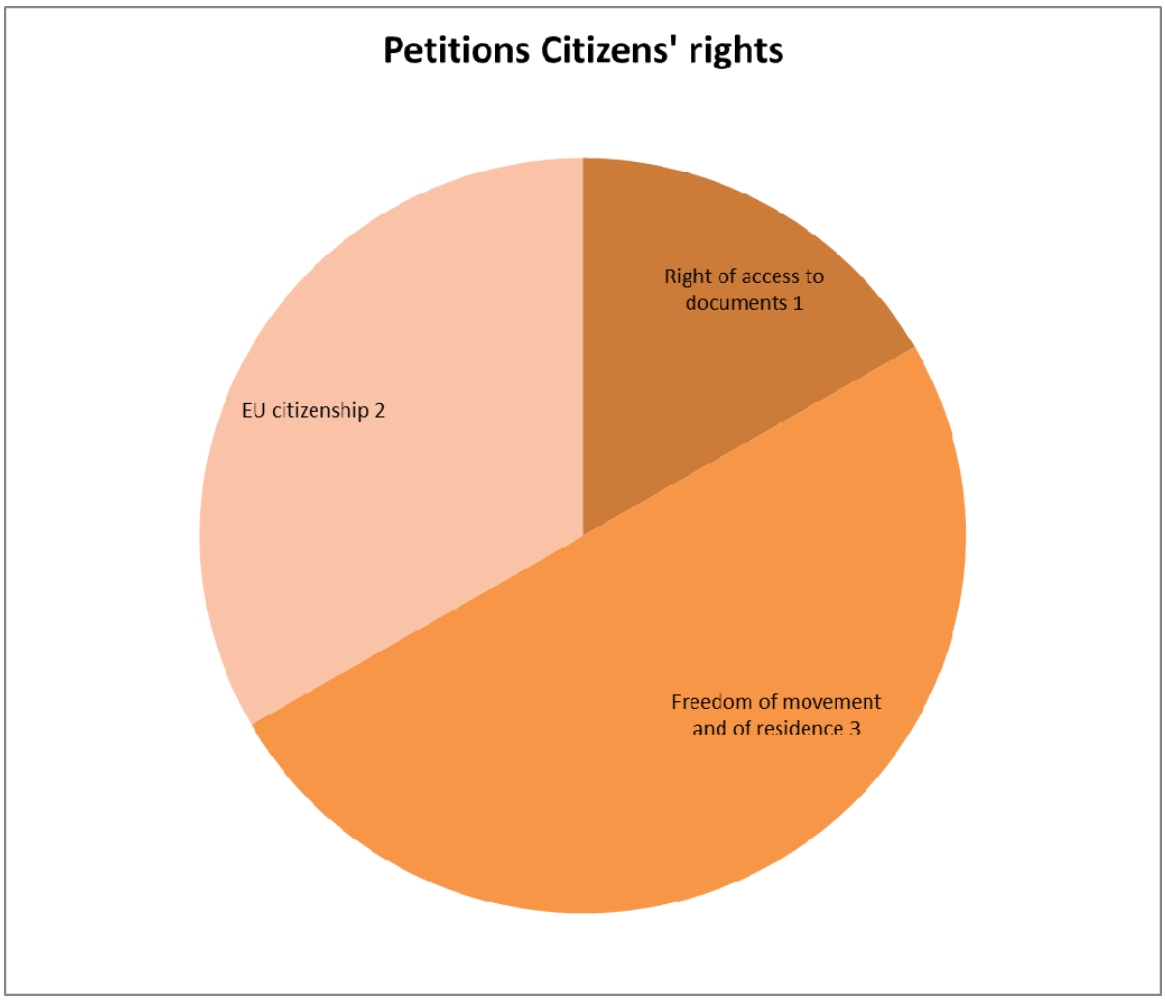
The Charter provides that any EU citizen and any natural or legal person residing or having its registered office in a Member State, has the right to refer to the European Ombudsman on cases of maladministration in the activities of the EU institutions, bodies, offices and agencies, with the exception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

In 2013, the Ombudsman was able to help more than 23 000 citizens. This includes individuals who complained directly to the European Ombudsman (2 420 complaints), those who received a reply to their request for information (1 407) and those who obtained advice through the interactive guide on the European Ombudsman's website (19 418).

Over 60 % of the complaints were within the competence of a member of the European Network of Ombudsmen, and 31 % fell within the European Ombudsman's mandate.[91]



[91] It is not possible to indicate how many users who were advised by the Interactive Guide to complain to the European Ombudsman actually did so, since the Interactive Guide does not require a login name and password in the way that the online complaint form does, and this for data protection reasons.



Article 45: Freedom of movement and residence

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

Legislation

Concerning the freedom of movement of workers, the European Commission proposed **measures facilitating the exercise of rights conferred on workers**[92] by introducing a legal obligation for Member States to provide workers who consider they have suffered or are suffering from unjustified restrictions to their right to free movement or consider themselves wronged by failure to apply the principle of equal treatment to them, with appropriate means of redress at national level. The proposal covers both judicial and extra-judicial means of redress, including alternative dispute settlement mechanisms such as conciliation and mediation. Ombudsmen and equality bodies or other similar structures may also provide an alternative to the general courts, in accordance with Article 47 of the Charter which encourages Member States where only administrative procedures are provided to ensure that any administrative decision may be challenged before a tribunal.

In 2005, the European Commission had submitted a proposal Directive on **facilitating free movement through better conditions for the acquisition and preservation of supplementary**

[92] Proposal for a Directive on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, COM(2013) 236 final. Available at: http://ec.europa.eu/social/BlobServlet?docId=10017&langId=en.

pension rights, and a revised proposal in 2007. The Council reached a general approach in June 2013. The trilogue concluded with a compromise agreement in November 2013, thus paving the way for the adoption of the Directive before the 2014 European elections. The agreed proposal provides that workers' occupational pension rights should be granted no later than after three years of employment relationship and preserved after they leave the pension scheme. Under the compromise agreement, the Directive would only apply to workers who move between Member States, however Member States may extend these standards also to workers who change jobs within a single country.

The European Commission also adopted a **proposal on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the EU**[93]. This proposal promotes the application of the Charter in particular by addressing the indirect discrimination of nationals of other Member States in comparison with own nationals; by promoting the right to move and reside freely within the territory of the Member States, to seek employment, to exercise the right of establishment and to provide services or conduct business in other Member States (Articles 45, 15 and 16 of the Charter). The proposal also positively impacts on the right to respect for private and family life, the right to marry and found a family, the right to property as well as on the rights of the child (Articles 7, 9, 17 and 24 of the Charter).

In order to achieve correct transposition and application of EU free movement rules across the EU the European Commission had launched infringement procedures against twelve Member States in 2011, followed by reasoned opinions in seven instances in 2012. In the course of 2013, two Member States adopted the provisions necessary to fully transpose the EU free movement rules, hence solving all the issues raised by the European Commission. The European Commission is closely monitoring progress in the remaining Member States.

Based on numerous individual complains and petitions received, the European Commission took action to ensure that nationals of other Member States residing in Malta are not **discriminated against on grounds of their nationality**. It raised in particular issues related to discriminatory treatment as regards access to reduced water and electricity tariffs and bus tariffs, treatment which creates an unacceptable obstacle to exercising the right to free movement and residence. The European Commission is also investigating other cases in which Maltese nationals have allegedly obtained preferential treatment in comparison with other EU citizens.

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

Within the scope of proceedings against Belgium aiming to ensure that children born in Belgium with one Belgian parent and one parent of another EU Member State can be registered with the **double surname** with which they are registered in the consulate of another EU Member State, Belgium has committed itself to amend its legislation. The European Commission is pursuing its dialogue with the Belgian authorities about the attribution of surnames to children born in Belgium where both parents are EU citizens from another Member State.

Spain promised to amend its legislation in response to the European Commission's request to ensure that **partners in a durable relationship** are able to enjoy their right of free movement.

After receiving numerous complaints from holders of **Swedish identity cards** prevented from travelling to an EU country outside the Schengen area on the basis of this document, the European Commission contacted the Swedish authorities who committed to amend their legislation to ensure that Swedish nationals can travel freely to any country within the EU with their national identity card.

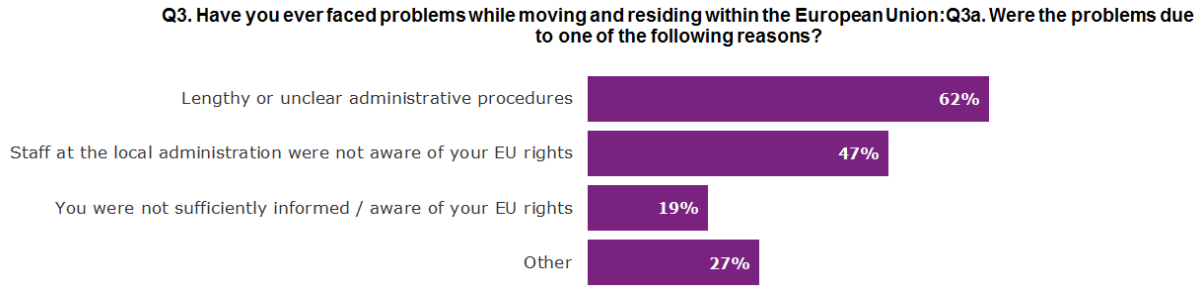
[93] Proposal of 24 April 2013 for a Regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012, COM(2013) 228 final. Available at: http://ec.europa.eu/justice/civil/files/com_2013_228_en.pdf.

