



BEUCITIZEN
BARRIERS TOWARDS EU CITIZENSHIP

**Report on mechanisms transposing and enforcing
civil rights aiming at identifying barriers that EU
citizens and third-country nationals face in
gaining (cross-border) access to justice in
selected EU Member States**

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D7.2 Report exploring the mechanisms for
enforcing civil rights with a view to identifying
the barriers

Version

1.0

Date Due

31 July 2015

Submission date

29 July 2015

Work Package

7 – Civil rights

Lead Beneficiary

12 -- CEU

Dissemination Level

PU



Grant Agreement Number 320294
SSH.2012.1-1



Change log

Version	Date	amended by	changes
1.0	29.07.2015	Orsolya Salát	Final paper delivered

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EXECUTIVE SUMMARY

Civil rights' standards, whether they derive from international, European (European Convention on Human Rights and European Union), or constitutional law, are meaningless if not supplemented by an institutional environment and procedural devices which secure their effective exercise and protection. To identify barriers which EU citizens face when trying to enjoy their civil rights (eg the right to protection of personal data, due process rights, freedom of religion, freedom of expression, right to private and family life, freedom of religion, right to property, etc), one must therefore investigate the modalities of implementation and enforcement of civil rights. Diverse mechanisms, whether judicial or not, exist at different levels. The range of tools which individuals and those who help them (in particular civil society organizations, and in some policy fields, specialised independent authorities) can activate to protect civil rights on the territory of the EU is on paper impressive. Whether they provide for the effective realization of civil rights in practice requires, however, further empirical investigation. The determination of the most appropriate course of action depends on the rights involved, their sources, the author of measures or practices that threaten them, institutional structures, and other more practical considerations (information, resources, location, language issues, time, etc).

This report (Deliverable 7.2) analyses the way specific civil rights are protected in selected Member States (Belgium, the Czech Republic, Denmark, France, Hungary, Italy, the Netherlands, Spain and the United-Kingdom), with a focus on implementation and enforcement aspects. It is based on answers, for the selected Member States, to a two-part questionnaire, which enquired about the protection of civil rights first within the scope of application of EU law, and, second, in matters which do not necessarily have an EU law connection, but nonetheless affect the way EU citizens, whether mobile or not, can exercise their civil rights.

In the first part, after having outlined the range of procedural remedies available at various levels, the report examines how EU instruments which grant specific civil rights, such EU Data Protection and e-Privacy Directives, are actually transposed and enforced in the respective Member States. It then reviews the application of EU Regulations on the allocation of competence and mutual recognition of judicial decisions in civil and commercial matters, the Brussels I and II bis Regulation, to check to what extent they contribute to ensure EU citizens' and other individuals' right to an effective remedy across borders, whilst respecting due process requirements, or the right to family life. Furthermore, it critically assesses the implementation and application of EU instruments in the field of criminal cooperation, in particular the



Framework Decision on the European Arrest Warrant, with regard to the remedies which individuals can activate to safeguard their due process rights, or their right to family life or not to be subject to torture or inhuman or degrading treatment. It also examines to what extent compensatory harmonization measures in criminal procedure, in the way they have been implemented so far, can address those concerns.

In the second part, the report screens through, and draws conclusions on, the effective realisation of specific civil rights, the enforcement of which has been highlighted by the country experts as particularly problematic.

The findings suggest that civil rights standards in the EU are generally satisfactory, and remedies well-developed in most Member States. However, some barriers arise from the narrow scope of protection afforded to certain rights in some of the Member States, with the result that EU citizens, depending on where they live, are not equally protected; this is problematic for the notion of EU citizenship, since the right to equal treatment before the law is a core citizen's right. Furthermore, judicial decisions which rule legislative provisions incompatible with civil rights standards are not always followed up by necessary legislative amendments, or at least changes in administrative practices, which de facto deprives citizens from the enjoyment of their rights. Further barriers results from difficulties in accessing appropriate remedies in case of (imminent) violations, in particular in political and institutional environments in which checks and balances do not operate properly, and political expediency takes the upper hand. Limits in the availability of emergency or interim proceedings, legal aid, or NGO support create serious hindrance in litigating for civil rights. There is evidence of adjustments mechanisms between remedies at different levels, which citizens seeking protection and civil rights organisations can resort to; however, these do not play out across the board, with the consequences that deficiencies remain.



LIST OF ABBREVIATIONS

Charter, EU Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
FRA	Fundamental Rights Agency



INTRODUCTION: FROM RIGHTS TO REMEDIES TO BARRIERS...

Civil rights are core citizenship rights. The report on the first task of Work package 7 (Deliverable D.7.1) identified which civil rights European Union (EU) citizens, as EU citizens but also citizens of a EU Member State, and also non-citizens who find themselves on the territory of the EU, legally enjoyed in selected Member States. Individuals in the EU derive civil rights from various legal sources, at international, regional, supranational and national level. These rights and their scope of protection constantly evolve as a result of interactions between different human rights legal orders, in particular the European Convention on Human Rights (ECHR), EU human rights norms (ie the EU Charter of Fundamental Rights, the general principles of EU law and EU legislation protecting civil rights), and national norms (ie constitutional or legislative provisions, or case law), as well as through cross-fertilization between national legal systems. The D7.1 report nonetheless outlines that the main point of reference for civil rights protection remains the domestic level, although there are variations across Member States in terms of their openness to European and international norms. The ECHR and the European Court of Human Rights' (ECtHR) case law are gradually becoming more influential in the definition and content and scope of specific rights. EU law, in particular the EU Charter of Fundamental Rights, plays a more marginal role, except where core EU citizenship rights, such as the right to move and reside in another Member State, or specific EU legislation for the protection of fundamental rights (eg non-discrimination, data protection) is at stake. One of the most recent contributions of the CJEU to the development of civil rights is the recognition, based on EU data protection laws, of the 'right to be forgotten.'¹ The limited effect of EU law on setting and upholding civil rights standards results, to a significant extent, from limited EU legislative intervention in the field, and the restricted reach of the EU Charter, which is applicable only where there is a connection with EU law (ie in situations falling 'under the scope of application of EU law').² The confusion as to what falls under the scope of EU law, not only in the Court of Justice of the

¹ Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* ECLI:EU:C:2014:317

² For recent restatements, see cases C- 617/10, *Fransson* ECLI:EU:C:2013:105; C-416/10, *Križan*, ECLI:EU:C:2013:8; C 206/13, *Siragusa*, ECLI:EU:C:2014:126; C-265/13, *Marcos*, ECLI:EU:C:2014:187. For a recent, controversial, exclusion of the application of the Charter in matters dealing with data protection, see case C- 446/12 to C- 449/12, *W.P Willems v Burgemeester Van Nuth*, ECLI:EU:C:2015:238.



European Union (CJEU) case law, but also in lawyers' mind, contribute to limit the Charter's influence. Awareness is slowly improving though, and the EU is starting to make a more distinctive contribution to the protection of civil rights.³

The ECHR sets minimum standards, but states are free to offer stronger protection to particular civil rights (Article 53 ECHR). However, the CJEU case law suggests that in the context of EU mutual recognition regimes, or judicial cooperation (e.g. European Arrest Warrant), EU fundamental rights standards overrule higher domestic standards (and thus constitute maximum standards),⁴ and this despite Article 53 of the EU Charter providing that 'nothing in this Charter should be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized in their respective fields of application' by international agreements such as the ECHR and national constitutions. The application of EU law, and reliance on European civil rights norms, be they ECHR or EU provisions, may thus well result in a lowering of civil rights standards. The question of standards is a relevant one in assessing barriers to the exercise of civil rights, the objective of Work Package 7, as barriers arise from the moment that individuals are not able to achieve the required standards of protection. Further obstacles result from difficulties in realising or enforcing their rights. This second report (Deliverable 7.2), addresses these two dimensions.

Civil rights' standards, irrespective of the level and manner in which they are set, are meaningless if not supported by mechanisms which secure their effective exercise and protection. In order to identify barriers, one must therefore investigate the modalities of enforcement of civil rights. Diverse mechanisms, whether judicial or not, exist at different levels. They vary depending on the rights involved, their sources, the author of measures or practices that threaten them, institutional structures, and other more practical considerations (information, resources, location, language issues, time, etc). Like the catalogue of civil rights protected in various legal instruments across the EU, the range of tools which individuals have at their disposal for the enforcement of civil rights on the territory of the EU is, on paper, impressive. Whether they provide for the effective realization of civil rights however requires further investigation.

Where the problem lies at EU level, that is when acts (or omissions) by EU institutions jeopardize civil rights, individuals can rely on a limited range of non-judicial as well as judicial

³ See A.R. González, *The application of the Charter of Fundamental Rights of the European Union by legal practitioners* (2014), http://ec.europa.eu/justice/events/fundamental-rights-charter-training-2014/files/alejandro_rubio_gonzalez1712_en.pdf.

⁴ C-399/11, *Melloni*, ECLI:EU:C:2013:107.



mechanisms to obtain some form of redress. EU citizens may pressure for change in EU rules and practices through participation in European Parliament elections (Articles 20(2)b and 22 TFEU). So far however, European elections have not really mobilized much around rights issues, despite some of the candidates' attempts (eg on the Passenger Name Record Database, and its impact on privacy and data protection). Individuals can also start, or sign up to, a European Citizen Initiative, which if it is successful, would invite the Commission to table relevant acts (Articles 20 and 24 TFEU). The recent initiative 'On the Wire', which calls for better protection for lawyer-client privilege, offers a good example (in progress).⁵ EU citizens may also complain to the European Ombudsman in cases which amount to mal-administration, which includes violation of fundamental rights (Articles 20(2)d, 24 and 228 TFEU). The European Ombudsman recently called the EU to improve judicial guarantees for whistle blowers,⁶ for example; it also invited the EU to monitor more carefully that fundamental rights are respected in the use of funds disbursed under the EU cohesion policy.⁷ Citizens, furthermore, may petition the European Parliament (Articles 20(2)d, 24, 227 TFEU). For example, Irish citizens complained to the EP that the British authorities were taking too long to issue residence documents, and withheld for a long time travel documents.⁸ NGOs are currently calling EU citizens to petition their MEPs in order to influence the debates on the resurrected proposal for a Passenger Name Record Directive.⁹ The European Parliament, and the LIBE Committee in particular, are however watching out for the protection of civil rights, by EU institutions as also Member States. In July 2015, they agreed to back up the Passenger Name Record agreement only if sufficient data protection safeguards are included.¹⁰ In 2013, it approved a report (Tavares report)¹¹ on the

⁵ See for example the recent initiative 'On the Wire' on *strengthening communication privacy between private individuals by law and wiretapping of lawyer-client communications (rights of the defense)* at <http://ec.europa.eu/citizens-initiative/public/initiatives/ongoing/details/2015/000001>; the European Initiative for Media Pluralism, at <http://ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2013/000007>; 'One of Us' on *the legal protection of dignity, the right to life and of the integrity of every human being from conception*, at <http://ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2012/000005>

⁶ European Ombudsman, Press release No 3/15, of 2 March 2015, at

<http://www.ombudsman.europa.eu/en/press/release.faces/en/59135/html.bookmark>

⁷ European Ombudsman, 'Compliance with fundamental rights in the implementation of EU cohesion policy', Case: OI/8/2014/AN, Decision 11 May 2015, at

<http://www.ombudsman.europa.eu/en/cases/summary.faces/en/59871/html.bookmark>

⁸ European Ombudsman, 'Problems with the EU? Who can help you?'

<http://www.ombudsman.europa.eu/en/atyourservice/whocanhelpyou.faces#/page/9>

⁹ See for example the call by the NGO Access 'Mobilizing for Global Digital Freedom, at

<https://www.accessnow.org/blog/2015/02/13/parliament-votes-to-push-forward-its-agenda-eu-pnr>.

¹⁰ European Parliament, LIBE committee, Passenger Name Records: MEPs back EU system with data protection safeguards, 15 July 2015, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bIMPRESS%2b20150714IPR81601%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>.

¹¹ Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)),



concerning situation of fundamental rights in Hungary,¹² and in January 2015, held a hearing about the fundamental rights situation in Hungary.¹³ In case of violation of their right to data protection by EU institutions or bodies, citizens may turn to the European Data Protection Supervisor. For example, citizens alerted that authority when it turned out that the personal data of individuals who had taken EU pre-selection tests had been handled by a private sub-contractor.¹⁴

In addition to these non-judicial avenues, natural and legal persons can bring judicial proceedings against EU measures and practices which have adverse effects on their civil rights. They may do so directly, through an action for annulment under Article 263 TFEU, if they can show they are individually and directly concerned by an EU Decision, or directly concerned by an EU regulatory act.¹⁵ They may also contest EU acts indirectly, by challenging implementation and application measures before domestic courts and ask the national judge to make a reference for a preliminary ruling to the CJEU, questioning the validity of the EU act on which the national measures are based (Article 267 TFEU). This indirect path is, in fact, the only way for individuals to challenge EU legislative instruments, as they do not have standing to contest them under the action for annulment.¹⁶ The most recent, and significant example, were judicial proceedings brought against national measures which implemented the controversial EU Data Retention Directive, which led Irish and Austrian courts to refer the question of its legality to the CJEU, which declared it null and void. It found that it failed to sufficiently protect the right to private life and data protection.¹⁷ Legal and natural persons may also, under certain conditions, petition EU courts for interim relief measures to preserve their rights (Article 279 TFEU) or seek compensation for harmful breaches of EU law before EU courts, through an action for damages (Articles 268 and 340(2) TFEU).

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0229+0+DOC+XML+V0//EN>

¹² European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0315&language=EN&ring=A7-2013-0229>

¹³ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+COMPARL+LIBE-OJ-20150122-1+02+DOC+XML+V0//EN>

¹⁴ European Ombudsman, 'Problems with the EU? Who can help you?' at <http://www.ombudsman.europa.eu/en/atyourservice/whocanhelpyou.faces#/page/11>.

¹⁵ Natural and legal persons may also challenge inaction by EU institutions, but only to the extent that EU institutions were under a duty to act in a particular way (Article 265 TFEU).

¹⁶ They can only challenge directly individual decisions or regulatory measures of the EU (Article 263(4) TFEU). For a recent re-statement, see Case C-583/11, *Inuit ECLI:EU:C:2013:625*.

¹⁷ Case C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others ECLI:EU:C:2014:238*.



Scholars have assessed critically the effectiveness of EU level remedies against violations of civil rights, which originates from EU institutions and bodies. Criticism is notably targeted at restrictions on individuals' standing for the judicial review of EU acts,¹⁸ although the situation has improved with the Lisbon Treaty and the removal of the 'individual concern' condition to challenge regulatory acts, and the EU courts' deferential attitude to the EU legislator, in particular in cases which challenge EU legislative measures.¹⁹ The CJEU is however enforcing more vigorously the Charter's civil rights provisions, in particular the right to an effective judicial remedy, against executive or administrative measures of the EU (e.g. anti-terrorism sanctions, competition cases, etc.).²⁰ The prospect of the EU accession to the ECHR may have triggered this heightened CJEU vigilance over the respect by the EU administration of individuals' rights, even if the process of accession has been put to a halt temporarily with the release of the Court's opinion in December 2014 which rejected the draft agreement on accession as incompatible with the Treaties.²¹

Individuals may also turn to EU institutions and bodies when they experience civil rights violations at the hands of national authorities, when these act within the scope of application of EU law. In cross-border problems, they may contact the SOLVIT network.²² This network of national administrators supervised by the Commission helps with economic and social security matters, but also, in matters of civil rights, with securing residence rights in other Member States for EU citizens and their families. They may also contact advisors at Europe Direct²³ or seek guidance from Your Europe,²⁴ although many citizens are probably not aware of these options.²⁵ Furthermore, under the Article 258-260 TFEU infringement action, individuals may

¹⁸ E.g. A. Albors-Llorens 'The standing of private parties to challenge Community measures: Has the European Court missed the boat?' *The Cambridge Law Journal* 62.01 (2003): 72-92; A. Arnall, 'Private applicants and the action for annulment since Codorniu' *Common Market Law Review* 38.1 (2001): 7-52; M.-P. Granger, 'Towards a liberalisation of standing conditions for individuals seeking judicial review of Community acts: Jégo-Quéré et Cie SA v Commission and Unión de Pequeños Agricultores v Council', *The Modern Law Review* 66.1 (2003): 124-138.

¹⁹ E.g. A.J., Williams, *EU human rights policies: a study in irony*. Oxford University Press, 2004; M. Varju, *European Union Human Rights Law – The dynamics of Interpretation and Context* (Hart, 2014); M.-P. Granger 'The Court of Justice's dilemma – between 'more Europe' and 'constitutional mediation' in C. Bickerton, D. Hodson, and U. Puetter (eds), *The New Intergovernmentalism: States and Supranational Actors in the Post Maastricht Period* (Oxford University Press, 2015).

²⁰ Craig and G. De Burca, *EU Law – Texts, Cases and Materials* (Oxford University Press, 2011), Chapter 11; Chalmers et al, *European Union Law – Texts and Materials* (Cambridge University Press, 2014), Chapter 6.

²¹ Opinion 2/13 on the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454

²² See Solvit website, at <http://ec.europa.eu/solvit/>

²³ See Europe Direct website, at http://europa.eu/europedirect/index_en.htm

²⁴ See Your Europe website, at <http://europa.eu/youreurope/>

²⁵ A 2011 survey revealed that only 1% of EU citizens would turn to SOLVIT in case their EU rights are breached, Special Eurobarometer 363, Report Internal Market: Awareness, Perceptions and Impacts, September 2011, at



send a complaint to the European Commission in case national authorities (including governments, legislators or courts) fail to respect their civil rights, when they act under an 'EU mandate'. The Commission will communicate and request information from the Member State in question, and if it finds a violation, may call the Member State in question to comply with relevant civil rights obligation (including respect of EU legislation protecting EU citizens rights, general principles of EU law protecting fundamental rights and the EU Charter of Fundamental Rights). If the Member State does not rectify the situation, the Commission may bring it before the Court, and ask for a declaration that the state has failed to fulfil its obligations under the Treaty, and for a fine or periodic penalty to be imposed. The Commission will keep the complainant informed of the steps taken. The Commission has been actively using this procedure to secure member's state compliance with EU law at large, but has been more cautious in using it to target specifically human rights violations by Member States. A notorious exception was, however, when it brought action against Hungary which had dismissed a whole generation of judges by lowering without transitional arrangements the judicial retirement age. The measure, which aimed at making room for more government-friendly magistrates, was condemned by the CJEU for violating EU legislation prohibiting age discrimination, but it also affected judicial independence and thus the right to fair trial (even if the Commission and CJEU did not address those grounds).²⁶ Finally, a procedure exist at EU level in case a Member State fails to comply with EU values set out in Article 2 TEU, which include respect for fundamental rights (Article 7 TEU). However, the substantive and political threshold for its activation and the imposition of a sanction on a Member State are so high that it is only a 'nuclear' option. Although there exists monitoring mechanisms, such as the EU justice scoreboard,²⁷ and the regular reports on fundamental rights prepared by the Commission²⁸ and the Fundamental Rights Agency,²⁹but these do not trigger any EU intervention.

Individuals thus normally turn to domestic bodies to enforce their civil rights against state bodies or private actors, including where those rights are rooted in or challenged by EU law, since national courts are the 'ordinary courts' for the enforcement of EU law. The national courts have the authority to determine those matters themselves, but they may, or in some case should,

http://ec.europa.eu/public_opinion/archives/ebs/ebs_363_en.pdf, 62.

²⁶ C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687.

²⁷European Commission, 'The EU Justice Scoreboard – A tool to promote effective justice and growth', COM(2013) 160 final, Brussels, 27 March 2013.

²⁸ European Commission, 2014 report on the application of the Charter of Fundamental Rights, 8 May 2015, available at http://ec.europa.eu/justice/fundamental-rights/files/2014_annual_charter_report_en.pdf

²⁹European Parliament, Fundamental rights: challenges and achievements in 2014 - Annual report, June 2015, available at http://fra.europa.eu/sites/default/files/fra-annual-report-2014_en.pdf



seek assistance from the CJEU. Under Article 267 TFEU, individuals can ask national judge to refer questions to the CJEU concerning the interpretation of EU law so that they can decide whether the contested national rules are compatible with EU law (Article 267 TFEU). The CJEU usually provides interpretations of EU law, which indicate to the referring courts whether national measures comply with EU law. The Court has been, over the years, increasingly vigilant over Member States when they act within the scope of EU law, and repeatedly reminded them of their duty to respect EU legislation which protects human rights, including civil rights, and to apply and implement EU law in a manner which is conform to EU human rights standards. For example, the CJEU, in unison with the ECtHR,³⁰ invited Member States to use their discretion under the Dublin asylum regime in conformity with the Charter, with the consequence that they must refuse to send asylum-seekers back to a Member State which, according to reliable evidence, is displaying systemic failure in the treatment of asylum seekers, as failing to do so would amount to a violation of Article 4 of the EU Charter of Fundamental Rights on the prohibition on inhuman and degrading treatment.³¹

The use of EU-level remedies for the protection of human rights has been already well-investigated. Less information is, however, available on how civil rights, irrespective of their sources, are protected at the domestic level, within as well as outside the scope of EU law. Scholarship on EU law tends to focus on EU level standards and remedies, whilst comparative constitutional or administrative law literature focuses on domestic sources. They do not approach it from the perspective of EU citizenship, and the right of EU citizens to have rights.

This report examines, from a comparative perspective, the use of domestic mechanisms in the protection of civil rights, whether these derive from EU law or not, with the view to get a sense of the barriers which citizens and other individuals residing or moving across EU Member States face in the realization of their civil rights. It will examine, more particularly, what can be done to secure the enforcement of EU and national law which protects particular civil rights (eg right to effective judicial protection, right to data protection, freedom of expression, etc), or to prevent that in the domestic implementation or application of EU measures (in particular mutual recognition instruments concerning judicial cooperation in civil and criminal matters), civil rights are adversely affected. These enforcement aspects will be further explored in the context of case studies (Deliverables D7.3-6).

³⁰ ECtHR, 21 January 2011, *M.S.S. v. Belgium and Greece*, App. 30696/09.

³¹ Joined cases C-411/10 *N. S. v Secretary of State for the Home Department and M. E. and Others* and C-493/10 *v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, ECLI:EU:C:2011:865.



The research objective for this report is to go beyond general textbook-style presentations of remedies available for the enforcement of civil rights and liberties, as well as existing generic data on national legal systems available on EU websites, in particular the European e-Justice portal,³² and offer a more focused assessment of the effective protection of rights and articulation of remedies across a number of legal areas, contrasting and comparing situations that fall under the scope of EU law and others who do not, or not obviously. It covers Belgium, the Czech Republic, Denmark, France, Hungary, Italy, the Netherlands, Spain and the United-Kingdom and is based on a two-part questionnaire addressed to national rapporteurs, which includes ‘top-down’ and ‘bottom-up’ dimensions.

The first part of the questionnaire identifies three sets of EU legislative instruments dealing respectively with data protection, mutual recognition in civil matters and mutual recognition and harmonization in criminal matters. These EU measures either afford protection to particular civil rights (eg Data Protection and e-Privacy Directives, Victims Right Directive) or they potentially jeopardize civil rights (eg European Arrest Warrant, Data Retention Directive), or both (eg Brussels I and II Regulations on the mutual recognition of judicial decisions in civil matters).³³ National rapporteurs were asked to identify what problems arise in the implementation of those instruments (legislative, executive or administrative transposition; judicial application) and their impact on the civil rights of EU citizens and other individuals potentially affected by these measures. The second part adopts a more bottom-up approach. The questionnaire invited national rapporteurs to identify which rights are particular problematic in their Member State from the point of view of their application and implementation, irrespective of whether there was a special connection with EU law.

Issues of process (remedies) and substance (standards) cannot be easily separated, as they operate in constant interactions. Both are intertwined in the national reports, as they are in this synthetic one, and it is through an analysis of their interactions in specific contexts that we get a sense of how rights are actually protected, and what obstacles those who seek to enforce their

³² See e-Justice portal, at <https://e-justice.europa.eu/home.do?action=home&plang=en>. This portal including comparative data on national legal systems which include, notably, judicial systems, legal professions, litigation, rights of victims, criminal procedure, mutual recognition in civil and commercial matters, successions, wills, legal aid, or mediation.

³³ The Work Package leaders deliberately excluded an analysis of national remedies for the enforcement of EU non-discrimination rules, and the application of the Charter in asylum procedures, as these had been already investigated by, notably, the EU Fundamental Rights Agency. On non-discrimination, see cases reported on the non-discrimination database of the EUFRA at http://fra.europa.eu/en/case-law-database/field_info_charter_article%253Asource/13196. On the application of EU asylum law, see booklet, *The Application of the EU Charter of Fundamental Rights in to asylum procedural law* (October 2014) <http://ecre.org/component/downloads/downloads/937.html> and the IARLJ Database for relevant national cases on http://iarlj.eear.eu/IARLJ/SearchForms/IARLJ_Database_Start.htm



rights face. It however poses a number of methodological and analytical challenges.³⁴ This report tries to bring together the (sometimes disparate) findings which come out of the national reports, to draw conclusions as to the effective exercise of civil rights by EU citizens and others who live in the EU, given the state of affairs of judicial and non-judicial remedies and litigation practices and patterns at national level. It seeks to highlight the particular difficulties which those who live in the EU encounter when they seek to enforce their civil rights.

This report first clarifies the requirements which national judicial remedies must fulfil under the ECHR and EU law, and national law (1). It continues with an assessment of the protection of civil rights within the scope of application of EU law (2), in particular EU data protection legislation, EU criminal law measures, in particular judicial cooperation in criminal matters, and mutual recognition in civil matters. It then exposes the problematic implementation of specific rights selected by country rapporteurs, some of them which fall within the scope of application of EU law, others which do not in an obvious manner, but which could nonetheless affect the ability of EU citizens to exercise their EU citizenship (3).

³⁴ Whilst the original intention for choosing the dual approach was to focus on the remedial issues, it had, in some cases, the effect of partially detracting attention away from mechanisms and actors involved in the enforcement of civil rights, and related problems, towards an analysis of the implementation of the EU instruments identified. Another challenge relates to expertise. Assessing deficiencies in the protection of civil rights which occur in the context of the implementation and application of EU instruments requires a minimum understanding of the fields covered by those instruments, including international private law, commercial law, family law, criminal law and procedure, data protection, etc. as well as an ‘eye’ for human rights. Whilst national rapporteurs generally possess the latter, they did not necessarily have the former (sector-specific expertise), or were not always able to hire assistance in this respect, which rendered the task particularly challenging.



1. EFFECTIVE JUDICIAL REMEDIES FOR THE ENFORCEMENT OF EU LAW (INCLUDING ITS LEGISLATION WHICH PROTECT CIVIL RIGHTS)

Breach of civil rights by national authorities or private actors are primarily addressed through the national systems of judicial and non-judicial remedies. Given their importance for the effective realization of rights, these remedies must comply with basic requirements set at ECHR, EU and national level.

1.1 NATIONAL REMEDIES UNDER EU LAW

EU law, for its enforcement, does not impose the creation of new remedies.³⁵ It relies on national judicial remedies, according to the principle of national procedural autonomy.³⁶ In order to guarantee that EU rights are not devoid of substance by enforcement failures at domestic level, the CJEU set out minimum requirements with which national remedies must comply when EU rights are at stake, and over the respect of which it exercises supervision.³⁷ These have consolidated over the years into two essential requirements: equivalence and effectiveness. The first one requires that remedies and actions for the enforcement of domestic law are equally available in cases involving EU rights;³⁸ the second evolved from a requirement not to make it practically impossible or excessively difficult to enforce EU law rights into the condition that national remedies should be adequate and effective ones.³⁹ Effectiveness requires not only that individuals be guaranteed access to court to enforced EU rights, but also that individuals have access to legal aid,⁴⁰ that their due process rights are respected,⁴¹ or that sanctions imposed on those who break EU rules have a deterrent effect.⁴² Specific judicial remedies must thus be available in cases of violation of EU law: these are the repayment of charges or taxes levied in

³⁵ Case 158/80 *Rewe-Handelsgesellschaft Nord mbH and Rewe-Markt Steffen v Hauptzollamt Kiel* ECLI:EU:C:1981:163; see also case C-432/05 *Unibet* ECLI:EU:C:2007:163.

³⁶ Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* ECLI:EU:C:1976:188

³⁷ For an overview of these developments, see, Craig and G.de Burca, *EU Law - Text, Cases, And Materials* (Oxford: Oxford University Press, 2011) Chapter 9; Chalmers, Damian, Gareth Davies, and Giorgio Monti. *European Union law*, Cambridge University Press, 2014, Chapter 7. See also, M. Dougan, *National remedies before the Court of Justice* (Hart 2004).