Policy

In November 2013, the European Commission has adopted a Communication on Free Movement[94], which underlines the joint responsibility of Member States and the EU institutions to uphold EU citizens' rights to live and work in another EU country and outlines concrete actions to support Member States efforts to do so while helping Member States to reap the positive benefits it brings. The policy paper clarifies EU citizens' rights to free movement and access to social benefits, and addresses the concerns raised by some Member States in relation to the challenges that mobility can represent for local authorities.

Actions 3 and 10 of the 2013 EU Citizenship Report – lifting obstacles to free movement of persons

Almost one in five of the respondents to the 2012 public consultation on EU citizenship who used their right to free movement experienced problems, often due to lengthy or unclear administrative procedures. Another problem was that local administrations were not always aware of citizens' free movement rights.



Source: 2012 Public consultation on EU citizenship - Base: Respondents who faced problems while moving or residing in another EU country

The European Commission committed to further list obstacles to citizens' enjoyment of their rights to free movement and residence by developing an **e-training tool** enabling local administrations to fully comprehend free movement rights of EU citizens (action 10). It also announced solutions to remove obstacles faced by EU citizens and their family members in relation to **identity and residence documents** issued by Member States, including through optional uniform European documents for citizens, where applicable (action 3).

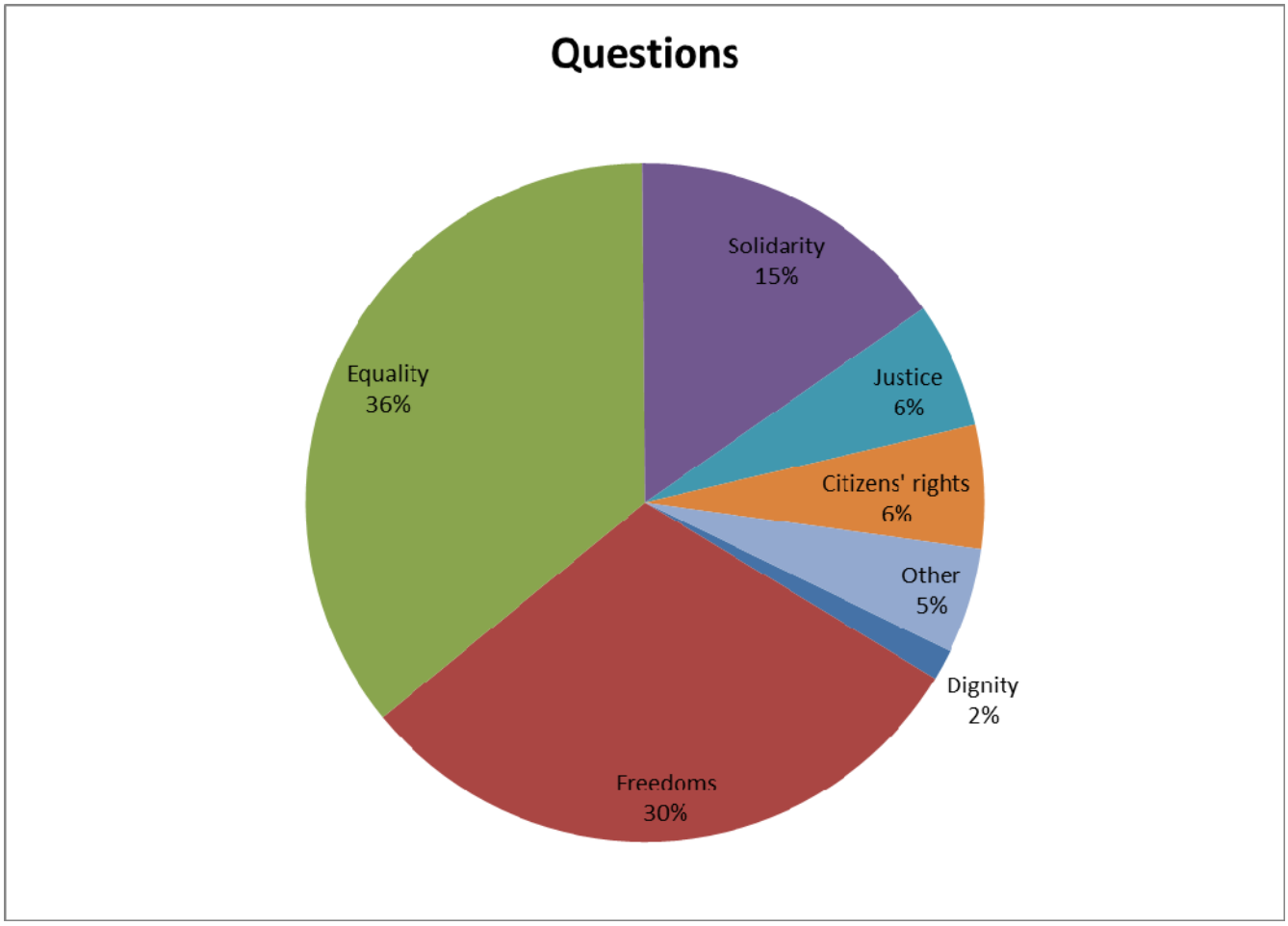
Article 46: Diplomatic and consular protection

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

Legislation

The **right of unrepresented Union citizens to enjoy the protection of the diplomatic or consular authorities of any Member State under the same conditions as for the nationals of that Member State** is enshrined in the Treaty on the Functioning of the EU (Article 20 (2) (c) and 23) and in the Charter (Article 46). The European Commission proposed on 14 December 2011 a set of clear and legally binding rules on cooperation and coordination between the Member States' consular authorities, with a view to ensuring that Union citizens enjoy effective consular protection, regardless of their nationality. The discussions on this proposal are still on-going in the Council.

[94] European European Commission, European European Commission upholds free movement of people, MEMO/13/1041, 25.11.2013, available at http://europa.eu/rapid/press-release_MEMO-13-1041_en.htm.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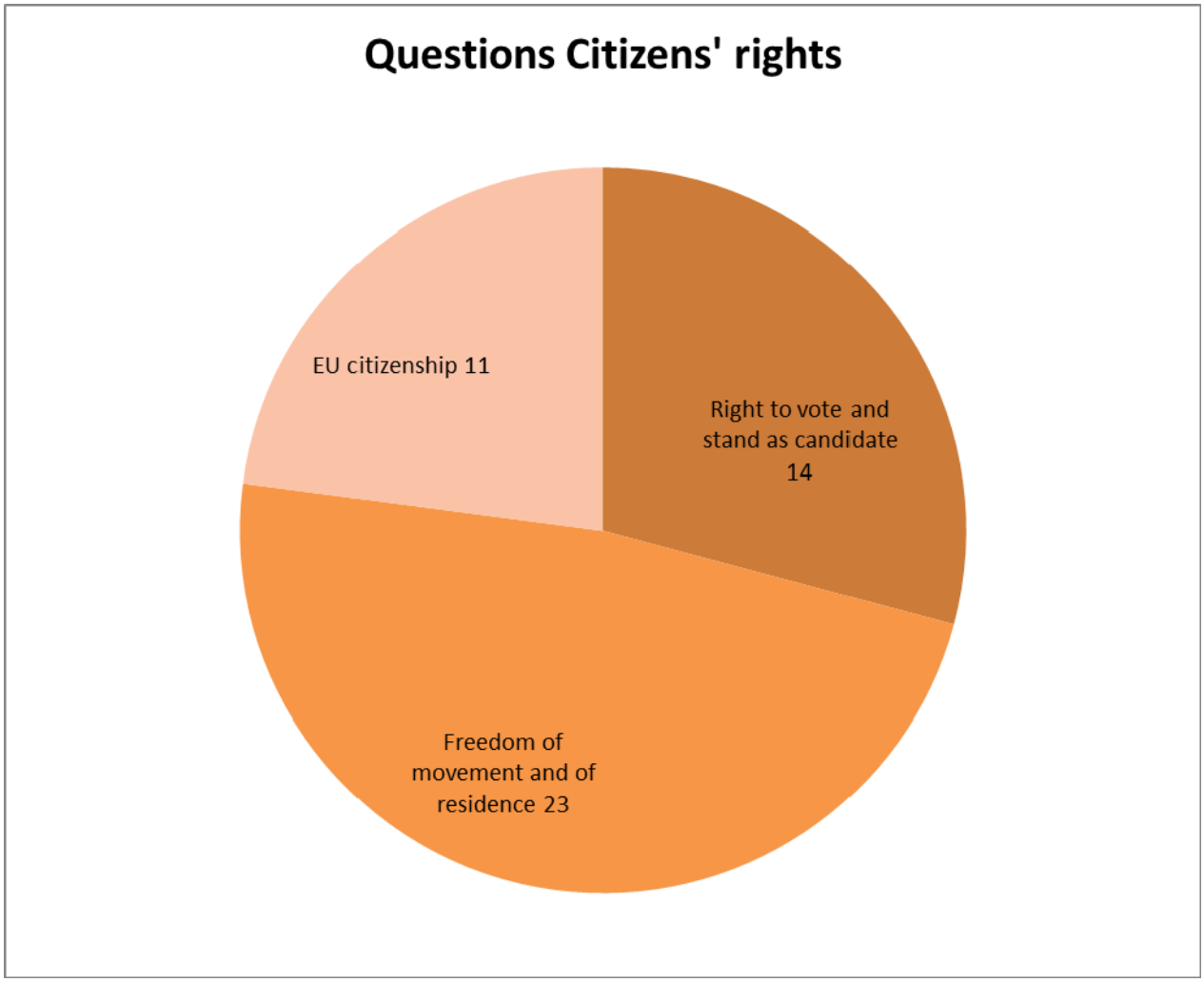