³⁸ Case C-326/96 *Levez* ECLI:EU:C:1998:577.

³⁹ Cases C-14/83 *Von Colson and Kamann* ECLI:EU:C: 1984:153.; C-222/84 *Johnston* ECLI:EU:C:1986:206; C-177/88 *Dekker* ECLI:EU:C:1990:383, C-271/91 *Marshall*; ECLI:EU:C:1993:335; C- 453/99 *Courage v Crehan* ECLI:EU:C:2001:465; C-432/05 *Unibet* ECLI:EU:C:2007:163.

⁴⁰ Case C-279/09 *DEB* ECLI:EU:C:2010:811.

⁴¹ Cases C-222/225 *Van der Weerd* ECLI:EU:C:2009:295 C-276/01 *Steffenson* ECLI:EU:C:2003:228; C-472/11 *Baniff* ECLI:EU:C:2013:88; C-443/03 *Leiffer* ECLI:EU:C:2005:665.

⁴² Case C-14/83 *Von Colson and Kamann* ECLI:EU:C: 1984:153.;



violation of EU law,⁴³ compensation or repayment for violation of EU competition law,⁴⁴ or interim relief in case of reference for a preliminary ruling.⁴⁵ Moreover, the CJEU requires that Member State be liable to pay compensation for damages caused by sufficiently serious breach of superior EU law rules for the protection of individuals by public authorities, where a direct causal link is established between the violation and the damage suffered (*Francovich* liability).⁴⁶ Sometimes, EU legislation provides for specific remedies, procedures or assistance to be available for the enforcement of the rights they confer (eg Remedies Directive in EU public procurement law).⁴⁷

The CJEU case law on remedies has been largely codified by the Lisbon treaty, as Article 19(1) TEU now requires that ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’. Moreover, Article 47 of the EU Charter of Fundamental Rights further consolidates the right to an effective remedy and a fair trial as a fundamental right, and fleshes it out. It provides that ‘everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal...Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. 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.’⁴⁸

Beyond legal requirements, EU institutions and the EU Fundamental Rights Agency are developing policies aimed at improving access to justice for civil rights claim under the EU Charter of Fundamental Rights. The FRA is developing the Complaints, Legal Assistance and

⁴³ C-199/82 *San Giorgio* ECLI:EU:C:1983:318

⁴⁴ C-453/99 *Courage v Crehan* ECLI:EU:C:2001:465

⁴⁵ C-213/89 *R v Secretary of State for Transport, ex parte Factorame Ltd. And Others* ECLI:EU:C:1990:257; C-415/11 *Aziz* ECLI:EU:C:2013:164.

⁴⁶ C-6 and 9/90 *Francovich* ECLI:EU:C:1991:221; C-46/93 and 48/93 *Brasserie du Pêcheur/Factortame* ECLI:EU:C:1996:79. For an overview of how it is applied by domestic courts, see M.P.F Granger, ‘National applications of Francovich and the construction of a European administrative jus commune’ *European Law Review* 2 (2007): 157-192.

⁴⁷ Eg. Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts OJ L 395, 30.12.1989, 33–35; Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors OJ L 76, 23.3.1992, 14–20. These were amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts OJ L 335, 20.12.2007, 31–46

⁴⁸ Case C-166/13, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis* ECLI:EU:C:2014:2336.



Rights Information Tool for You (CLARITY) project, and together with the European Commission for the Efficiency of Justice (EFEJ) and the ECtHR, is putting together a Handbook on Access to Justice which will present the key European legal and jurisprudential principles in the area of access to justice.⁴⁹ The FRA also started to collect national court decisions which make reference to, or apply, the Charter, but the database is incomplete.⁵⁰

1.2. *THE RIGHT TO FAIR TRIAL AND DOMESTIC REMEDIES UNDER THE ECHR*

Member States are all parties to the ECHR, and must respect it. The EU is not yet a party, but the CJEU finds inspiration in the ECHR and the case law of the ECtHR to determine the substance and scope of application of the Charter or general principles of EU law protecting human rights (Article 6 TEU). National courts, as Member States' authorities, contribute to the respect of the ECHR, although their power to give effect to ECHR provisions may be limited under domestic constitutional arrangements. Under the Convention system, national courts are the first port of call to challenge violations of the ECHR provisions. It is only where those fail, namely when domestic remedies have been exhausted, or are not available, that matters can be brought to the ECtHR. In case the ECtHR finds a violation of the ECHR, it will pass the matter to the Council of Europe's Committee of Minister to monitor compliance (eg through legislative amendments, case law adjustment or individual measures). The ECtHR may also award compensation ('just satisfaction') for damage suffered by individuals as a result of the violation of a Convention right.

Particularly relevant is the case law of the ECtHR on Article 6, the right to a fair trial, which frames national remedies. It imposes certain requirement regarding access to court, and institutional and procedural guarantees.⁵¹ Based on this, the Council of Europe published a 'Guide on good practices in respect of domestic remedies.'⁵²

⁴⁹ Fundamental Rights Agency of the EU, Handbook on Access to Justice website, <http://fra.europa.eu/en/project/2014/handbook-access-justice-europe>.

⁵⁰ Fundamental Rights Agency of the EU, Case Law database, at <http://fra.europa.eu/en/case-law-database>.

⁵¹For a summary, see ECtHR, Guide on Article 6, Right to a Fair Trial, at http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf.

⁵² Council of Europe, 'Guide on good practices in respect of domestic remedies' (2014) http://www.echr.coe.int/Documents/Pub_coe_domestics_remedies_ENG.pdf



1.3 ACCESS TO JUSTICE AND EFFECTIVE REMEDIES UNDER NATIONAL (CONSTITUTIONAL) LAW

In addition to the EU and the ECHR, the constitutional law of the Member States provides and protects access to justice and the right to effective remedies: eg in Belgium (Article 13 of the Constitution), France (case law based Article 16 of the 1789 Declaration on the rights of the man and citizen),⁵³ or Hungary (Art. XXVIII of the Fundamental Law). It is however, not unlimited or unconditional.

Admissibility requirements, such as time limits, or standing conditions (eg interest to act), may be imposed, which can restrict access to specific remedies. Certain measures remain immune to challenges (eg *acte de gouvernement* in France), although the trend is towards an extension of judicial control. Access to certain remedies, such as the constitutional review of legislative acts, may also be limited, like in France until the 2008 reform and the introduction of the *Question Prioritaire de Constitutionalite*,⁵⁴ or in Hungary on fiscal matters since 2010.⁵⁵ In such cases however, national courts may still be able to neutralize legislative provisions which impinge on civil rights by setting aside their application or invalidating their implementing executive or administrative measures through invoking their incompatibility with ECHR or EU law, like in France before 2010.⁵⁶ Executive or administrative general or individual measures (or omissions), as well as private persons acts or activities, normally fall under some form of judicial control to guarantee their compliance with the law, including civil rights guarantees. Violations of the right of access to justice may lead to tort action and compensation (eg in Belgium).⁵⁷

Access to justice is a right, not an obligation. Individuals can usually waive their right, except in specific circumstances (eg in Belgium, where the Anti-Discrimination Act, Anti-Racism Act and Gender Equality Acts applies).⁵⁸

The right to an appeal, and thus to different degrees of jurisdiction, is not always guaranteed, like in Belgium.⁵⁹ In France, it is only guaranteed in criminal matters, but not in civil or administrative proceedings.⁶⁰ Moreover, costs of access to justice may constitute a barrier. In some countries (eg France), there is a legal obligation that fees to bring proceedings should not

⁵³ Decision No 86-224 DC of 23 January 1987; crim., 17 May 1984; CE Ass., 7 February 1947.

⁵⁴ Report on France, 2-5.

⁵⁵ Report on Hungary, 56.

⁵⁶ Report on France, 7-9.

⁵⁷ Report on Belgium, 68.

⁵⁸ Report on Belgium, 68.

⁵⁹ Report on Belgium, 69.

⁶⁰ Report on France, 14, 45.



be prohibitively expensive.⁶¹ Since 2010, there is a fierce debate in the Netherlands concerning court registry fees, after a proposal of the Minister of Justice and Security to increase these costs. NGOs and various organisations have expressed their concern with regard to access to justice in this regard.⁶²

1.4. NATIONAL REMEDIES FOR THE ENFORCEMENT OF CIVIL RIGHTS: THE LEGACY OF NATIONAL JUDICIAL TRADITIONS AND CONTEMPORARY DEVELOPMENTS

Given the reliance on national remedies for the enforcement and respect of civil rights recognized under both EU law and the ECHR, an understanding of national systems of judicial and non-judicial remedies is essential. National reports, however, did not always provide a systematic overview of judicial and non-judicial mechanisms available for the enforcement of civil rights, which could be triggered whether the civil rights to be enforced find their source in EU, ECHR or national law. However, the national reports suggest that violations of civil rights, such as the right to freedom of expression, the right to manifest one's religion or the right to an effective judicial remedy, as well as breach of EU provisions, such as those protecting personal data, or due process guarantees, may be addressed through a wide range of judicial as well as non-judicial mechanisms.

Non-judicial avenues may include civil resistance, petitioning parliamentary bodies or other political personalities, or reporting or complaining to administrative hierarchies. Moreover, the last decades have witnessed the development of a range of independent public authorities or agencies, such as ombudsman-type bodies, human rights agencies or other independent organs (e.g. data protection authorities, equality bodies, etc), which not only raise awareness about civil rights, and collect information and data about the state of their protection, but also for an increasing number of them, directly monitor and enforce the respect of specific rights. Some of these bodies have strong enforcement capacity and sanctioning powers. Victims of civil rights violation who do not wish to litigate may also, in some cases, turn to alternative dispute resolutions mechanism, such as negotiation, collaborative decision-making, mediation, or

⁶¹ Report on France, 44.

⁶² Report on the Netherlands, 44.



arbitration. Agreements struck through these out-of-court settlement mechanisms may not, however, be against public order.⁶³

Judicial actions include proceedings before international bodies (eg Human rights Committee) and European judicial bodies (the ECtHR and CJEU), as well as before constitutional, administrative or ordinary courts. Courts can use a range of tool to address civil rights violations. Administrative courts (eg France, Belgium) or ordinary courts acting in administrative court capacity (eg United-Kingdom) can annul executive and administrative measures which have adverse impact on civil rights, through (administrative) judicial review type procedures (eg *recours pour excès de pouvoir* in France, etc). Criminal courts may impose criminal sanctions (typically fines and jail sentences). Administrative courts, and ordinary courts, may also issue injunctions to stop civil rights violations or order appropriate measures to prevent civil rights' abuse (eg seizures) or avoid further damage (eg conservatory measures), or order the payment of compensation for damages caused by civil rights violations. The availability of emergency proceedings or interim reliefs procedures appears as paramount to prevent irreparable civil rights abuse, and in some countries, have undergone significant development and expansion, like in France since 2000.⁶⁴

In some cases, fast-track or accelerated procedure may be used, which on one hand, reinforce the right to effective remedies and fair trial through the speedy delivery of justice, on the other, could jeopardize the rights of the defense, if expediency comes at the cost of the respect of due process guarantees, like France recently with the introduction of an accelerated procedure for prosecuting and judging the criminal offense of apology of terrorism.⁶⁵

The identification of the most suited forms of action depends on a number of factors, including the context in which the breach occurred (eg whether it involves public authorities or persons in charge of public services or actors acting in private capacities, criminal actions or civil matters, etc.), the source, nature and content of the contested provisions and protective norms, and the type of measures sought (eg annulment of a measure, recognition of a breach, injunctions to terminate a violation, compensation, etc.). More practical consideration, such as resources, exposure, pressures, legal expertise, etc., also matter.

In all Member States, there are complex articulations and interactions between different, and at times competing, mechanisms for the protection of civil rights (in addition to competition and

⁶³ Report on Belgium, 70.

⁶⁴ Report on France, 23-25, 43.

⁶⁵ Report on France, 132.



interactions between different rights themselves). This complexity, which is accentuated by the development of European level standards and remedies (both ECHR and EU), may create new opportunities; however, it also complicates the identification and navigation of possible avenues, and brings to the fore the importance of expert legal advice, which not all individuals may be able to find or afford. Legal aid schemes may palliate to resource shortage, but are not always available or sufficient to secure suitable legal advice in all situations (eg Belgium, France, the Netherlands). The development of the Internet, and the ensuing provisions of online information and advice service, offers new opportunities to bring justice closer to the citizens. Public authorities in the Member States as well as the EU institutions have engaged in efforts to improve information on how to seek remedies for various types of civil rights violations. They also provide basic legal advice through online tools and portal. Still, further improvements are needed, as information remains patchy and non-consolidated, and advice limited.

In many Member States, civil society organizations (CSOs) play a key role in monitoring respect for civil rights and supporting victims of violations, including by initiating or backing judicial action. Increasingly, they work hand-in-hand with governmental bodies (eg data protection authorities, equal opportunity bodies, human rights bodies, etc) to secure the respect of civil rights. In some countries, CSO are clearly compensating for state failure,⁶⁶ calling and relying on external support from international CSO or intergovernmental organizations. In some countries, academia also plays an active role in supporting the development of civil rights frameworks and their enforcement through awareness raising and involvement in litigation.⁶⁷

⁶⁶ eg Report on Hungary, 80.

⁶⁷ eg Report on Belgium, 75.



2. THE EFFECTIVE ENFORCEMENT OF CIVIL RIGHTS WITHIN THE SCOPE OF APPLICATION OF EU LAW

As exposed in the introduction, Member States must respect EU civil rights when they act within the scope of EU law. They must make sure that remedies are available for the application of EU law which are effective, including in securing respect for civil rights. In this part, we explore how protective EU legislation, in particular EU data protection laws, are applied through the domestic systems; we also assess to what extent the national application of EU instruments concerning judicial cooperation civil and criminal matters effectively protects important civil rights of EU citizens, such as the right to an effective remedy, the rights of the defense, the right to a fair trial, the right to family life, the principle of non-discrimination based on nationality, freedom of expression, or free movement rights.

2.1 EU LEGISLATION ON THE PROTECTION OF PERSONAL DATA

Computerization, digitalization and the development of mobile communication and the Internet results in a wide range of personal data being collected, stored, processed and transferred by and to a range of public and private actors. Whilst this use of personal data may pursue valuable and legitimate objectives (fight against crime, public health, etc), they are circumstances in which the scale of intrusion in private life outweighs the potential benefits.

In the 1990s, the EU started to regulate the field in order to support the internal market which would benefit from the free flow of data whilst at the same time ensuring minimum protection for individuals. It adopted a number of important instruments, notably Directive 95/46/EC (Data Protection Directive),⁶⁸ and Directive 2002/58 (E-Privacy Directive).⁶⁹ EU data protection legislation found inspiration in domestic legal systems which had already established data protection laws, as well as the case law of the ECtHR on the protection of private life.⁷⁰

⁶⁸Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data *Official Journal L 281*, 23/11/1995, 31 – 50.

⁶⁹Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector *Official Journal L 201*, 31/07/2002, 37 – 47.

⁷⁰For a summary, see I.Roagna 'Protecting the right to family and private life under the European Convention on Human Rights (2012), 19 and 54, at http://www.coe.int/t/dgi/hr-natimplement/Source/documentation/hb11_privatelife_en.pdf.



2.1.1 EU LEGISLATIVE FRAMEWORK FOR THE PROTECTION OF PERSONAL DATA

The 1995 Data Protection Directive defines personal data and establishes fundamental principles. Personal data must be: (a) processed fairly and lawfully; (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes;⁷¹ (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed; (d) accurate and, where necessary, kept up to date;⁷² etc) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed⁷³ (Article 6). It imposes confidentiality (Article 16) and security obligations (Article 17), prohibits the transfer of data to countries which do not provide for suitable data protection legislation (Article 25), and lists lawful exceptions and derogations to the processing of personal data. In addition to the protective environment, which these measures would contribute to create, the Directive also grant specific rights to individuals. These rights, according to the established case law of the CJEU on direct effect, could be invoked by individuals against public authorities, in case of lack of – or wrongful – implementation of the Directive. These rights are the following.

Right to consent

Personal data may be processed only if the data subject has unambiguously given his consent, except where an exception applies (Article 7).⁷⁴ ‘Sensitive’ data, which reveal racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the

⁷¹ Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;

⁷² Every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified.

⁷³ Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.

⁷⁴ There are exception to the principle of consent where: (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or (c) processing is necessary for compliance with a legal obligation to which the controller is subject; or (d) processing is necessary in order to protect the vital interests of the data subject; or (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1) of the Directive (Article 7)).



processing of data concerning health or sex life can be processed only in the specific circumstances defined in the Directive, and require explicit consent (Article 8).

Right to information

The data controller (or his representative) must provide a data subject with basic information (Article 10).⁷⁵ Similar information requirements apply to situations where the data have not been obtained from the data subject (Article 11).

Right of access

Data subjects have the right to obtain from the controller confirmation as to whether or not data relating to him or her are being processed, and communication of the data undergoing processing, as well as the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive (Article 12)

Right to object

Data subject have the right to object, free of charge, to the processing of personal data for marketing purposes or to be informed before personal data are disclosed for the first time to third parties or used on their behalf for the purposes of direct marketing, and to be expressly offered the right to object free of charge to such disclosures or uses. He or she can also object on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation.

'Right to be forgotten'

In 2010, Vivian Reding, then Vice-President of the European Commission and Commissioner to justice, fundamental right and citizenship, declared that the right to be forgotten was a fundamental right and value of the EU.⁷⁶ In 2014, the CJEU interpreted Article 12 of the Data Protection Directive as recognizing the right to be forgotten.⁷⁷ It consists in the right for individuals, under certain conditions, to ask search engines to remove links with personal

⁷⁵ These are (a) the identity of the controller and of his representative, if any;(b) the purposes of the processing for which the data are intended;(c) any further information such as the recipients or categories of recipients of the data, whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply the existence of the right of access to and the right to rectify the data concerning him in so far as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.

⁷⁶ V. Reding, 'Privacy matters - Why the EU needs new personal data protection rules', 30 November 2010, at http://europa.eu/rapid/press-release_SPEECH-10-700_en.htm .

⁷⁷ C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* ECLI:EU:C:2014:317.



information about them. The interest of the public to have access to information must nonetheless be taken into account.⁷⁸

Right to remedies

To ensure the respect of rights and obligations it sets, the Data Protection Directive prescribes particular remedies. It requires the setting up of independent national data protection authorities which can investigate violations of data protection rules, intervene to remedy them, and engage in legal proceedings or bring violations to the attention of the judicial authorities (Article 28). Furthermore, the Directive grants individuals the right to judicial remedy for any breach of the rights guaranteed by the national law applicable to the processing in question [and, interestingly, not just for violation of the Directive] (Article 22), and the right for any person who has suffered damage as a result of violation of the rights and obligations enshrined in the Directive to receive compensation from the controller (Article 23).

Given the obligations which the Directive requires Member States to impose on data controller, and the right which it grants individuals in relation to their personal data, supported by specific remedies, the Directive is an important instrument for the protection of EU citizens' right to privacy.

The 2002 e-Privacy Directive complements the EU protective framework by adjusting it to the specificities of telecommunication and Internet data. Notably, it requires consent for automated processing for marketing purposes, and regulates the storage and use of traffic and location data (the so-called 'meta-data').

⁷⁸ The CJEU also confirmed the responsibility of search engines, and the applicability of the Directive to US-based Google search engine. Even if the physical server of a company processing data is located outside of the EU, EU rules apply to search engine operators if they have a branch or a subsidiary in a Member State, which promotes the selling of advertising space offered by the search engine. Search engines are controllers of personal data, and thus must comply with the Directive's obligations.



2.1.2 TRANSPOSITION OF THE DATA PROTECTION AND E-PRIVACY DIRECTIVE

The Data Protection and E-Privacy Directive impose minimum standards for the protection of personal data; although some countries had already extensive regimes for the protection of personal data (eg France), others had only limited ones (eg United-Kingdom, Denmark). In those countries, the Directives represented an important step towards affording better protection to privacy in the digital era. The quality and timeliness of the implementation are therefore paramount to secure the effective protection of personal data.

The 1995 Data Protection Directive was eventually transposed in all Member States. However, in many countries, transposition came late. Some transposed it through a series of legislative instruments, other through a data protection act (or an amended one), often complemented by a range of executive measures. Most countries already had data protection regimes in place which needed to be adjusted, thereby contributing to delays in transposition. France only transposed it in 2004 Law by amending the 1978 Law, which provided for the basic legal framework for the protection of personal data.⁷⁹ In Italy, a Legislative Decree implemented both the Data Protection Directive and the e-Privacy Directive in 2003.⁸⁰ In the Netherlands, the 1995 Directive was implemented through the Protection of Personal Data Act, which came into force in 2001.⁸¹ In Spain, the 1995 Directive, and the 2002 Directive, were transposed through various legislative acts and executive measures, starting in 1999.⁸² In Belgium, it was implemented through an amendment to the 1992 Privacy Law, complemented by a 2001 Royal Decree.⁸³ In the Czech Republic, it was transposed as part of the *acquis communautaire* through a 2000 Act, and other legislative measures.⁸⁴ In the United Kingdom, where there was strong scepticism about the right to privacy, not recognized under the common law, many bills which sought to protect privacy had failed in parliament. The United-Kingdom nonetheless adopted in 1998 the Data Protection Act which not only implemented the Directive but also consolidated earlier legislation.⁸⁵ There was also reluctance in Denmark towards the Data Protection Directive at the time of the negotiations, and consequently the Directive was first transposed in the country by a

⁷⁹Report on France, 91.

⁸⁰Report on Italy, 72-75.

⁸¹Report on the Netherlands, 17.

⁸²Report on Spain, 21.

⁸³Report of Belgium, 24-27.

⁸⁴Report on the Czech Republic, 18-20.

⁸⁵Report on the United Kingdom, 19.



2000 Act. The act, which radically transformed Danish law on the matter, is now recognized as having improved citizens' rights protection.⁸⁶

The 2002 e-Privacy Directive was transposed more rapidly and apparently smoothly, although there were also delays. Hungary implemented it by a 2003 Act and government decree, the United-Kingdom by a 2003 regulation, Italy together with the 1995 Directive by a 2003 Legislative Decree, France with the 2004 e-Commerce Law and its 2005 implementing decree, Belgium in 2005 through various legislative provisions, in the Czech Republic through amendment of the 2000 law and other legislative measures, in Denmark by a 2011 act and executive order, the Netherlands by an 2012 act.

These legislative and executive transposition measures sometime faced judicial challenges (see below), but were normally declared conform to EU and/or domestic law.⁸⁷ The fact that EU data protection Directives were generally transposed in domestic law does not necessarily mean that national law complied with their provisions across the board. The national reports provide evidence that a number of national measures are in breach of EU law on Data Protection. For example, in the Czech Republic, the police can use data to search for missing person without judicial authorization, or can use data in supervision of capital market with only national bank authorization.⁸⁸ In the United-Kingdom, data must be kept longer than necessary with no minimum or maximum period set, which gives wide discretion to the data controller; the data protection authority has limited powers; implied consent may be sufficient; there is a lack of transparency on privacy policy, or lack of security of data which are transferred outside of the EU.⁸⁹ In France, the law grants access to the data not only to law enforcement authority, but also to HADOPI (the authority for the fight against copyright infringement online) and ANSSI (national agency for system security).⁹⁰ In the Netherlands, the policy rules of the Dutch Data Protection Authority, provide that only complaints concerning structural infringements, or a large group of individuals, or which fall within the particular focus of the Data Protection Authority, will be investigated and enforced.¹ This result in the authority having a very broad discretion and complaints by individuals not been followed up, which would undermine the effective protection of data protection by the Dutch Data Protection Authority.⁹¹

⁸⁶Report on Denmark, 18.

⁸⁷See Report on the Czech Republic, 20; Report on France, 92-93.

⁸⁸Report on the Czech Republic, 22.

⁸⁹Report on the United Kingdom, 27-28.

⁹⁰ Report on France, 93-94.

⁹¹Report on the Netherlands, 17.



2.1.3 MANDATORY DATA RETENTION AND EU LAW

The 1995 and 2002 Directives allowed data retention measures, under certain conditions. Some Member States had adopted measures imposing data retention on private operators. The resulting diversity led the EU to rapidly introduce the controversial Directive 2006/24/EC (Data Retention Directive).⁹² It required Member States to adopt measures obliging electronic communications providers to retain all traffic and location data from landline, mobile and Internet communications, for a period of no less than six months and up to two years. It therefore replaced the *option* of setting up mandatory data retention schemes with an *obligation*. The data hereby collected could be accessed later and used by law enforcement agencies (and possibly intelligence services) for the detection, investigation and prosecution of serious crime. The Directive did not, however, regulate the use, access and exchange of the retained data.

In 2011, the Commission released a report evaluating the implementation and application of the Data Retention Directive. It found it overall satisfactory from the point of view of civil right protection.⁹³ Many did not share this assessment. Individuals and CSOs challenged before domestic courts national measures adopted for its implementation for violation of freedom of expression, the right to privacy and the right to the protection of personal data. The question of the validity of the Directive was eventually brought before the CJEU via the preliminary reference procedure. The Court invalidated the Directive as it constituted a disproportionate interference with the right to private life and the protection of personal data (Article 7 and 8 of the EU Charter of Fundamental Rights).⁹⁴ The Directive on Data Retention is now null and void, but national measures on data retention, whether or not adopted in implementation of the Directive remain. However, they must comply with the Data Protection and E-Privacy Directives rights and obligations, as well as the conditions set out by the CJEU in the Digital Ireland

⁹²Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending OJ L 105, 13.4.2006, 54–63

⁹³ 'Overall, ... data retention [was] a valuable tool for criminal justice systems and for law enforcement in the EU. . Given the implications and risks for the internal market and for the respect for the right to privacy and the protection of personal data, the EU should continue through common rules to ensure that high standards for the storage, retrieval and use of traffic and location data are consistently maintained....', Report from the Commission to the Council and the European Parliament, Evaluation report on the Data Retention Directive (Directive 2006/24/EC) , 8 April 2011, COM(2011) 225 final.

⁹⁴C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger v Minister for Communications, Marine and Natural Resources* ECLI:EU:C:2014:238.



case, as derived from the EU Charter (ie no blanket retention, high security guarantees, retroactive access limited to what is strictly necessary),⁹⁵ and the case law of the ECtHR.⁹⁶

The transposition of the Data Retention Directive had in any case been problematic; it faced societal and political resistance in a number of Member States. Even when legislative measures were adopted for their transposition, their implementing acts did not always follow. In Belgium, it was transposed by a 2005 Act and Royal Decree⁹⁷ and in Spain by a 2007 Law.⁹⁸ Italy adopted a Legislative decree in 2008, which fixed the length of retention to the maximum period (two years), except for content data (one year).⁹⁹ In Denmark, it was implemented through an executive order in 2006, which provided for one year retention period (with many exceptions). It came into force in 2007, as Danish law stepped up its monitoring of citizens telephone and internet communication.¹⁰⁰ France did not adopt legislative transposition measures, because its legislative framework was apparently in line with the Directive. It however adopted a decree in 2011, which specified which data should be retained and for how long (one year).¹⁰¹ The United-Kingdom transposed it through a 2009 regulation. When the Directive was invalidated, it adopted an emergency act, which will stay in force until 2016, which re-implemented the Directive and gave powers to the executive to make further provision for the data retention.¹⁰² The Netherlands transposed it through the Data Retention Act and Dutch Law on Telecommunication, which imposed a one-year retention period (six months for Internet data).

In the Czech Republic, a data retention law which had been adopted prior to the Directive was invalidated by the Czech constitutional court; that led to the adoption of a new legislative act in 2012, which provided for better safeguards for privacy.¹⁰³ Some of the transposition laws (eg Hungary) were challenged before constitutional courts (See below).

When the Directive was invalidated, the government asked the Council of State for an opinion as to the validity of the Dutch transposition act under the CJEU ruling. As the Dutch law faithfully followed the Directive, it advised that it would be incompatible with the Charter, applicable since the measure fell under the scope of the EU law (in particular the e-Privacy directive), and with

⁹⁵ For a commentary, see M.-P. Granger, and K. Irion, "The Court of Justice and the Data Retention Directive in Digital Rights Ireland - Telling Off the EU Legislator and Teaching a Lesson in Privacy and Data Protection." *European Law Review* 39.4 (2014): 835-850, 849.