Questions Citizens' rights
EU citizenship 11
Right to vote and stand as candidate 14
Freedom of movement and of residence 23

6. Justice

Right to an effective remedy and to a fair trial

Presumption of innocence and right of defence

Principles of legality and proportionality of criminal offences and penalties

Right not to be tried or punished twice in criminal proceedings for the same criminal offence

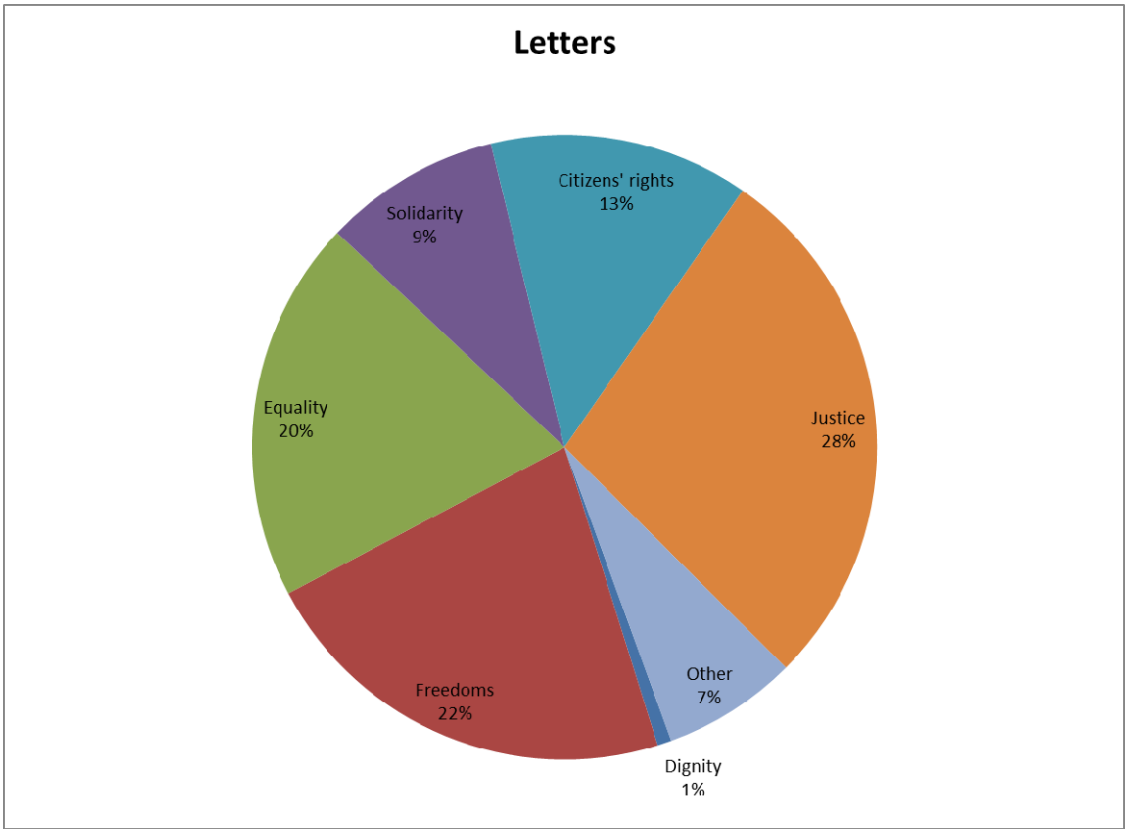
Following the analysis of the national implementation of the **Visa Code** on the right to appeal against a visa refusal/annulment/revocation, the European Commission raised a number of questions on the compatibility of national legislations with the provisions of the Visa Code and of the Charter. It concluded that the right to an effective remedy and to a fair trial, as enshrined in Article 47 of the Charter, requires that the appeal against a visa refusal, annulment or revocation, includes, as only or last instance of appeal, access to a judicial body. Letters of Formal Notice were sent to several Member States.

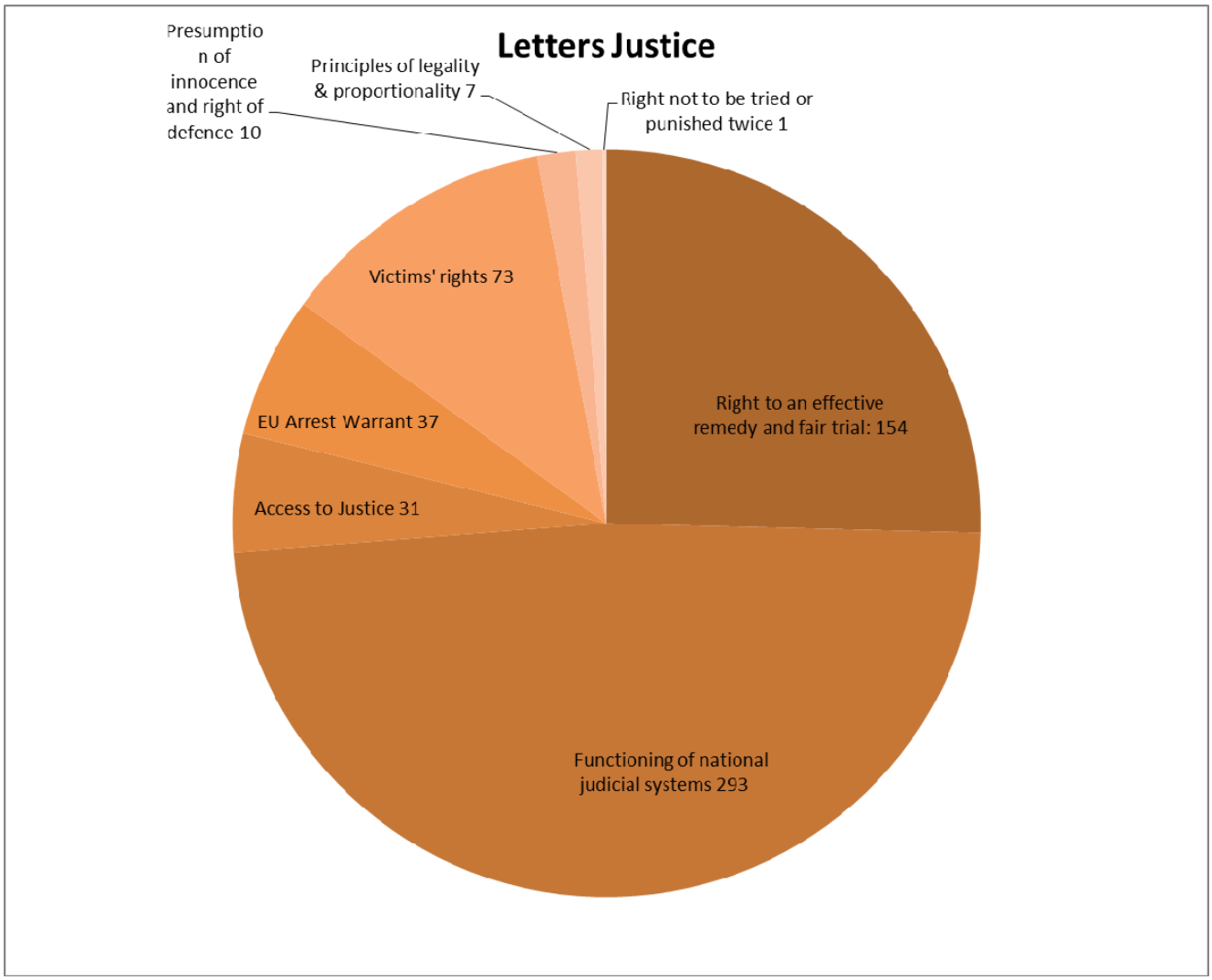
In November 2013, the European Commission has proposed a **procedural rights package** consisting of three directives and two European Commission recommendations. These **five legal measures** are to make further progress on the Procedural Rights Agenda and to strengthen the foundation for the European area of criminal justice**.**

The European Commission has also adopted a proposal for a Council Regulation on the establishment of a **European Public Prosecutor's Office (EPPO)**. The Charter constitutes the common basis for the protection of rights of suspected persons in criminal proceedings during the pre-trial and trial phase. The activities of the European Public Prosecutor's Office should in all instances be carried out in full respect of those rights.

The CJEU held in ***Åkerberg Fransson*** that the **right not to be tried or punished twice in criminal proceedings for the same offence** does not preclude a Member State from imposing, for the same acts, a combination of tax penalties and criminal penalties.

In the ***Melloni*** case, the CJEU confirmed that the fundamental constitutional principle of **primacy of EU law** also applies to the relationship between the Charter, on the one hand, and the national constitutional provisions on fundamental rights, on the other hand. A Member State may thus **not invoke a provision of its constitution, even if it ensures a higher level of protection of a fundamental right than the Charter**, as a ground for not applying a clear provision of EU law.