⁹⁶ ECtHR, 4 December 2008 *S and Marper*, App. 30562/04; and 18 April 2013 *M.K. v France* App. 19522/09

⁹⁷ Report on Belgium, 27.

⁹⁸ Report on Spain, 21.

⁹⁹ Report on Italy, 72.

¹⁰⁰ Report on Denmark, 20.

¹⁰¹ Report on France, 92.

¹⁰² Report on United Kingdom, 24-25.

¹⁰³ Report on Czech Republic, 22.



the ECHR. The government however decided to retain the law and announced it would have it amended to improve privacy guarantees.

2.1.4 REMEDIES TO ENFORCE THE PROTECTIVE PROVISION OF THE EU DATA PROTECTION AND E-PRIVACY DIRECTIVES

2.1.4.1 ADMINISTRATIVE REMEDIES – SANCTIONS BY DATA PROTECTION AUTHORITIES

In most countries, the national data protection authorities, as expected by the Directive, play an active role in monitoring the respect of rights and obligations imposed by the 1995 and 2002 Directives, as they apply to both public bodies and private actors. All are entrusted with information and awareness-raising capacity, advisory functions, investigative powers, and are able to bring matters before a judge. In some countries, they also keep a register of mandatory notification or grant authorization for data processing, when required under national law, and enjoy important sanctioning powers.

Their independence is usually guaranteed through organizational and institutional arrangements. Procedure before these authorities, when they may lead to sanctions, are normally subject to due process requirements, and also judicial review. In France, the CNIL preventive and repressive functions are organizationally separated, in order to respect due process rights and the right to a fair trial.¹⁰⁴ The independence of some of these bodies has however been under threat. For example, in Hungary, a 2011 law abolished the function of the Data Protection Ombudsman, a personality who had been vigorously enforcing privacy rules, before the end of his mandate, to replace him with a weaker Freedom of Information Authority, whose head is nominated by the Prime Minister and appointed by the President of the Republic. The CJEU found the termination of the mandate before term contrary to EU law, but did not require any change.¹⁰⁵

The national data protection authorities play an important information role, which is all the more essential in a field which is complex and technologically demanding. They issue guidelines which assist a range of actors (eg health authorities, employers, etc) in complying with their obligations, and inform citizens as to which guarantees they should expect.¹⁰⁶. For example, the Danish authority issued a guideline which offered a ‘practical approach’ on how to enforce the

¹⁰⁴ Report on France, 87.

¹⁰⁵ Case C-288/12 *Commission v Hungary* ECLI:EU:C:2013:81. See report on Hungary,

¹⁰⁶ Report on France, 107, Report on Italy, 75-77, Report on Belgium, 28, Report on Denmark, 19, Report on the Netherlands, 17.



'Cookie executive order'¹⁰⁷ or in the Netherlands, the Dutch Personal Data Authority issued a guideline on how to protect personal data and a guideline for elementary schools to deal with data protection in their obligation to report on children. This, in itself, contributes to a better awareness and respect for the right to data protection, but it is not enough, in particular as complying with data protection law is demanding in both human, technological and financial resources. In that regard, the lack of guidance offered by the British Information Commissioner Office on e-mail tracking, for example, is particularly problematic.¹⁰⁸ Note that in some countries, like Denmark, other authorities, such as the Business Authority, release information on data protection legislation.¹⁰⁹

Data protection authorities also give opinions.¹¹⁰ For example, the Spanish Data Protection Authority expressed serious doubts as to compatibility of the proposal for the Passenger Name Data Record Directive with the right to data protection; it also criticized the Data retention Directive transposition law.¹¹¹

Some data protection authorities have preventive functions. In France for example, data processing not likely to interfere with private life or fundamental freedom must still be declared to the CNIL, whilst the collection and processing of sensitive data and database set up for defense and security must be authorized by the CNIL, which checks that they comply with rules on data protection.¹¹² In Italy too, the Data Protection Authority keeps a registry of notification of processing and delivers authorization for the processing of sensitive data.¹¹³

Data protection authorities receive complaints or petitions from individuals and legal persons (for example, the French CNIL receives more than 5000 complaints a year). However, they are not necessarily compelled to act upon these complained .¹¹⁴ Data protection authorities have investigative powers. However, some of them are more extensive than others (for example, the CNIL can carry on-site visit.)¹¹⁵

¹⁰⁷ Report on Denmark, 20.

¹⁰⁸ Report on the United Kingdom, 24.

¹⁰⁹ Report on Denmark, 20.

¹¹⁰ eg report on France, 42 and 107; Report on Belgium, 28.

¹¹¹ Report on Spain, 24.

¹¹² Report on France, 42, 86-87.

¹¹³ Report on Italy, 76.

¹¹⁴ Report on the Netherlands, 17.

¹¹⁵ Report on France, 89.



Data protection authorities can either bring cases to the attention of the Public Prosecutor¹¹⁶ or bring cases to court themselves,¹¹⁷ including in emergency relief.¹¹⁸

They also impose sanctions. These vary from one authority to the other. In France they include confidential or public warning, confidential or public fines (up to 150000 EUR, 3000000 EUR in case of repeated violations), confidential or public injunction (eg cease-and-desist injunction), withdrawal of processing authorization, etc. The French CNIL modulates the sanctions depending on the cooperation of the accused and the seriousness of the violations. It has taken a particularly tough stance on Google. In 2014, it imposed a 150 000 EUR fine on Google for various failures (lack of information, length of retention of data non-specified, failure to obtain consent, etc). Following the 2014 Google ruling, the CNIL received 150 complaints concerning refusal to delist; on 15 June 2015, it issued a public notification to Google to respond to delisting requests by removing links from all Google extensions.¹¹⁹ However, not all data protection authority are very active in sanctioning violation of data protection rules. The British Information Commissioner Office, for example, hardly imposes any fines.¹²⁰

In France, the CNIL imposes heavier fines than courts on those who breach the Directives and relevant national laws. However, the fines are still derisory compare to the profits that some of the companies make through the abuse of personal data. In this case, the best weapon is that public notice and fines generate bad enough publicity about the target companies that they will be more incline to comply with the data protection law.

Issues of competitive competence may arise between the data protection authorities and courts in matters of data protection. In France, the same violation can be brought before both, as the principle of *non bis in idem* does not apply. Courts and the CNIL can adjust their penalties according to each other's decision on the case.¹²¹ In contrast, in the Czech Republic, the Special Panel which decides on competence matters considered that in case of conflict of jurisdiction, courts should have priority.¹²²

¹¹⁶ Report on France, 89 and 107; Report on Belgium, 28.

¹¹⁷ Report on France, 107; Report on Belgium, 28.

¹¹⁸ Report on France, 107.

¹¹⁹ Report on France p. 89, 104-105.

¹²⁰ Report on the United-Kingdom p. 24.

¹²¹ Report on France, 106-107.

¹²² Report on the Czech Republic, 23.



2.1.4.2. JUDICIAL ENFORCEMENT OF DATA PROTECTION RULES

There is variation in the way national courts apply the Directives and national data protection law. In any case, they tend to rely on domestic law, unless national rules are alleged to be contrary to the Directives (rarely argued). For that reason, a search in judicial databases using the Directives as keywords does not generate many hits. One needs to search these databases entering the specific provision of national transposition measures, and analyse the findings, a task which goes beyond what can be done within the context of this Deliverable. The findings on national judicial application generated through the questionnaire are inevitably impressionistic, but may nonetheless point to particular difficulties which may jeopardise individuals' right to data protection and privacy.

A general impression is that the number of cases is very small compared to the scale of violations, and that violations of data protection rule remain under-investigated, under-prosecuted and not sufficiently sanctioned.¹²³In a significant number of Member States, courts have been proactive and protective of privacy. They have invalidated or sanctioned legislative and executive measures, or corporate practices, which constitute too far-reaching intrusions in the private lives of citizens. Others, however, have been more reluctant to challenge governmental and corporate data collection and processes practices. To some extent, it has to do with the overall acceptance and recognition of the right to privacy as an important civil right (e.g. contrast France and the United-Kingdom for example). In general, courts also appear more willing to take on big corporate actors than governmental authorities.

2.1.4.2.1 CONSTITUTIONAL REVIEW OF LEGISLATION FOR COMPATIBILITY WITH EU (OR CONSTITUTIONAL) DATA PROTECTION RULES

Constitutional courts control that legislative measures comply with data protection rules. In doing so however, their main points of reference seem to be national constitution and the ECHR, with EU Directives and the Charter taking a subsidiary position.

The constitutional cases concerning the implementation of the Data Retention Directive reveal that some constitutional courts, although not all, have been particularly vigilant. In 2012, two years before the CJEU found the Data Retention Directive incompatible with the EU Charter of

¹²³ Report on Italy, 78; Report on France, 104; Report on United Kingdom, 22-23.



Fundamental rights, the Czech Constitutional Court, petitioned by individuals, invalidated legislative measures which imposed six to twelve month retention of traffic data on service providers, as contrary to individuals' constitutional right to informational self-determination.. In Hungary, in contrast, the transposition law was challenged before the constitutional court, but the case is pending since 2008.¹²⁴

In 2011, the Czech Constitutional Court had ruled that Criminal Code provisions which only imposed a vague and general condition for access by law enforcement authorities to personal data (ie the clarification of the circumstances relevant to criminal proceedings) conflicted with the constitutional right to informational self-determination and Article 8 ECHR. It stressed the disproportionate use of request for traffic data in comparison to detected offences.¹²⁵

A Dutch court relied on EU law to set aside legislative measures imposing data retention. On 11 March 2015, the Hague court, in preliminary injunction proceedings, relied on Article 94 of the Constitution to find that the Dutch law that obliged service providers to collect and retain the data of mobile phones and Internet users, was not applicable, as it was in conflict with binding provisions of treaties or of resolutions by international institutions.¹²⁶ The finding was formally only binding on the parties, but erga omnes effects are assumed.¹²⁷ The Minister of Security and Justice announced that the Dutch government would not appeal against the ruling of the court in The Hague;¹²⁸ the law will now be amended.¹²⁹

In countries, where database are set up and regulated through legislative acts, constitutional courts have reviewed their compliance with constitutional provisions. They seem to generally endorse legislative initiatives where intrusion into privacy was considered justified by legitimate objectives (usually security ones) and proportionate. However, they would sanction measures which are too-intrusive, in light of the objective pursued. The French *Conseil Constitutionnel*, for example, found that a national genetic fingerprint data base was proportional to the legitimate objective of the fight against crime, but declared unconstitutional a database nicknamed the 'File of Honest People' which collected data such as civil status

¹²⁴ Report on Hungary, 25.

¹²⁵ Report on the Czech Republic, 20.

¹²⁶ Rechtbank Den Haag, 11 March 2015, ECLI:NL:RBDHA:2015:2498, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:2498>.

¹²⁷ For more details, J. Uzman, *Constitutionele remedies bij schending van grondrechten – Over effectieve rechtsbescherming, rechterlijk absteren en de dialoog tussen rechter en wetgever*, Kluwer 2013.

¹²⁸ TK 33 542 Nr. 18. Accessible:

https://www.eerstekamer.nl/behandeling/20150410/brief_regering_geen_hoger_beroep.

¹²⁹ Report on the Netherlands, 34-36.



information or finger prints for its wide-ranging intrusion on the private life of innocent people.¹³⁰

The French *Conseil constitutionnel* also scrutinised carefully the controversial HADOPI Law for the protection copyright online, which granted wide-ranging powers to a special surveillance authority (HAPOPI). It endorsed the HADOPI's monitoring activities, including the power to request, collect and process data on Internet users, because it was subject to judicial control, and monitoring by the data protection authority monitoring, including authorization requirements for data processing and on the condition that it complied with data protection rules.¹³¹

The ECtHR sometimes intervene to put an end to practices which did not afford sufficient protection to the right to privacy, such as for example, the inability to request removal from a French criminal database following acquittal.¹³²

2.1.4.2.2 REMEDIES IN ADMINISTRATIVE COURTS

Administrative courts, where they exist, or ordinary courts competent to deal with challenges against public measures, have an important role to play in protecting individuals against excessive intrusion of their privacy by public authorities. In some countries, NGOs, often acting in a collaborative manner, have challenged governmental measures, which regulated data collection and processing in particular sectors. In France, where the implementation of the Data Retention Directive was carried out through a decree, they sought to contest it, arguing on the basis of legislative and constitutional grounds (and not on the Data Protection and e-privacy Directive, or the EU Charter); the *Conseil d'Etat* however confirmed its legality.¹³³ In contrast, in the Netherlands, in the context of a preliminary injunction, the court, applying the CJEU Digital Rights Ireland ruling, neutralized the data retention legislation, holding that telecommunication operators were not obliged to collect and retain data...¹³⁴

The Dutch Council of State recently referred questions as to the compatibility with the Charter of the collection of fingerprints for the production of passports, an obligation derived from an EU

¹³⁰ Report on France, 93.

¹³¹ It however found that its strong sanctioning power, which included removing Internet access, without due process guarantees (eg presumption of innocence), was not acceptable, and constituted a serious interference with freedom of expression and communication. It considered that only a judge could take such sanctions, following an adversarial procedure. (Report on France, 93-94)

¹³² Report on France, 94.

¹³³ Report on France, 97.

¹³⁴ eg Report on the Netherlands, 36.



regulation; however, the CJEU, controversially, found that the case did not fall under the scope of application of the Charter and declined to rule on the matter.¹³⁵

Individuals have also opposed in administrative courts the collection and processing of data by public authorities (eg pupils file). In most case, they rely on the national law, and the Directive is sometimes mentioned as back-up .¹³⁶

Finally, in some countries, like in France, the supreme (administrative) courts have been called to review decisions (including sanctions) imposed by the data protection authorities. In most cases, they support their findings.¹³⁷ In the Netherlands, the Council of State heard a challenge to the discretion of the data protection authority to investigate, and referred two questions to the CJEU.¹³⁸

2.1.4.2.3 REMEDIES IN ORDINARY COURTS

Ordinary courts have proved overall active in trying to enforce data protection rights (eg France, Italy, Spain, etc) against private actors. However, this is not the case everywhere ¹³⁹ and varies also over time.¹⁴⁰

Data protection litigation faces specific obstacles. The field is complex, technology evolving quickly, the financial stake usually small for individuals, damage is difficult to establish, lawyers costs high, etc. All these make individuals reluctant to sue; in such context, it is important that NGO can be involving in securing the development and respect of data protection rules. However, in some countries, like United-Kingdom, only individuals can bring action for violation of data protection legislation.¹⁴¹ Given the scale and systematic nature of data collection and processing, the availability of class action would help challenge excessive corporate or governmental intrusion with privacy. Data on this issue is however lacking, except for the United-Kingdom, which does not allow it.¹⁴² Cases which receive high media attention, and which take a protective stance, such as the Google decision by the CJEU, may incite more individuals to turn to data protection authorities or courts to protect their rights.

¹³⁵ C-446/12, C-447/12 and C-448/12 *Willems, Kooistra, Roest and Van Luik* ECLI:EU:C:2015.238. Report on the Netherlands, 37.

¹³⁶ Report on France, 95.

¹³⁷ See Report on France, 96-97.

¹³⁸ See pending case before the CJEU: C-192/15, *Rease en Wullems*.

¹³⁹ See Report on the United Kingdom, 21-22.

¹⁴⁰ eg Report on Hungary,

¹⁴¹ Report on the United Kingdom, 20.

¹⁴² Report on the United Kingdom, 21.



The respective role of civil and criminal remedies should be examined, as Member States seem to have adopted different strategies in this regard. In France, for example, breaches of data protection tend to be remedied through criminal proceedings, although civil actions (tort, injunctions, etc) are also possible.¹⁴³

Whilst some courts at least have displayed some reluctance to stop data collection and processing by public authorities ¹⁴⁴ unless they were unnecessary or manifestly disproportionate, they have, in contrast, shown a greater inclination towards bringing the activities of (big) corporations within the protective ambit of EU and national data protection law.

For example, before the 2014 Google ruling by the CJEU, French courts had already ruled that the examination of data collected through ‘tachographs’, search engines or listing on Google search qualified as data processing, and where such subject to data protection rules.¹⁴⁵ Courts in the Czech Republic regularly interpret the notion of ‘personal data’ in reference to the Directive.¹⁴⁶ On the contrary, courts in the United-Kingdom have construed ‘personal data’ narrowly, requiring ‘relevance and proximity’, in breach of the EU Directive. IP addresses are not considered personal data, and are therefore not falling under the scope of the Directive.¹⁴⁷ French courts, moreover, have for a while accepted jurisdiction in cases against companies based outside the EU.¹⁴⁸

Unsurprisingly coming from a country in which civil society and political elite have long called for its recognition, French courts are actively enforcing the right to be forgotten. In December 2014, a French court enforced the EU right to be forgotten against intermediaries and instructed Google to delist a press article.¹⁴⁹

When ordinary courts must balance data protection with other interests or rights, they have often sided with privacy. For example, an Italian court, in interim proceedings involving a file-sharing site, applied the e-Privacy Directive and considered that the protection of confidentiality in electronic communication prevailed over the enforcement of subjective rights such as digital copyright, and rejected the claim of a copyright owner who wanted to compel an Internet Service Provider to release the e-mail addresses of subscribers who had allegedly infringed their

¹⁴³ Report on France, 104.

¹⁴⁴ Report on France, 93-97, Report on the Netherlands, 19.

¹⁴⁵ Report on France, 98-99, 101.

¹⁴⁶ Report on the Czech Republic, 23.

¹⁴⁷ Report on the United Kingdom, 22.

¹⁴⁸ Report on France, 104.

¹⁴⁹ Report on France, 101.



copyright.¹⁵⁰ French courts are keen to impose the removal or the delisting of defamatory articles to protect privacy, but where online publications denounced problems in the functioning of justice or public institutions, they then privilege freedom of expression and information.¹⁵¹

Some courts, like the Belgian ones, seem to be struggling to draw the line between data protection and commercial interests or organizational purposes: they ‘placed few fetters on the use of health data for consumer acquisition’,¹⁵² and did not grant ‘resident’ of nursing the right to access their data, for they are not ‘patients’.¹⁵³

Unfortunately, national reports did not provide much information on the nature on the judicial remedies available, or the sanctions or damages imposed on those who breach data protection rules. In France, criminal sanctions for most violations are very high (ie up to five years imprisonment and a 300 000 EUR fine, more than for involuntary manslaughter), but courts do not condemn individuals to jail and rarely impose the heavy fines. Even when they do impose high fines (such as with Google), these are no deterrent in comparison to the economic benefits derived from illegal data processing.

2.1.4.2.4 BARRIERS TO THE EXERCISE OF DATA PROTECTION RIGHTS

Probably the major problem concerning both the administrative and judicial enforcement of the EU data protection framework is its complexity; individuals struggle to understand what their rights are, and even the more willing parties find it difficult to understand what is required from them to be in compliance with the rules, and do not have the expertise or resources to do so. Besides, as technology evolves rapidly, legislators, data protection authorities, and courts are struggling to stay ‘in touch’. Public and private efforts made in order to respect the rules become quickly redundant, which can be discouraging, in particular where important human and financial resources have been devoted to develop, or comply with, fast-changing rules. New models of social media, in which individuals upload information about themselves, results in difficult allocations of responsibilities whilst third party access to these data poses serious threat on privacy.¹⁵⁴ Furthermore, in countries in which data protection authorities are weak and in which legal aid is not available or sufficient and NGO litigation is not possible, costs act as a powerful deterrent, as the financial stakes for individuals are usually low. In that regard, it is

¹⁵⁰ Report on Italy, 79.

¹⁵¹ Report on France, 101-102.

¹⁵² Report on Belgium, 29.

¹⁵³ Report on Belgium, 30.

¹⁵⁴ Report on the United Kingdom, 23.



important to develop simplified procedures for the enforcement of data protection rights, and involve private actors in the process (like with the right to be forgotten and the special form which Google provided to handle delisting requests).

2.2 THE PROTECTION OF CIVIL RIGHTS IN PROCEDURES FOR THE MUTUAL RECOGNITION OF JUDICIAL DECISIONS IN CIVIL MATTERS

The intensification of cross-border activities, as a result of the European integration (eg internal market, abolition of internal border within Schengen, student exchange program, research mobility supports, etc.) and technological development (e.g. e-commerce, social media, etc.) has led to an increase in the number of judicial disputes which have cross-border dimensions. The EU has, over the years, developed a number of EU-specific mutual recognition mechanisms in civil matters, to facilitate the cross-border resolution of disputes (through the determination of competence matters) and the recognition and enforcement of judicial decisions.

In civil and commercial matters, the Brussels Convention was adopted on 27 September 1968 which regulated the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In 2001, the EU adopted Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,¹⁵⁵ commonly known as *Brussels I*. The Brussels I Regulation has now been amended and a Recast Regulation has been adopted, Regulation No 1215/2012, known as *Brussels I bis*.¹⁵⁶ However, as it only applies to decisions delivered after 10 January 2015, its implementation and application will not be examined in this report.

In family matters, Regulation No 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, known as *Brussels II bis*, was adopted in 2003;¹⁵⁷ it repealed and replaced a previous regulation

¹⁵⁵OJ L 012, 16.01.2001, 1.

¹⁵⁶Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) OJ L 351.1, 20.12.2012, 32.

¹⁵⁷OJ L 338, 23.12.2003, 1



on the matter which had never been implemented (Regulation 1347/2000, known as Brussels II).¹⁵⁸

This section focuses on the implementation of Brussels I and Brussels II bis and their incidence on civil rights protection in the EU. Although not traditionally considered by the scholarly literature as part of the ‘EU citizenship package’, an argument can easily be made to that effect. Indeed, Brussels I (and now Brussels I bis) and Brussels II bis Regulations are amongst the most frequently litigated EU instruments. They are particularly relevant for EU citizens, in particular mobile ones, as well as all those engaging in cross-border economic activities within the EU, and are there to assist them when ‘things go wrong’, and provide them with effective remedies.

First, these EU instruments set rules determining the competent court. That way, they help aggrieved parties figuring out where they should turn for judicial remedies; they seek to ensure that the most suitable court hears the dispute; and they minimize problematic concurrent litigation, denial of justice, forum-shopping and other obstructing techniques by unscrupulous parties (usually the stronger and better advised...). Second, these EU legislative measures set up simplified mechanisms for the recognition and enforcement of judicial decisions in disputes which have a cross-border dimension. Therefore, they contribute in a crucial manner to the realization of the right to an effective judicial remedy, as well as civil rights which domestic proceedings may seek to enforce (eg freedom of expression, right to family life, right to privacy, etc).

For all these reasons, the faithful application of these EU instruments is primordial in securing core civil rights. However, in that they provide for quasi-systematic recognition and enforcement of judicial decisions issued by other Member States, based on mutual trust, these EU mutual recognition instruments may at times also jeopardize civil rights, where substantive and procedural standards at national level are falling behind. This could be the case where the court of another Member State does not protect due process to the same standards as the state in which enforcement of the decision is sought, or afford limited protection to freedom of expression. Both Brussels I and II bis includes provisions, which aim at guaranteeing that mutual

¹⁵⁸Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses OJ L 160, 30.6.2000, 19–36. In addition to these two main instruments for the mutual recognition of decisions in civil matters, further EU regulations have been adopted to further simplify the enforcement of specific judicial decisions: Regulation No 606/2013 on the mutual recognition of protection measures in civil matters; Regulation No 1896/2006 on the European Order for Payment Procedure; Regulation No 861/2007 on the European Small Claim Procedure; Regulation No 805/2004 on the European Enforcement Order for Uncontested Claims; Regulation No 3/2009 alimony.



recognition does not come at the expense of the rights of the defense, or other important public policy objectives. It is nonetheless important to examine how these are used in judicial practice.

Whilst national rapporteurs have provided information on executive and legislative measures which were adopted in all Member States' covered to enable the application of the regulations, not all the national rapporteurs provided details on their judicial application; the findings are thus mainly based on information taken from the reports on France, Italy, Belgium, Spain, and the Czech Republic.

2.2.1 BRUSSELS I REGULATION AND CIVIL RIGHTS PROTECTION

The objective here is not to detail the content and operation of the Brussels I Regulation, or all aspects of its application at domestic level, but rather to highlight its implications for the protection of civil rights at domestic level. It will examine first the Commission 2009 assessment of the Regulation, before looking at the implementation of the Regulation in the different national contexts.

2.2.1.1 BRUSSELS I AND CIVIL RIGHT PROTECTION – THE 2009 COMMISSION REPORT, AND THE RECAST REGULATION

In 2009, the Commission released a report on the application of the Brussels I Regulation, which identified circumstances in which its application by domestic courts could adversely affect civil rights.¹⁵⁹ It suggested that, rather than the Regulation itself, lacunas in the Regulation led to inequalities in the exercise of due process rights and the right to a fair trial, as well as uneven protection of civil rights, in particular personal data or privacy.

A first set of problems results from the absence of rules in the Brussels I Regulation as regard disputes in which defendants from a third-state are involved. In Member States where no additional jurisdictional protection exists, consumers, for example, may be deprived of an effective remedy against third state companies, or have to sue (or defend themselves) before third state court, where they would not benefit from the Regulation simplified enforcement mechanism, EU protective provisions on, for example, consumer rights, product liability or data protection, and generally the rights of the defense and due process offered by courts in the Member States of the EU. Moreover, the absence of common rules regulating the effect of third-

¹⁵⁹ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM/2009/0174 final.



state judicial decisions in the EU may result in situations where third state judgments are recognised and enforced, although they are in breach of EU law. Finally, the absence of harmonised rules on the conditions under which Member States' courts can decline their jurisdiction in favour of the courts of third-states leads to confusion, which is also detrimental to the rights of the defense or other rights protected by the EU and its Member States.¹⁶⁰

The second set of circumstances identified in the 2009 Commission report concerns the (ab)use of the Regulation's *lis pendens* rule. The Regulation, as (problematically) interpreted by the CJEU,¹⁶¹ allowed individuals or companies to rely on the Regulation's *lis pendens* rule to delay proceedings against them. On that basis, an individual or company who suspects they will be taken to court for violation of copyright, for example, will bring a related suit (eg declaratory relief) in a state in which litigation is notoriously slow, often Italy (hence the expression 'firing an Italian torpedo'), with the result that the aggrieved party can no longer sue them, as any other court seized of the dispute would have to wait for a decision from the first court seized. In the meanwhile, the party that abusively seized the 'wrong' court can continue to profit from its wrongful conduct, and the aggrieved party suffers additional delays, costs and uncertainty, which seriously jeopardizes their right to a fair trial and effective judicial remedy.

Finally, the 2009 Commission report suggests that national courts have made a moderate use of provisions which made it possible to refuse to enforce a judgment from another Member State to protect the procedural rights of defendants.¹⁶²

The recast Regulation (Brussels I bis), which came into force on 1st January 2015, aims to remedy some of the flaws outlined above. The most significant, as far as civil rights are concerned, are the following. First of all, the Recast Regulation expanded the scope of choice-of-court clauses in contract, to enable more disputes being determined before courts of the Member States, and thus subject to the Regulation and its due process guarantees, as well as other EU and Member States' provisions protective of civil rights. Furthermore, exclusive jurisdiction clauses will override *lis pendens*, thus restricting opportunities for delaying or obstructing litigation. It also clarifies the effect of arbitration exclusion, to prevent parties from

¹⁶⁰ Report from the Commission to the European Parliament, the Council and THE European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM/2009/0174 final, 5

¹⁶¹ A trend supported by the CJEU case law (C- 116/02 *Erich Gasser GmbH v Misat Srl* ECLI:EU:C:2003:657; C- 159/02 *Turner v Grovit* ECLI:EU:C:2004:228).

¹⁶² In the *Krombach* case, the CJEU recognized the protection of the rights of the defense as a component of the procedural public order, under Article 27-2 of the Brussels Convention, the violation of which could prevent the recognition and enforcement of decisions of other state parties. C-7/98 *Dieter Krombach v André Bamberski* ECLI:EU:C:2000:164.



abusively starting litigation to avoid going into arbitration. It abolishes the *exequature* procedure, thereby further simplifying the procedure for recognition and enforcement. It is, here, important to note that the original Commission's proposal actually maintained *exequature* in defamation cases as well as decisions resulting from collective redress mechanisms, because of the too wide disparities between the legal systems of the Member States in these matters.¹⁶³ The final text however does not include these exceptions. Although concerns were raised as regard the removal of this additional 'control' stage, commentators suggest that it should not constitute a threat on the rights of the defence, as the enforceability of judgments may still be challenged.¹⁶⁴

2.2.1.2 THE 'IMPLEMENTATION' OF THE BRUSSELS I REGULATION

The Brussels I Regulation is, like all EU regulations, directly applicable, and thus does not require any transposition measures. However, most Member States adopted legislative and executive measures at domestic level to adjust domestic law, which often provided for very different rules than those imposed by the Regulation, and to facilitate the application of the Regulation (eg identification of competent national authorities, procedures, formalities, templates, etc.). In Member States which have codified laws, it led to amendment of the relevant codes (*Code Judiciaire* in Belgium, *Code de Procédure Civile* in France, Civil Code in the Netherlands, etc).