Letters Justice
Presumptio n of innocence and right of defence 10
Principles of legality & proportionality 7
Right not to be tried or punished twice 1
Victims' rights 73
EU Arrest Warrant 37
Access to Justice 31
Right to an effective remedy and fair trial: 154
Functioning of national judicial systems 293

Article 47: Right to an effective remedy and right to a fair trial

Article 47 of the Charter provides that when EU rules give a right to a person, he or she can go before a court in case this right is violated. This protection is called a **right to an effective remedy**, because it provides to individuals a legal solution decided by a tribunal when an authority used EU law in an incorrect way. The right to an effective remedy guarantees judicial protection against violations of any EU rule which grants rights to people. It therefore plays a key role in ensuring the effectiveness of all EU law, ranging from social policy, to asylum legislation, competition, agriculture, etc.

Article 47 of the Charter does not only provide a right to an effective remedy and to a fair trial, but it also stipulates that **legal aid** shall be made available to those who lack sufficient resources, in so far as such aid is necessary to ensure effective access to justice. This means that the right to effective access to justice cannot be hampered by the fact that a person cannot afford to take a lawyer.

The right to an effective remedy and to a fair trial as the Charter right most frequently referred to in national case law

Data collected by FRA shows that the right to an effective remedy and a fair trial was the Charter right most frequently referred to in national court rooms, accounting for 14% of all the references to the Charter which were analysed in 69 national judgments. This is in line with earlier findings, including the data collection by FRA of 2012.

Right to an effective remedy and a fair trial

Legislation

The EU legal framework on victim's rights was significantly reinforced by the adoption, of **a Regulation on mutual recognition of protection measures in civil matters**[95]**.** The Regulation establishes a simple and rapid mechanism for the recognition of protection measures ordered in a Member State in civil matters. With this Regulation, citizens (in most cases women who have restraining orders against someone) can be assured that the order obtained in their home country will have the same standing wherever they are in the EU.

The European Commission has launched infringement procedures against Poland on this matter as a result of which Poland has amended its Civil Procedural Code, and excluded the application of this notional service method in relation to addressees residing in other Member States. The amendment entered into force in August 2013.

After careful analysis of the information provided by Member States on the national implementation of the provisions of the **Visa Code** (Regulation (EC) No 810/2009) on the right to appeal against a visa refusal/annulment/ revocation, the European Commission raised a number of questions on the compatibility of the national legislation of several Member States with the provisions of the Visa Code and Article 47 of the Charter. The European Commission concluded that the right to an effective remedy and to a fair trial enshrined in Article 47 of the Charter requires that the appeal against a visa refusal, annulment or revocation, includes, as only or last instance of appeal, access to a judicial body. The European Commission considered that 6 Member States were not compliant with Article 47 of the Charter combined with the relevant articles of the Visa Code, as these Member States did not provide access to a judicial body. Letters of Formal Notice were sent to these Member States in early 2013. In reply to the European Commission's letter of formal notice, the Hungarian

[95] Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters (OJ L 181, 29.6.2013, p. 4).

authorities announced that they accept the European Commission's analysis and that they have decided to amend Hungarian law in order to introduce, as a last instance of appeal, access to a judicial body. The amending act introducing into Hungarian law the possibility for judicial review as a last instance of appeal against decisions to refuse/revoke/annul a Schengen visa has entered into force on 1 July 2013. Against this background, the European Commission decided to close the case. The initial replies from the 5 other concerned Member States stated their disagreement with the analysis made by the European Commission. These replies are currently under assessment.

The European Commission welcomed the adoption of the Fifth Amendment to Hungary's Fundamental Law which addressed the Commission's concerns as to the conformity of the Fourth Amendment with EU law. These concerns related in particular to the clause on European Court of Justice judgments entailing payment obligations and the clause giving powers to the president of the national office for the judiciary to transfer cases from one court to another. The Commission was concerned that these clauses could affect the **effective application of Union law** in Hungary and the fundamental rights of citizens and businesses to an **effective remedy by an independent court in Union law cases**, as guaranteed by Article 47 of the EU Charter of Fundamental Rights. These clauses have now been removed.

Case law

The EU has the possibility to take sanctions or restrictive measures which might impact on the fundamental rights of the addressee of these measures. In the *Kadi II*[96] appeal judgment, the Court clarified certain procedural rights of persons suspected to be associated with terrorism, such as the right to good administration and the right to an effective remedy and to a fair trial (Articles 41 and 47 of the Charter). The Court **ensured the protection of fundamental rights and freedoms whilst recognising the imperative need to combat international terrorism**. The assets of Mr Kadi had been frozen by the European Commission to implement a decision of the UN Sanctions Committee established by a resolution of the UN Security Council. The Court stated that, since no information or evidence had been produced by the European Commission to substantiate the allegations of Mr Kadi being involved in activities linked to international terrorism, roundly refuted by him, those allegations did not justify the adoption, at EU level, of restrictive measures against him.[97]

In a preliminary ruling regarding **costs of national judicial proceedings in EU environmental matters**[98], the CJEU clarified that the requirement under the EU Directive that the cost should be 'not prohibitively expensive' also concerns the respect of the right to an effective remedy under Article 47 of the Charter. The Court explained that in its assessment whether the national rules (in this case UK law) ensure effective judicial protection in the field of environmental law without excessive cost, the national court should not only look at the claimant's financial situation (subjective analysis), but should also carry out an objective analysis of the amount of the costs of litigation before national courts. The cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable. The national court may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime. The CJEU stated that the requirement under the EU directive that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking a review by the courts by reason of the financial burden that might arise as a result.

[96] CJEU, Case C-584/10 P *European Commission and Others v Kadi* (Kadi II), Appeal Case against T-85/09 *Kadi v European Commission* (Kadi I), 18.7.2013.

[97] See also the 2013 Report on the Application of the EU Charter of Fundamental Rights under 3.4 Control of the Court over the EU institutions.

[98] CJEU, Case C-260/11, *Edwards & Pallikaropoulos*, 11.3.2013.

In a preliminary ruling concerning **national court jurisdiction for disputes regarding EU agricultural aid**[99], the CJEU examined whether it is in accordance with Article 47 of the Charter if national jurisdictional rules confers all the disputes relating to decisions of a national authority responsible for the payment of agricultural aid under the common agricultural policy to a single national court. The CJEU looked into the length of proceedings before this specialised national court (in Bulgaria) and found that the average length of proceedings of six to eight months, in principle, does not appear excessive in the context of the single area payment scheme. The CJEU clarified that the fact that disputes are concentrated before the referring court allows that court to acquire specific expertise by ruling on issues relating to agricultural aid, thereby limiting the average length of the proceedings. In addition, a centralised court, specialising in agricultural aid, seems likely to ensure uniform practice throughout the national territory, thereby contributing to legal certainty. The CJEU noted that that a farmer who is challenging a decision of the national administration on agricultural aid, is not obliged to appear in person before this specialised court but can be represented by a lawyer, a relative or other persons. The CJEU concluded that Article 47 of the Charter does not preclude a national rule of jurisdiction conferring on a single court all disputes relating to EU agricultural aid, provided that court actions are not conducted in in less advantageous conditions to those under national aid schemes, and that jurisdiction rule does not cause individuals procedural problems, e.g. regarding the duration of the proceedings, such as to render the exercise of the rights derived from EU law excessively difficult.

In June 2013, the Austrian Administrative Court 'Unabhängiger Verwaltungssenat' has lodged a request for a preliminary ruling to the CJEU[100] on the interaction between the **transparency principle** under the 'Environmental Information Directive' 2003/4/EC and the **right to a fair trial** as stipulated in Article 47 of the Charter. The case is still pending.

In the *Alder* case[101] the CJEU held that a system for national domestic service of documents in cases where the party to be served resides in another Member State and has a known address there, is incompatible with the objective of protecting **the rights of the defence** envisaged in Regulation No 1393/2007. In this case, Polish procedural law required a representative in the forum Member State for purposes of serving judicial documents to parties residing in other Member States, and allowed the court as a sanction for not complying with this rule to use a notional service method, according to which judicial documents addressed to that party were placed in the case file and were deemed to have been effectively served.

Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters foresees the recognition and enforcement of judgments in civil and commercial matters in other Member States without *exequatur*, which is the procedure for recognition and enforcement of a judgment in another Member State. The question which arises in this context is if **automatic enforcement of a judgment** rendered in another Member State also has to take place, if this judgment was rendered in clear **violation of the right to a fair trial**. In a case of a judgment rendered against it in the UK, the company Trade Agency submitted a cassation complaint to the Latvian Supreme Court[102] complaining about the lower instance Latvian courts which had recognized a judgement of the Supreme Court the United Kingdom by default. The company claimed it did not receive the notification of the litigation process in the United Kingdom, which constituted a violation of the right to a fair trial. The Senate of the Supreme Court in Latvia referred two questions to the CJEU. It asked if the Latvian Court had a competence to review the evidence before recognizing the judgement under the Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. It also asked if the fact that the decision was given in default of appearance of the applicant was compatible with Article 47 of the Charter. The CJEU[103]

[99] CJEU, Case C-93/12, *Agrokonsulting*, 27.6.2013.

[100] CJEU, Case C-329/13, *Stefan*, case in progress.

[101] CJEU, Case C-325/11, *Krystyna Alder and Ewald Alder v Sabina Orlowska and Czeslaw Orlowski*, 19.12.2012.

[102] Civil Cases Department of the Senate of the Supreme Court (Latvijas Republikas Augstākās tiesas Senāta Civillietu departamenta), case No. SKC-1/2013. 13.2.2013

[103] CJEU, Case C-619/10, *Trade Agency*, 6.9.2012.

ruled that Regulation 44/2001 shall be interpreted in a way which (1) allows the court of the Member State where the judgement shall be enforced to crosscheck the evidence and (2) does only allow refusal of the enforcement of the judgement if it is clear from the context of the case that there is a violation of fair trial rights enshrined in Article 47 of the Charter.

Ruling of the Constitutional Court of the Slovak Republic[104]

A Slovak Arbitration Court ruled on a case in which the applicant claimed insurance payments. The Arbitration Court ruled in favour of the applicant. The executor then asked the district court to issue authorisation to launch distraint proceedings, which consist in the seizure of someone's property in order to obtain payment of a dept. When deciding on the case, the district court established the facts of the case anew, ignoring the case file of the Arbitration Court. Based on gathered evidence, it refused to schedule a hearing and adjudicated without the applicant's participation, rejecting the executor's motion for the commencement of distraint procedures. The case was brought to the Constitutional Court, which made reference to Directive 93/13/EEC on unfair terms in consumer contracts and to case law of the CJEU. The Constitutional Court pointed out that when implementing EU law the national court must respect the requirements of effective judicial protection of the rights that individuals derive from Union law, as guaranteed by Article 47 of the Charter. Among those requirements is the principle of *audi alteram partem*, which does not only confer on each party to proceedings the right to be apprised of the documents produced and observations made to the court by the other party and to discuss them, but it also confers a right on the parties to be apprised of pleas in law raised by the court of its own motion, on which it intends to base its decision, and to discuss them. The Constitutional Court thus confirmed the case law of the CJEU and decided that the lower courts were bound to ensure the protection of the applicant's right to be present when his case was tried and his right to deliver opinions on all pieces of evidence.

Right to legal aid

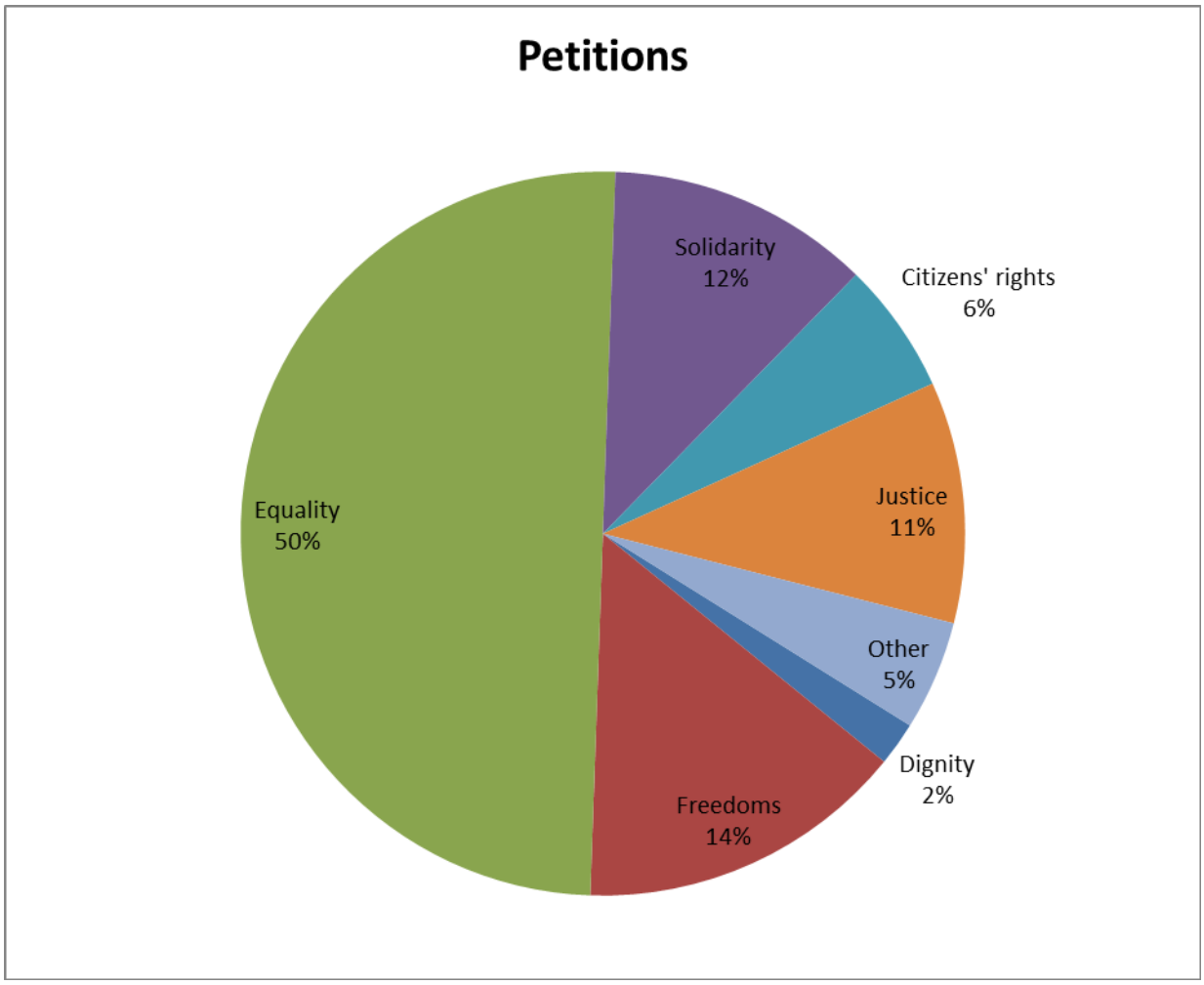
The main recurrent problem addressed by citizen's in their letters to the European Commission in regard to the right to legal aid as enshrined in Article 47 of the Charter is the restriction of the scope of Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes ('the legal aid directive') to civil and commercial matters, excluding administrative matters. The provisions of this directive apply to "cross-border" civil cases, in other words where the person requesting legal aid does not live in the Member State where the case will be heard or where the decision is to be enforced. In 2013, the European Commission has contacted 18 Member States via the EU Pilot communication system regarding their implementation of the legal aid Directive.

The European Commission's Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings, which forms part of the procedural rights package proposed in November 2013, is discussed below under Article 48 on the presumption of innocence and the right of defence.

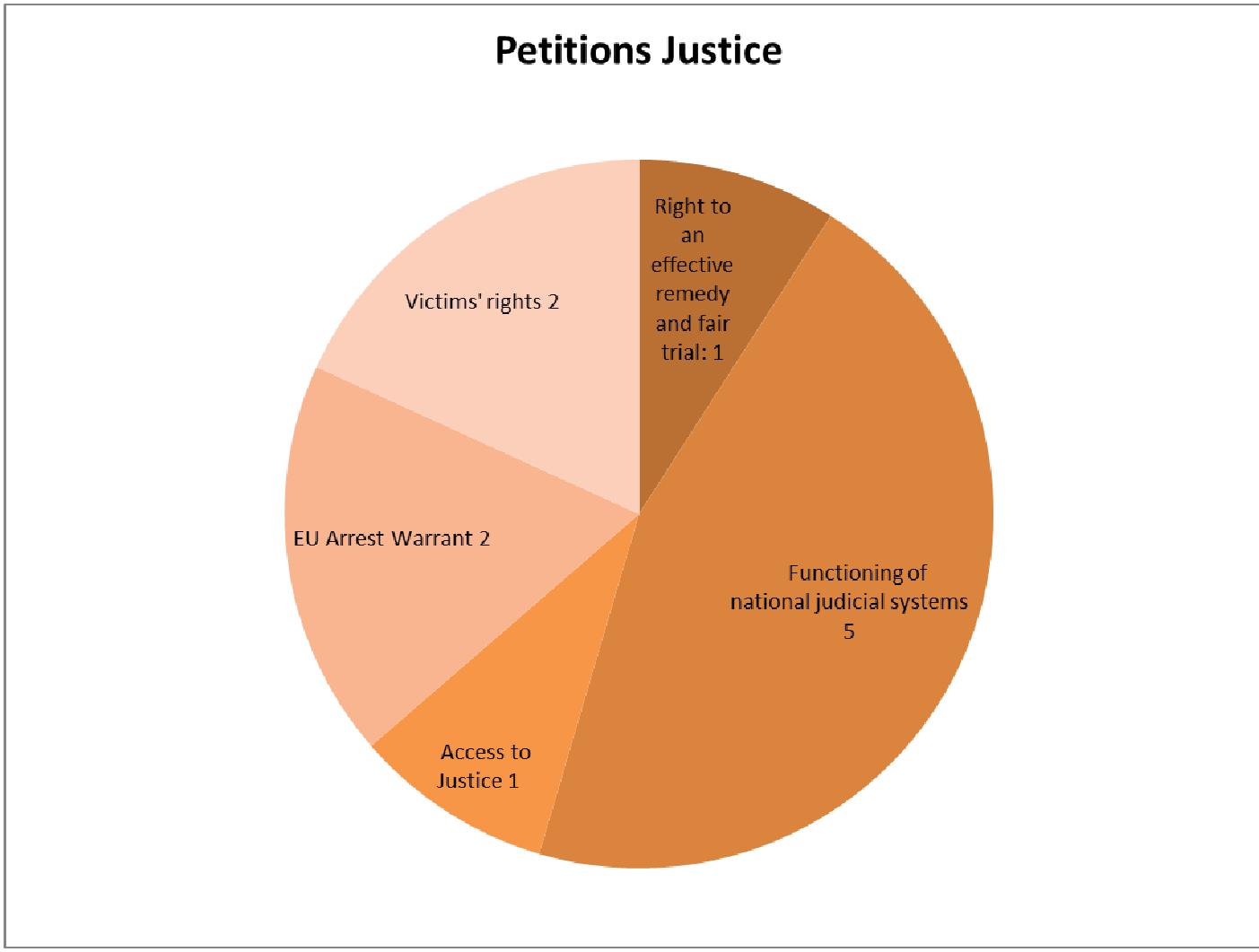
Ruling of the Supreme Administrative Court of Poland[105]

[104] Constitutional Court of the Slovak Republic (Ústavný súd Slovenskej republiky), case II. ÚS 499/2012-47, Company R v. Supreme Court of the Slovak Republic, 10.6.2013.