The United-Kingdom elected to opt-in the Brussels I Regulation, which is given effect in domestic law through the Civil Jurisdiction and Judgment Order 2001, amending the Civil Jurisdiction and Judgment Act 1982. It is directly applicable since 1 March 2001. The difficulty lies with its 'integration' with the common law, which traditionally determines those matters.¹⁶⁵ Denmark, which had an opt-out, agreed to participate in Brussels I through a 'parallel agreement' (ie intergovernmental agreement reproducing the content of the regulation) adopted through 2006

¹⁶³ See Commission 'Proposal for Regulation of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters', SEC (2010) 748 Final. On the diversity in Member States defamation laws, see Commission study, Comparative study on the situation in the 27 Member States as regard to the law applicable to non contractual obligations arising out of violations of privacy or the right related to personality http://ec.europa.eu/justice/civil/files/study_privacy_annexe_3_en.pdf

¹⁶⁴ E. B. Crawford et J. M. Carruthers, 'Brussels I a – the Brussels Regulation recast: closure (for the foreseeable future)', *Scots Law Times* (2013) No 12, 94.

¹⁶⁵ Report on the United Kingdom, 4.



legislative act. The parallel agreement, approved by the Danish parliament, is applicable and binding in Denmark.¹⁶⁶

2.2.1.3 THE APPLICATION OF THE BRUSSELS I REGULATION BY NATIONAL COURTS

Data on the application and enforcement of Brussels I is not available in a synthetic format.¹⁶⁷ The JURE database, maintained by the EU Commission, contains data on the judicial application of the Brussels I Regulation, including summary of national courts decisions in English. However, this database, as well as the EUR-LEX option of searching national decisions,¹⁶⁸ are not comprehensive.¹⁶⁹ The national rapporteurs were asked to identify to what extent the application of the Regulation by national courts impacted positively or negatively on the protection of civil rights. The general picture is one of faithful application of the Regulation, problems in application largely arising from ambiguities and lacunas in the EU instrument itself. Some countries, such as Belgium, display exemplarity in the application of the Regulation.¹⁷⁰ Other national courts have nonetheless attempted to 'rectify' aspects of the Regulation which could jeopardize the rights of the defense of weaker parties (eg France, Czech Republic) or which led to abusive practice (eg Italy). There have been, however, a couple of contentious issues, some of which affect the protection of civil rights, notably due process guarantees, and which thus deserve to be examined in more details.

2.2.1.3.1 CONFUSIONS ON THE SCOPE OF APPLICATION

The Brussels I Regulation applies in cross-border disputes in cases the defendant is domiciled in a Member State of the EU (Article 2 and 4) or are connected to EU law under other grounds of jurisdiction. In the new Member States that joined in 2004, for example in the Czech Republic,

¹⁶⁶ The 2012 Recast Brussels I Regulation has been similarly approved through a legislative amendment. The parallel agreement is implemented through executive orders and guidelines. (Report on Denmark, 6-7).

¹⁶⁷ On this point, see Appendix, http://ec.europa.eu/justice/civil/files/brussels_i_appendix_d_17_12_10_en.pdf, 191; see also Impact assessment accompanying the proposal for the Brussels I Recast Regulation SEC (2010) 1547 final, at http://ec.europa.eu/justice/policies/civil/docs/sec_2010_1547_en.pdf

¹⁶⁸ See search results for France, at http://eur-lex.europa.eu/search.html?instCitedStatus=SEC_LEG&COUNTRY_CODED=FRA&qid=1435149744600&CI_SEC_LEG=32001R0044*&instCitedYear=2001&DTS_DOM=NATIONAL_LAW&type=advanced&instCitedNum=44&lang=en&instCited=REGULATION&SUBDOM_INIT=NAT_CASE_LAW

¹⁶⁹ See the collection of decisions in JURE – Jurisdiction, recognition and enforcement of judgments in civil and commercial matters, at <http://eur-lex.europa.eu/collection/n-law/jure.html>;

¹⁷⁰ Report on Belgium, 3.



courts at first sometimes wrongly excluded the application of the Regulation where one of the parties only was domiciled in a Member State. There were also issues related to the temporal application of the Regulation. On a reference from the Czech Republic, the CJEU agreed that the Regulation was only applicable for the purpose of recognition and enforcement where it was in force at the time of delivery of the judgment in both Member States.¹⁷¹

2.2.1.3.2 THE NATIONAL APPLICATION OF COMPETENCE RULES AND RESPECT FOR THE RIGHT TO AN EFFECTIVE REMEDY (AND OTHER CIVIL RIGHTS)

The Brussels I Regulation sets out rules to determine which court is competent to hear a particular cross-border dispute involving civil and commercial matters. Plaintiffs and their lawyers can use the European Judicial Atlas to identify the relevant court in other Member States.¹⁷² These rules, which usually try to designate the most 'suitable' court to deal with the case, are generally well-known by national courts, which apply them faithfully and follow relevant CJEU interpretative rulings;¹⁷³ there have been some issues and confusions, which have, in most cases, been resolved, thereby avoiding harmful concurrent jurisdiction or denial of justice.

The basic rule determining competence under the Regulation is that of the domicile of the defendant. This rule is particularly important for non-EU nationals who (legally) live in the EU, since it guarantees that a court of a Member State can hear a dispute, and with it the benefit of higher standards of civil rights protection. The Regulation also includes special rules of attribution of competence, for example in case of contract (place of delivery), in tort (where harm or causal event occurred), alimony (debtor's domicile), etc. It also recognizes special exclusive jurisdiction rules for real estate (location of the immovable property), legal persons (seat), registration on civil registry (state of the registry), trademarks (place of registration), the enforcement of decisions (place of execution). Furthermore, the Regulation provides for special rules for certain kinds of contracts (eg consumer, employment, insurance), which favour courts 'closer' to the weaker party. Finally, there are prorogation clauses, according to which parties to a contract may include a choice-of court clause which identifies the competent court.

¹⁷¹ C-514/10 *Wolf Naturprodukte v SEWAR spol s.r.o* ECLI:EU:C:2012:367. (for details, see Report on Czech Republic, 3-4.)

¹⁷² See webpage, European Judicial Atlas in Civil Matters, at http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm.

¹⁷³ See Report on Belgium, 4-8.



In order to 'broaden the scope of protection of rights assigned to the claimant', some national courts do not require the claimant to specify which rule applies.¹⁷⁴

In tort liability matters, one observes an extension of the application of the rule of attribution based on the place where harm occurred. The CJEU case law enables parties to bring proceedings for defamation in the courts of all Member States in which harm occurred through the publication or release of defamatory material in those countries (*Shevill* case).¹⁷⁵ In the *Pickney* case, referred from France, the CJEU confirmed the competence of a French court in relation to a damage claim regarding copy infringement by an Austrian manufacturer whose products were sold by a British company, through an Internet site accessible from France.¹⁷⁶

With the development of the Internet however, and the availability of online material across borders, this ground of jurisdiction may turn out problematic. EU lawyers may be familiar with the case in which an French-Israeli academic sued for libel US Professor J.H.H Weiler in a French court for publishing a critical book review written by a German scholar and available online on the European Journal of International Law website. The French court eventually declined jurisdiction, since the plaintiff had been forum-shopping and could not prove that the review was accessible from France or was actually consulted in France before the end of the statute limitation period (incidentally, it also qualified the academic criticism in the book review as legitimate, and not libelous).¹⁷⁷ As national rules on freedom of expression are diverse, litigants may be tempted, as they did in the Weiler case, to bring litigation in courts of countries which impose tougher limits on free speech to seek compensation for words which would not constitute violation of free speech and thus not support compensatory action in other countries. It could even have a chilling effect on freedom of expression.

National courts have, however, been vigilant over forum-shopping and have set some limits. For example, the Italian Supreme Court declined jurisdiction to hear a case against a Swiss newspaper because it did not sell copies in Italy and limited its jurisdiction to determining damage suffered in Italy in a case involving a German newspaper with broad diffusion in Italy.¹⁷⁸

The CJEU *Gasser and Turner* case law,¹⁷⁹ which prevents anti-suit injunctions, commonly used by common law courts to prevent diversion tactics, enabled parties to bring suits in courts which

¹⁷⁴ Report on the Czech Republic, 5.

¹⁷⁵ C-68/93 *Shevill and Others v Presse Alliance* ECLI:EU:C:1995:61.

¹⁷⁶ C-170/12 *Pinckey v KDG Mediatech AG* [2013].

¹⁷⁷ Report on France, 123-124.

¹⁷⁸ Report on Italy, 24.

¹⁷⁹ Cases C-159/02 *Turner v. Grovit* ECLI:EU:C:2004:228 and C-116/02 *Erich Gasser GmbH v. MISAT* ECLI:EU:C:2003:657.



are not the one chosen or even competent ones (to improve the odds of getting a favourable ruling or to delay or obstruct judicial actions against them), in a way which can undermine the other parties' right to an effective remedy.

For long, the Italian Supreme Court declined jurisdiction when claimants sought negative declaration of tort, to prevent *lis pendens* abuse and delays.¹⁸⁰ However, following the *Folien Fisher* CJEU ruling,¹⁸¹ the Italian Supreme Court recognized its jurisdiction, including over the foreign fraction of the patent, something which the trial court of Milano still refuses to do.¹⁸² In case of summary proceedings, national courts have sought to deny jurisdiction, to obstruct 'forum-shopping' by plaintiffs.¹⁸³

Courts have tried to set limits to the *lis pendens* rule in order to prevent fraudulent abuse.¹⁸⁴ A reference sent by the French *Cour de Cassation* led the CJEU to strike a better balance between the rights and interests of both parties. In the *Cartier* case, the CJEU finally accepted the right to contest the jurisdiction of the court seized by the other parties before making submissions on the merits.¹⁸⁵

Exclusive choice-of-court agreement posed particular problems in France. French courts took time to come to terms with the CJEU ruling according to which such agreement prevailed over the domiciliation clauses (eg France, only in 2006).¹⁸⁶ Besides, in a controversial ruling, the French *Cour de cassation* recently refused to recognize the validity of unilateral jurisdiction clauses (frequent in the insurance and banking sector) which obliges only one of the parties (eg the client) to bring its case in a specific court, while the other (eg the bank or insurance company) is free to select any other competent court. The case opposed a French national (residing in Spain), to the Luxembourg based Rothschild bank.. The bank contested the French court's jurisdiction based on a contractual provision which conferred jurisdiction to Luxembourg courts, unless the bank decided otherwise. The French court found the clause invalid, as it depended on the sole decision of the bank. The decision has been particularly criticized amongst Anglo-saxon commentators, as British courts recognize the validity of such

¹⁸⁰ Report on Italy, 30.

¹⁸¹ Case C- 133/11 *Folien Fisher* ECLI:EU:C:2012:664.

¹⁸² Report on Italy, 31.

¹⁸³ Report on Belgium, 6, Report on Italy, 31.

¹⁸⁴ Report on France, 50.

¹⁸⁵ Case C-1/13 *Cartier* ECLI:EU:C:2014:109.

¹⁸⁶ Report on France, 53.



clause. The French court decision contradicts the Brussels I Regulation, but appears to better protect the weaker party.¹⁸⁷

The jurisdiction according to which consumers should be sued in the courts of the Member State in which they reside posed some problems, in the case of customers with unknown address. Czech courts referred the matter to the CJEU, which balanced the right of fair trial and the rights of the defense of the weaker party, the consumer, who would be harmed in case proceedings would proceed against them without their presence, and the right to effective remedy of the applicant company, and set out a particular sequencing to determine the competence of national courts.¹⁸⁸ The judgment was not totally welcome in the Czech Republic, but courts followed it, whilst showing diligence in trying to find customers' address.¹⁸⁹

Particularly from the point of view of EU citizenship and equal treatment, many countries (eg France, Italy, Czech Republic), which had a tradition of national court's competence based on the nationality/citizenship of the applicant or the defendant, have adjusted to the Brussels I domiciliation rule.¹⁹⁰ In some countries, like Italy or France, the Brussels I competence regime has been extended beyond the scope of application of the Regulation thus triggering a Europeanization of Italian private international law rules.¹⁹¹

National courts, when it comes to case involving parties from third-state,, or without a connecting ground to the EU, have often found themselves competent to hear disputes on additional grounds, in order to guarantee access to justice. Italian courts follow a liberal system, and the only obstacle to accepting jurisdiction would be in cases that concern immovable property situated abroad.¹⁹² French courts will, for example, accept jurisdiction to hear cases in emergency or where plaintiffs show that it would be impossible for them to bring their claim before a foreign court.¹⁹³ However, as noted by the Commission in the 2009 Report, national

¹⁸⁷ It could, however, have reached a similar outcome by relying relevant provision of the Brussels 1 Regulation which protect consumers, which it did not. For a critical commentary, see M. Scherrer, 'The French Rothschild Case: A Threat for Unilateral Dispute Resolution Clauses?', at <http://kluwerarbitrationblog.com/blog/2013/07/18/the-french-rothschild-case-a-threat-for-unilateral-dispute-resolution-clauses/>

¹⁸⁸ ie whether defendant resides in the Member States in such case that law applies, whether he or she resides in another Member States, in such case that Member State laws apply, or if no further indication, it is possible to apply the law of the state of the last know domicile) C-327/10 *Lindner v Hypotecni banka* ECLI:EU:C:2011:745.

¹⁸⁹ Report on the Czech Republic, 5-7.

¹⁹⁰ C-281/02 *Owusu v Jackson* ECLI:EU:C:2005:120. (Report on France, 52, Report on the Czech Republic, 4; Report on Italy, 4

¹⁹¹ Report on Italy, 5, Report on France, 52.

¹⁹² Report on Italy, 7.

¹⁹³ Report on France, 52.



rules in that regard vary, thus creating disparities in access to justice depending on the Member State involved.