In this case the applicant initiated an appeal before the Regional Administrative Court. The Regional Administrative Court pointed out that the cassation complaint brought by the applicant did not contain the applicant's personal signature, but only contained the electronic signature. The applicant was asked to rectify this formal shortcoming; otherwise his cassation complaint would be rejected. The applicant refused, as he considered that he was authorized to use the electronic signature. When the case was brought before the Supreme Administrative Court it decided that the lack of procedural regulation for lodging pleadings signed with an electronic signature does not affect the right to access to a court under Article 47 of the Charter as neither this provision nor the CJEU provide for such procedural requirements. Although this is a purely internal matter and the Charter is not applicable, the Court used the Charter to check the legality of national law. The Supreme Administrative Court concluded that the adoption of appropriate procedural rules to allow enjoyment of the right to access to a court is left to the Member States, in accordance with the principle of procedural autonomy, and thus confirmed that the cassation complaint could be rejected due to formal shortcomings.



[105] Supreme Administrative Court of Poland (Naczelny Sąd Administracyjny), case II OZ 327/13, Minister of Economy, Labour and Social Policy v. applicant P.S., 1.8.2013.



Article 48: Presumption of innocence and right of defence

Article 48 of the Charter provides that everyone who has been charged shall be presumed innocent until proven guilty according to the law. It further specifies that respect for the right to defence of anyone who has been charged shall be guaranteed.

Safeguarding **procedural rights of suspect and accused persons** remains a priority of the European Commission. Both the Charter (especially Articles 47 and 48) and the ECHR (especially Articles 5 and 6) constitute the common basis for the protection of the rights of suspected or accused persons in criminal proceedings in the pre-trial and in trial stages.

Legislation

Mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards of procedural rights in criminal proceedings. It presupposes that the competent authorities of the Member States trust the criminal justice systems of the other Member States. Mutual trust will be greatly enhanced if Member States are confident that their neighbours have a criminal justice system that guarantees fair trials.

On 27 November 2013, the European Commission has proposed a **procedural rights package** consisting of three directives and two European Commission recommendations[106]. These **five legal measures** are to make further progress on the Procedural Rights Agenda and to strengthen the foundation for the European area of criminal justice**.**

First, the European Commission is proposing a directive on the **presumption of innocence**, as it should always be for the prosecution to prove a suspect is guilty, and not for the suspect to prove he is innocent. A suspect cannot be considered guilty if he was never given the chance to defend himself in trial by being present, and no one can infer guilt from a suspect's silence.

Second, the European Commission is proposing a directive on **special safeguards for children** involved in criminal proceedings. Children do not always understand the consequences of their actions. They should not be allowed to waive their right to a lawyer. Children should also benefit from a set of other safeguards such as prompt information about their rights, assistance by their parents or another appropriate adult, recording of interviews and specific protection in case of deprivation of liberty. All these measures should enable children to exercise their right to a fair trial, to prevent re-offending and foster their social reintegration. Through the European Commission Recommendation on procedural safeguards for **vulnerable persons** suspected or accused in criminal proceedings, the European Commission is asking **Member States to provide a set of similar safeguards to vulnerable suspects** such as persons with a disability or mental impairment.

Third, the European Commission is proposing a **Directive on provisional legal aid** for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, which will cover the early stages of proceedings, when suspects are deprived of liberty and thus in most need of help. The European Commission wants to make sure any suspect under a European Arrest Warrant has access to legal aid in both the country of issuance and the country of execution. The European Commission in its Recommendation on the right to **legal aid** for suspects or accused persons in criminal proceedings is also recommending to Member States to take into account common objective criteria when assessing if a person is eligible for legal aid. The European Commission recommendation clarifies the case-law and promotes convergence between the different legal systems with a view to strengthening mutual trust.

Another important step in safeguarding procedural rights in the EU was the adoption of the **Directive on the right of access to a lawyer and to have a third party informed upon deprivation of liberty**[107]. With this landmark Directive, all suspects are guaranteed the right to be advised by a lawyer (including confidential meetings and allowing the lawyer to play an active role) from the earliest stages of proceedings (including at police questioning) until their conclusion. Where a suspect is arrested, the Directive also ensures that the person has the opportunity to communicate with the family. If they are outside of their home country, citizens have the right to be in contact with their country's consulate.

The provisions of the Charter are taken into account in new legislation proposed by the European Commission, and during the revision processes of existing legislation. Examples of the mainstreaming of procedural rights as enshrined in the Charter are the proposal on the European Public Prosecutor's

[106] COM(2013) 821, 822 and 824, 27.11.2013, and COM(2013) 8178 and 8179, 27.11.2013.

[107] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 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.

Office[108], the revised Eurojust regulation[109], the new OLAF regulation[110], and the negotiations on the confiscation and recovery of criminal assets.[111]

On 17 July 2013 the European Commission adopted a proposal for a Council Regulation on the establishment of a **European Public Prosecutor's Office (EPPO)**. Its exclusive task will be to investigate and prosecute and, where relevant, bring to judgment – in the Member States' courts - crimes affecting the EU budget. The European Public Prosecutor's Office will be an independent institution, subject to democratic oversight. The proposal includes a robust and comprehensive set of procedural safeguards, which will ensure that the rights of suspects and other persons involved in the European Public Prosecutor's investigations will be protected both by existing EU legislation and by national defense rights. The proposal clarifies that the suspected person has all rights granted by EU legislation and the Charter. These rights are listed explicitly, and include the rights to:

- interpretation and translation,
- information and access to the case materials,
- access to a lawyer and to communicate with and have third persons informed in case of detention,
- remain silent and to be presumed innocent,
- legal aid,
- present evidence, appoint experts and hear witnesses.

In addition, the suspected person has the defense rights granted by the national law governing the procedure. The Commission's proposal on the establishment of the EPPO contributes to the strengthening of the protection of the Union's financial interests and the further development of an area of justice, and to enhance the trust of EU businesses and citizens in the Union's institutions, while respecting all fundamental rights enshrined in the Charter. The Charter constitutes the common basis for the protection of rights of suspected persons in criminal proceedings during the pre-trial and trial phase. The activities of the European Public Prosecutor's Office should in all instances be carried out in full respect of those rights. This basic principle is enshrined in Articles 11 and 32 of the Commission's proposal. Furthermore, the respect of the Charter is one of the key criteria for the admissibility of evidence collected by the EPPO, as reflected in Article 30 of the proposal.

The reform of **Eurojust**, which has taken the form of a draft Regulation replacing the current Eurojust Council Decision, takes full account of the Charter. An explicit reference to the compliance with the Charter has been included in recital 8 of the proposal. Specific provisions have been included to deal with the processing of personal data, and the supervision over that processing has been entrusted to the European Data Protection Supervisor.

A new **Regulation 883/2013 concerning investigations conducted by OLAF[112]** has been adopted in September 2013 and entered into force in October 2013. It provides for specific procedural guarantees of the persons subject to OLAF investigations. Although OLAF conducts purely

[108] Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534.

[109] Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust), COM(2013) 535.

[110] Regulation No 883/2013 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, p. 1, 18.09.2013.

[111] Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union, COM(2012) 85.

[112] Regulation No 883/2013 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, p. 1, 18.09.2013.

administrative investigations, a set of rights and guarantees for the person subject to investigations applies. These include: the presumption of innocence, the right to avoid self-incrimination, the right to be assisted by a person of his choice, the right to obtain a copy of the interview records, and the right to be given an opportunity to comment before conclusions of the investigation are drawn up.

Data Protection during computer forensic examination by the European Anti-Fraud Office OLAF

The European Data Protection Supervisor (EDPS) has received several complaints about the manner in which OLAF had conducted an investigation and an on-the-spot inspection, including a forensic examination of digital media, in an EU institution. The EDPS examined the matter and concluded that OLAF's execution of the digital forensic examination complied with data protection requirements.

The Staff Working Document on the Application of the Charter in 2012 has already highlighted that the European Commission conducted a thorough impact assessment and held extensive internal consultations in order to ensure that all provisions of the proposal for a **Directive on the confiscation and recovery of criminal assets in the European Union**[113] fully respect fundamental rights. The Directive aims at attacking the financial incentive which drives most serious and organised crime, at protecting the EU economy against infiltration by criminal groups, and at returning criminal assets to governments and citizens. It lays down minimum rules for Member States with respect to freezing and confiscation of criminal assets through direct confiscation, value confiscation, extended confiscation, non-conviction based confiscation and third-party confiscation. Non-conviction based confiscation procedures allow the freezing and confiscation of property irrespective of a prior conviction of its owner in a criminal court, and third-party confiscation involves the confiscation of assets that have been transferred by an investigated or convicted person to a third party. In order for the presumption of innocence and the rights of defence of the person whose assets are confiscated to be respected, the introduction of harmonised non-conviction based confiscation provisions is foreseen only for very limited circumstances, that is where the defendant cannot be prosecuted due to death, illness or flight. Extended confiscation is allowed only to the extent that a court finds, based on specific facts, that a person convicted of an offence is in possession of assets which are substantially more probable to be derived from other similar criminal activities than from non-criminal activities. The convicted person is given an effective possibility of rebutting such specific facts. Moreover, the extended powers of confiscation cannot be applied to the alleged proceeds of criminal activities for which the affected person has been acquitted in a previous trial, or in other cases where the *ne bis in idem* principle applies. Third party confiscation is allowed only under specific conditions, that is where the acquiring third party paid an amount lower than market value and should have suspected that the assets are proceeds of crime, and after an assessment showing that confiscation of assets directly from the person who transferred them is unlikely to succeed. Finally, specific safeguards and judicial remedies are included in the proposal in order to ensure an equal level of protection and respect for fundamental rights. These include the right to be informed about the proceedings, the right to be represented by a lawyer, the obligation to communicate any decision affecting property as soon as possible and to have an effective possibility to appeal against such decision. These specific remedies are foreseen not only for accused or suspected person but also for other persons in the context of third party confiscation. The proposal is currently being discussed in the European Parliament..

Policy

The **European Commission continues to give financial support for the training of legal practitioners on fundamental rights,** following the ambitious targets set in 2011 for expanding training for legal

[113] Proposal for a Directive on the confiscation and recovery of criminal assets in the European Union, COM(2012) 85 final, 12.03.2012.

practitioners in Europe on how to apply European law[114]. During 2013, throughout the EU, training activities on EU fundamental rights were organised for legal practitioners (judges, prosecutors, lawyers, notaries, court staff, bailiffs, mediators). Around 9 % of all training activities on EU law topics had their main EU component on EU fundamental rights issues. It should be noted though that there are differences among the Member States: half of the activities reported to the European Commission were organised in only 4 Member States.

Case law

The EU institutions in a number of cases, irrespective of the existence of UN Security Council resolutions, have adopted decisions and regulations freezing the funds of persons and entities identified by the EU institutions as involved in nuclear proliferation. Some of the persons and entities concerned brought actions for annulment. They considered that the EU institutions had not respected their rights of defence, as the reasons for the restrictive measures had not been revealed to them, so they could not refute the allegations. In a series of judgments[115] the General Court annulled the acts of the EU institutions as regards several of the applicants. It found that the EU institutions had not produced enough evidence to justify the measures taken, and in certain cases that the EU institutions had breached the obligation to state reasons and disclose evidence.[116]

Article 49: Principles of legality and proportionality of criminal offences and penalties

Some fundamental rights are guaranteed in absolute terms and cannot be subject to any restrictions. Interferences with other rights may be justified if, subject to the principle of proportionality, they are necessary and genuinely serve to meet objectives of general interest recognised by the Union. Such justification is provided for in the proposal of the European Commission on the protection of the euro and other currencies by criminal law[117]. In particular the right to liberty (Article 6), the respect for private and family life (Article 7), the freedom to choose an occupation and right to engage in work (Article 15), the freedom to conduct a business (Article 16), the right to property (Article 17), the right to an effective remedy and a fair trial (Article 47), the presumption of innocence and the right of defence (Article 48), the principles of legality and proportionality of criminal offences (Article 49), the right not to be tried and punished twice (Article 50) were assessed by the European Commission in relation to the proposed criminal law measures. It was concluded that the proposed measures would affect these fundamental rights, but that these interferences with fundamental rights are justified because they serve to meet objectives of general interest recognised by the Union, in this case to provide effective and deterring measures for the protection of currencies.

Article 50: Right not to be tried or punished twice in criminal proceedings for the same criminal offence

The *ne bis in idem* principle is one of the cornerstones of criminal law and is based on the principle that no one shall be held liable to be tried or punished again in criminal proceedings for an offence

[114] European Commission Communication: Building trust in EU-wide justice, a new dimension to European judicial training, COM(2011) 551 final, available at: http://ec.europa.eu/justice/criminal/files/2011-551-judicial-training_en.pdf

[115] General Court, joined cases T-35/10 and T-7/11 *Bank Melli Iran*; Case T-493/10 *Persia International Bank plc*; joined cases T-4/11 and T-5/11 *Export Development Bank of Iran*; T-12/11 *Iran Insurance Company*; T-13/11 *Post Bank Iran*; T-24/11 *Bank Refah Kargaran*; T-434/11 *Europäisch-Iranische Handelsbank AG*; joined cases T-42/12 and T-181/12 *Naser Bateni*; T-57/12 *Good Luck Shipping*, and Case T-110/12 *Iranian Offshore Engineering & Construction Co. v Council,* 6.9.2013.

[116] See also the 2013 Report on the Application of the EU Charter of Fundamental Rights under 3.4 Control of the Court over the EU institutions.

[117] Proposal for a Directive on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, COM (2013)42 final, 5.02.2013.

for which he or she has already been finally acquitted or convicted. Article 50 provides that criminal laws should respect this.

Legislation

The European Commission has advanced in negotiations on the proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law[118]. The Union's financial interests can be protected by both administrative and criminal sanctions. Both types of sanctions co-exist at EU level. Severe administrative sanctions may be considered punitive in nature. In that case, the imposition of such 'administrative' alongside criminal sanctions for the same offence upon the same offender violates the right not to be tried or punished twice in criminal proceedings for the same criminal offence under Article 50 of the Charter. The proposal clarifies the relation between penalties under that directive and other relevant administrative measures under Union law and requires full respect for the right not to be punished twice.

Case law

In *Åkerberg Fransson*[119], the Haparanda District Court in Sweden was uncertain whether criminal proceedings for tax evasion could be brought against a defendant where a tax penalty had already been imposed upon him for the same acts of providing false information. It referred the question to the CJEU whether this practice is in line with the fundamental right not to be tried or punished in criminal proceedings twice for the same offence. The CJEU observed that with regard to the principle preventing a person from being punished twice, this principle does not preclude a Member State from imposing, for the same acts, a combination of tax penalties and criminal penalties. It is only if the tax penalty is criminal in nature and has become final, that the principle preventing a person from being punished twice will preclude the bringing of criminal proceedings for the same acts. In the case at stake, the administrative penalties were held to be criminal in nature and therefore are not applied any more by Sweden in combination with criminal law sanctions when punishing the same act.

Whereas the CJEU in the present case pronounced on the compatibility with the Charter of the Swedish tax penalties and criminal proceedings for tax evasion in relation to the EU rules on indirect tax, notably VAT, the CJEU did however not rule on the legality of the parallel imposition of tax penalties and criminal proceedings as concerns direct tax, including income tax, since this is not regulated at Union level. In NJA 2013 s. 502, the Swedish Supreme Court has, in a case of similar circumstances, extended the reasoning of the *Åkerberg Fransson* judgment to a case of imposition of tax penalties and criminal proceedings in the area of income tax. In this judgement, where the Court had to assess the obligation to respect the principle of *ne bis in idem* under the European Convention of Human Rights (ECHR) it was concluded that the meaning of article 50 of the Charter and the corresponding rule in article 4 of the ECHR protocol 7, should be given the same interpretation and that, in any event, Article 4 of the protocol should not entail a lower level of protection than Article 50 of the Charter. It would thus appear that the Swedish Supreme Court referred to the CJEU interpretation of a Charter provision, in order to establish the level of protection of a corresponding provision in the ECHR.

The Charter is both invoked by the parties as well as by the judge of his own motion in national proceedings

Data collected by FRA shows that in approximately half of the national cases where the Charter is mentioned (out of 69 national judgments analysed), the Charter was invoked by the

[118] Proposal for a Directive on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012) 363 final. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0363:FIN:EN:PDF.

[119] CJEU, Case C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, 26.02.2013. For a discussion on the applicability of the Charter in this case, see the 2013 Report on the Application of the Charter of Fundamental Rights, under 2. Applicability of the Charter to the Member States.

parties in the proceedings. In the other half of the cases the Court raised the Charter as a legal argument of its own motion. This shows that the national courts are not only reacting to Charter related arguments brought forward by the parties but rather take a proactive approach by using the Charter as a legal source of their own motion.

Article 53: Level of Protection

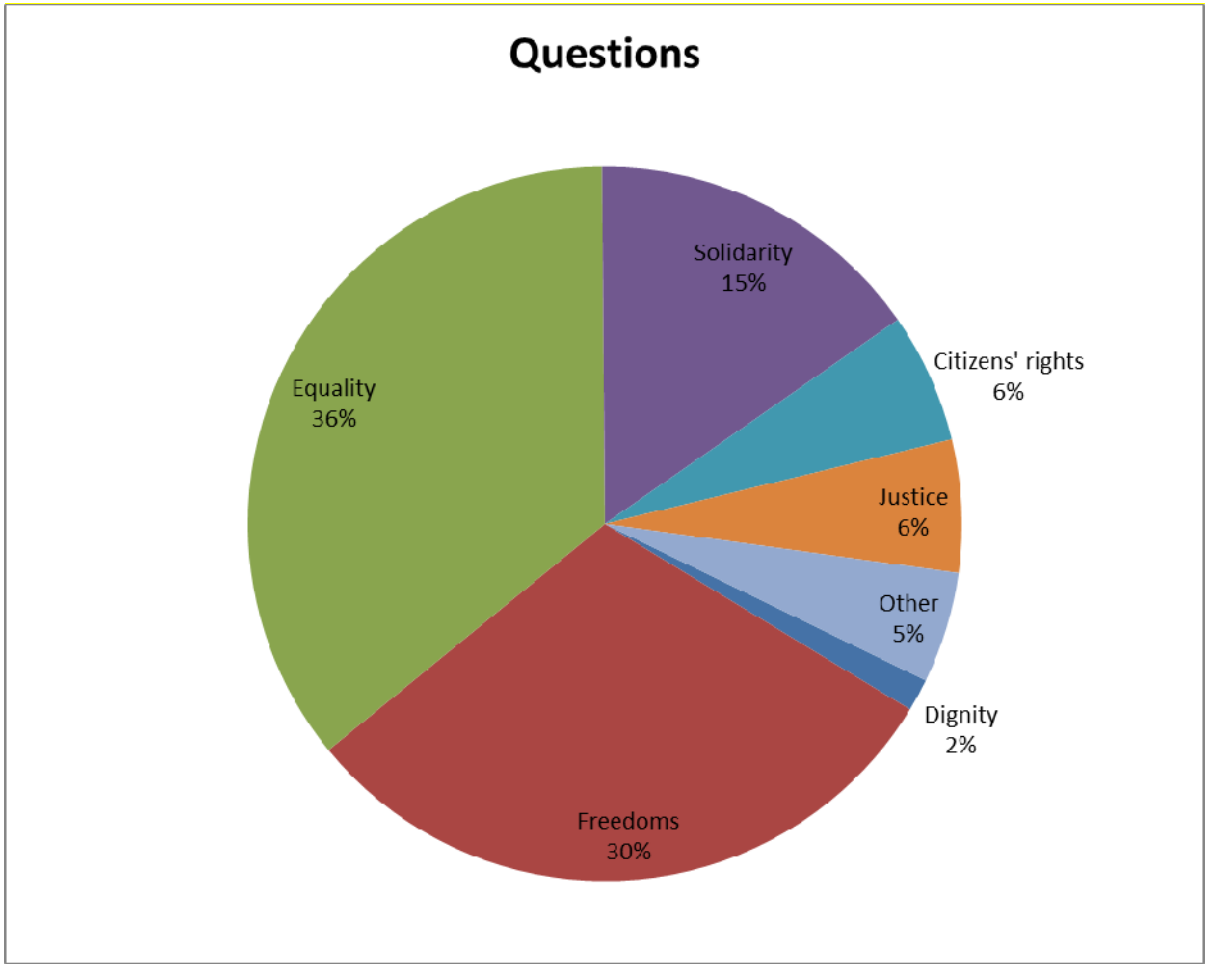
Article 53 of the Charter stipulates that the Charter shall not be interpreted in such a way as to restrict human rights and fundamental freedoms as recognised in the Member States' constitutions, by Union law, by international law, and by international agreements to which the Union or all the Member States are a party. This provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law.

Case law

In the *Melloni* case[120], the CJEU was asked if a Member State could make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State. Mr Melloni had been sentenced in absentia in Italy to 10 year's imprisonment for bankruptcy fraud. Following his arrest by the Spanish police, he opposed surrender to the Italian authorities. He contended that under Italian procedural law it is impossible to appeal against sentences imposed in absentia. He argued that the execution of the European arrest warrant issued against him should be made conditional upon Italy's guaranteeing the possibility of appealing against the judgment. He based his argument on Art. 47 of the Charter, the right to an effective remedy and to a fair trial, and on Art. 53 of the Charter, arguing that the Charter should be interpreted in the light of the provisions of the Spanish constitution, which foresees the possibility of judicial review of convictions.

The CJEU held that the Framework Decision on the European arrest warrant reflects the consensus reached by all the Member States regarding the scope of the procedural rights enjoyed by persons convicted in absentia who are subject to the European arrest warrant. Although the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that right is not absolute. To make the surrender of a person subject to a condition not provided for under the Framework Decision would undermine the principles of mutual trust and recognition which that decision purports to uphold and would compromise its efficacy. The Court also confirmed that the fundamental constitutional principle of primacy of EU law also applies to the relationship between the Charter, on the one hand, and the national constitutional provisions on fundamental rights, on the other hand. A Member State may thus not invoke a provision of its constitution, even if it ensures a higher level of protection of a fundamental right than the Charter, as a ground for not applying a clear provision of EU law.

[120] CJEU, Case C-399/11 *Stefano Melloni v Ministerio fiscal*, 26.02.2013.


Questions
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Citizens' rights
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Justice
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Other
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Dignity
2%
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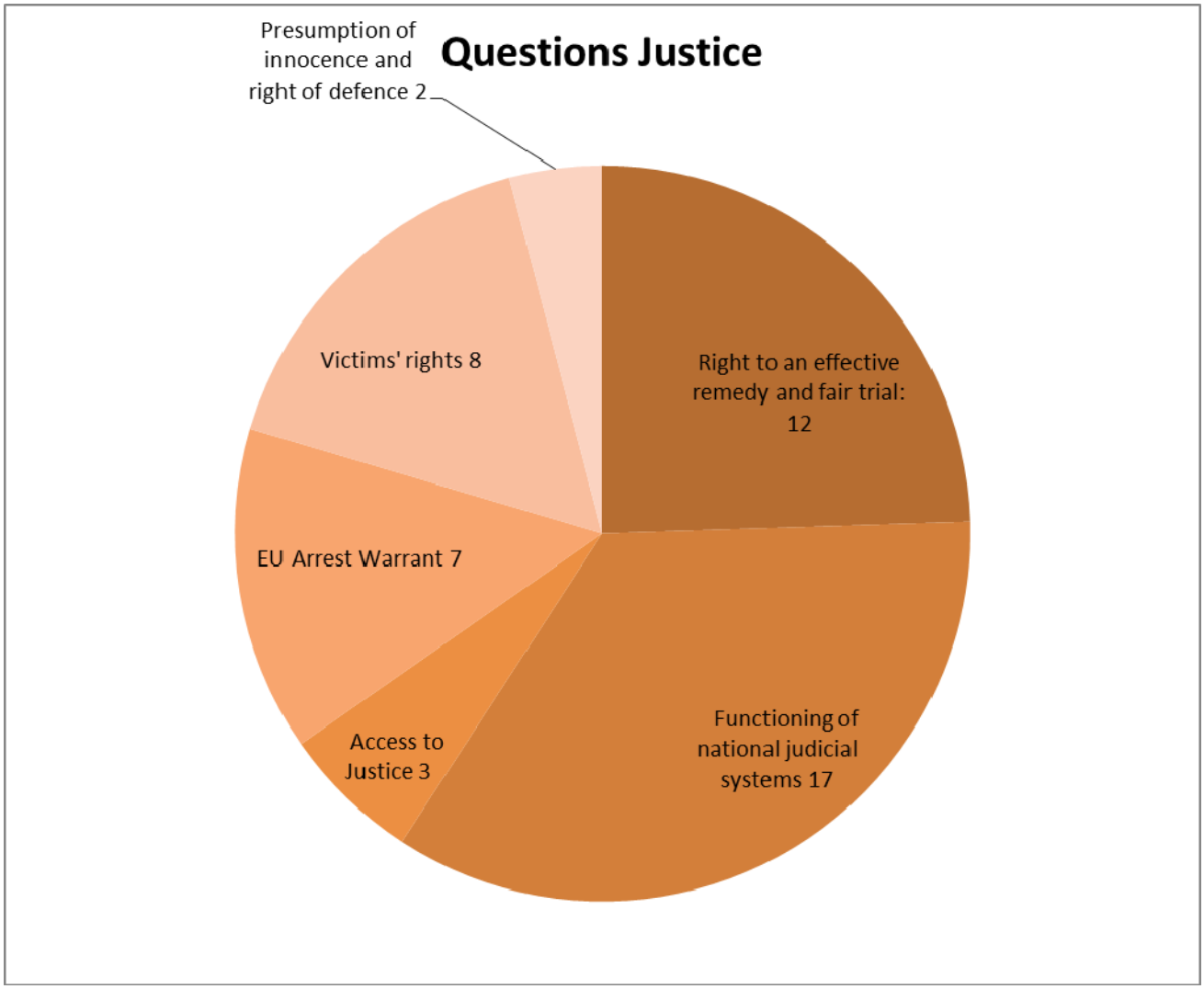
Questions Justice
Presumption of innocence and right of defence 2
Victims' rights 8
Right to an effective remedy and fair trial: 12
EU Arrest Warrant 7
Access to Justice 3
Functioning of national judicial systems 17