2.2.1.3.3 REFUSAL TO ENFORCE JUDGMENTS TO PROTECT THE RIGHTS OF THE DEFENSE

The simplified procedure for recognition envisaged by the Regulation (ie simplified exequature) consists in a mere formal check, since the other party is not heard and the court cannot ascertain on its own the existence of elements precluding recognition. Data suggests that the simplified procedure for the recognition and enforcement of decisions of courts of other Member States provided under the Regulation leads to very high recognition rates (e.g. 99.7 % in France),¹⁹⁴ thus making it particularly effective. The recognition itself may be subject to limited challenge opportunity. For example, in Italy, it can only be challenged through an extraordinary review in cassation.¹⁹⁵

Under Article 34 however, national judicial authorities may nonetheless refuse to declare enforceable a foreign judicial decision where it goes against the public order or the rights of the defense. Some national courts recognize the rights of the defense as part of the procedural public order.¹⁹⁶ National courts verify that parties have been in a position to defend themselves, meaning that they have been effectively and timely notified of documents instituting proceedings and given enough time to organize their defense, and reject requests where notification modalities were not respected, where jeopardizes the rights of the defense; they will also check that evidence used was lawful and admissible; or that the foreign court was impartial.¹⁹⁷ There have been issues, in particular, with regard to declaring enforceable common law Mareva injunctions (which are issued to prevent defendants from dissipating their assets) or anti-suit injunctions. French courts considered Mareva injunctions compatible with public order, but not anti-suit injunctions.¹⁹⁸ A good example of how argument based on the protection of the rights of the defense was, unsuccessfully, used to prevent the enforcement of a foreign decision is the *Gambazzi* case. An Italian citizen had been sentenced without being heard by a British court, and challenged the order of enforcement issued by the Italian court. The case was referred to the CJEU which considered that it was for the national court to check whether the right to be heard had been respected and to assess whether the sanction was proportionate.¹⁹⁹ The Italian

¹⁹⁴ Report on France, 56

¹⁹⁵ Report on Italy, 9.

¹⁹⁶ eg Report on France, 57; Report on Italy, 32 .

¹⁹⁷ Report on France, 57-58.

¹⁹⁸ Report on France, 58.

¹⁹⁹ C-394/07 *Marco Gambazzi v DaimlerChrysler* ECLI:EU:C:2009:219



court found that there had been no disproportionate infringement of the right to be heard, and dismissed the action.²⁰⁰

2.2.1.3.4 COSTS

There are two dimensions to costs: the costs of proceedings for the recognition and enforcement of judgment by courts of other Member States and the costs related to the main proceedings which led to the decision of which enforcement is sought.

Concerning the cost of the proceedings to seek recognition and enforcement of judicial matters, the simplification of the procedure compared to standard procedure under private international law rules, should have driven costs down. Not all national reports have produced information on this.

Applicants are not required to use a lawyer; however, in practice, navigating the procedure necessitates a minimum of legal expertise, and individuals usually hire lawyers. In France, the costs range from 500-1000 EUR, doubled in case of appeal.²⁰¹

Translation of documents, where it may be requested, like in France, may be costly, that is 5000 EUR for 70 page document.²⁰² These costs may be prohibitive, in particular if legal aid is not available in such proceedings.

When it comes to the costs of the main proceedings, costs relating to the determination of jurisdiction can be quite high, due to complexity and length, even national reforms have created the option of fee-arrangement.²⁰³ However, to some extent, the application of the Brussels I Regulation has opened possibilities for reduced litigation costs to enforce one's rights. For example, in trademark litigation, there were questions as to whether coercive measures could be enforced in other Member States using equivalent measures. A French court referred the matter to the CJEU, which decided they could.²⁰⁴ This decision enables victims of trademark violations to avoid multiple litigation in different countries and to bring proceedings in 'low-cost' countries (ie countries in which trademark litigation is not so expensive, such as France and Germany) and

²⁰⁰ Report on Italy, 32-33.

²⁰¹ Report on France, 55.

²⁰² Report on France, 55.

²⁰³ Report on Italy, 17.

²⁰⁴ Case C-235 *DHL Express France* ECLI:EU:C:2011:238.



seek their enforcement in ‘high-cost’ Member States (such as the United-Kingdom). There is evidence that national courts are following the CJEU decision.²⁰⁵

2.2.1.3.5 ADMINISTRATIVE ASPECTS

National courts usually do not require documentation beyond what is necessary. Although it is not required, the competent national authority sometimes requests certified translation of the decision, and in case of decision in absentia, that of the document instituting proceedings and the notification of the decision, which create additional practical and financial hurdles.²⁰⁶

The development of ICT should have improve the effectiveness of civil proceedings, including request for recognition and enforcement of foreign decisions. In Italy, the law now allows for the electronic filing of pleadings and documents in civil proceedings, which should contribute to improve Italian bad reputation in terms of length of proceedings.²⁰⁷ In some countries, one can apply for a copy of a court decision, including in matrimonial and custody matters, using online forms.²⁰⁸

2.2.1.3.6 BARRIERS TO THE EXERCISE OF THE RIGHT TO AN EFFECTIVE REMEDY IN THE CONTEXT OF THE APPLICATION OF THE BRUSSELS I REGULATION

Although the Regulation supports the right to an effective judicial remedy, lacuna in the scope of the Regulation, and its interpretation by the CJEU, which condones delaying and obstructive tactics by parties to the dispute, jeopardize individuals’ right to a fair trial and effective remedies. National courts have sometimes tried to mitigate these negative effects of the Regulation, but were forced to align on the CJEU approach, although there are signs that the CJEU is more willing to address abuses and the Recast Regulation should also remedy some of the current flaws. The Regulation is also problematic from the point of view of freedom of expression, in that it allows suits for defamation in countries other than the one in which words have been expressed, and easy enforcement of the judgment across the EU. However, courts have been vigilant in trying to prevent harmful forum-shopping. The analysis also highlighted costs related barriers (eg translation, legal fees).

²⁰⁵ eg Report on France, 50.

²⁰⁶ Report on France, 55.

²⁰⁷ Report on Italy, 19-20.

²⁰⁸ Report on France, 54.



2.2.2 CIVIL RIGHTS PROTECTION IN THE APPLICATION OF REGULATION 2201/2003 (BRUSSELS II BIS) RELATED TO DIVORCE, SEPARATION AND CUSTODY

Increased human mobility across the Member States of the EU, encouraged by EU programs and free movement rules, has led to an increase in the numbers of mixed families, and of families living in countries others than the one of their nationality. When families break up, as it happens in increasing proportions, it leads to difficulties not only in determining the law applicable to divorce, separation, and parental responsibility, but also the competent court. Moreover, obtaining recognition and enforcement of foreign judicial orders against a spouse can also be difficult. In the EU, families can rely on a specific instrument to facilitate the cross-border family disputes, Regulation 2201/2003 (Brussels II bis).²⁰⁹ This section will briefly present the instruments, as well as its implementation and application by national authorities, and identify barriers to the exercise of the right to a fair trial, due process and family life.

2.2.2.1 THE BRUSSELS II BIS REGULATION AND CROSS-BORDER DIVORCE, SEPARATION AND CUSTODY

Brussels II bis includes rules for the determination of competent courts, as well as a simplified procedure for the recognition and enforcement of judgments in matrimonial matters and parental responsibility. The operation of the Brussels II bis regime is facilitated by the use of standard certificates, which enable courts in all Member State to understand easily the content of foreign decisions, without the need for translation. Brussels II bis is an essential instrument in ensuring the right to an effective remedy as well as the maintenance of family links (and thus the right to a family life) for mobile EU citizens across-borders. Its correct implementation and

²⁰⁹ In 1998, the EU first adopted the Convention on the jurisdiction, recognition and enforcement of judgments in matrimonial matters, which never came into force. In 2000, the EU institutions adopted the Regulation 1347/2000 on the jurisdiction, recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, which was short-lived and was soon replaced by Regulation 2201/2003 on the same topic, known as Brussels II bis, which came into force on 1 August 2004 and applied to proceedings instituted after 1 March 2005. Brussels II bis did not change rules related to the attribution of competence in such matters, but devised a mechanism to avoid competing proceedings in different courts and different countries. It also changed substantially jurisdictional rules on parental responsibility, and extended their application to all children. As to recognition and enforcement, it developed mechanisms to prevent the non-recognition of foreign decisions, modified the process for recognizing and enforcing access orders and reinforced return provisions in case of child abduction. In this sense, they contribute to the right to an effective remedy by improving the cross-border delivery of justice, as well as the respect for family life. However, like with Brussels I, the quasi-systematic recognition of the enforceability of foreign decisions may turn problematic in the court of the other Member State which delivered the decision to be enforced fell short of providing sufficient due process guarantees.



application are therefore essential; however, like Brussels I, the quasi-systematic recognition and enforcement of foreign decisions may give rise to concerns for the protection of due process rights, as well as the right to family law, where the judicial systems uphold different standards.

2.2.2.2. IMPLEMENTATION OF THE BRUSSELS BIS REGULATION AND CIVIL RIGHTS

The Brussels II bis Regulation, like the Brussels I, is directly applicable and does not require domestic transposition measures. Member States nonetheless adopted legislative and/or executive measures to adjust domestic legal systems and make room for the application of the Regulation at domestic level. In countries which have codified systems, these amended the relevant codes. Denmark has an opt-out, and therefore is not bound by the Regulation; its request to opt-it was rejected by the Commission.²¹⁰ The purpose here is to assess the extent to which the national application of the Regulation contributes to the protection of civil rights or on the contrary jeopardizes them and how.

2.2.2.3 NATIONAL COURTS' APPLICATION OF THE BRUSSELS II BIS REGULATION

Overall, the Regulation seems to be well applied by national courts. In 2014, the Commission released a report in which it assessed the application of the Brussels II Regulation.²¹¹ In jurisdictional matters, it identified as particularly problematic the 'rush to court' caused by non-hierarchical, competing grounds of jurisdiction, and the lack of possibility for the parties to choose a competent court by common agreement; confusion surrounding the transfer to a more suitable court; the adoption of provisional measures by courts of the state in which the child was abducted; the interpretation of lis pendens rule; and the absence of rule of residual jurisdiction, or forum necessitatis rule. In recognition and enforcement matters, it indicates that the partial abolition of exequature leads to undesirable situations, that national courts do not follow a consistent approach in applying public policy grounds to refuse recognition or enforceability and that divergences in the national courts' application of procedural safeguards in case of abduction (eg hearing of the child) to issue return certificates, cause particular difficulties. There are also problems of cooperation between national authorities and serious deficiencies

²¹⁰ Report on Denmark, 9.

²¹¹ Report from the commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 , Brussels 15 April 2014, COM(2014) 225 final, at http://ec.europa.eu/justice/civil/files/matrimonial_act_part1_v3_en.pdf



problems at actual enforcement level, which is left to the member states to organise. The Commission has now launched a Consultation on the functioning of the Brussels II bis Regulation.²¹² This section will highlight aspects of the application of the Regulation by national courts which are most relevant with regard to the protection of civil rights, in particular the right to an effective remedy, the rights of the defense, and the right to family life of both children and parents. The findings largely confirm the 2014 Commission report.

2.2.2.3.1 GROUNDS OF COMPETENCE AND DETRIMENTAL CONCURRENT LITIGATION: THE RACE FOR DIVORCE AND CUSTODY

In matrimonial matters (eg divorce, separation), Brussels II bis provide for seven grounds of jurisdiction, with no hierarchical precedence (Article 3). It includes the parties' domicile, which allows to bring within the jurisdiction of a Member State of the EU disputes concerning third country nationals residing in the EU (see the Belgium report on the competence of Belgium court proceedings seeking annulment of a marriage celebrated in Rwanda between two Rwandan nationals, Report on Belgium p. 8). Moreover, a court seized of divorce proceedings may also hear matters of parental responsibility. The Regulation thus affords flexibility which can be used to bring matters before a court which appears most suited to hear the case, but it can also easily lead to concurrent proceedings in different courts across Member States,, which can have detrimental effects on the right to an effective remedy and family life. Indeed, as noted by the Commission, it may lead to the 'application of a law with which the defendant does not feel closely connected or which fails to take into account his or her interests. It may further complicate efforts of reconciliation and leave little time for mediation.²¹³ This 'race for divorce' also implies technical difficulties such as the determination of the exact time a divorce was 'filed' when two spouses filed for divorced in courts of different Member States on the same date.

In parental responsibility, the Regulation is more restrictive, and in order to protect children, attributes primary competence to the court of the 'habitual residence' of the child, except in case of emergency or abduction. Some courts, like the Spanish ones, wrongly applied the same grounds of jurisdiction to both divorce and custody proceedings, but the situation is improving.²¹⁴ The determination of the habitual residence of the child, not defined under the Regulation, has been problematic. The possibility for divergence interpretation could trigger

²¹² See consultation page at http://ec.europa.eu/justice/newsroom/civil/opinion/140415_en.htm

²¹³ See 2014 Commission report, above n 211, 5,

²¹⁴ Report on Spain, 5-6.



some kind of a 'race for custody'. Some national court, like the Czech ones, used their own criteria (Report on the Czech rep p. 8); others like the French, British or Luxembourg courts, used a definition of habitual residence elaborated by the CJEU in another context (Fernandez).²¹⁵ Eventually, upon a Finnish reference, the CJEU offered special guidance in order to determinate the child's habitual residence, including subjective and objective factors (Mercredi).²¹⁶ Recently, in the context of a reference from an Irish court in a case between a British mother and French father, which involved proceedings in France, the CJEU further clarified that procedural issues should also be taken into account in determining the habitual residence (*C.M.*).²¹⁷ There is evidence that national courts (eg in France, the Czech Republic) follow the CJEU instructions,²¹⁸ thus 'strengthening the protection of the right of the child in proceedings determining parental responsibility'.²¹⁹

There remain questions concerning which court's is competent to characterize the removal of a child (legal or illegal), which can lead to parallel proceedings in two different countries, or on the contrary courts in both countries denying competence. There seems to be particular difficulties in case involving Spain and the United-Kingdom.²²⁰

The determination of competence is still complex and leads to delayed or parallel proceedings, in a manner which is particularly damaging on the right to family life, and the right to an effective remedy. The *C.M.* case is a sad example of the challenges which mobile EU citizens face when their families break up and borders come, or are brought, between them.

2.2.2.3.2 REFUSAL OF RECOGNITION OR ENFORCEMENT BASED ON RIGHTS OF THE DEFENSE, RIGHTS OF THE CHILD OR RIGHT TO FAMILY LIFE

In matrimonial matters, the competent national authority may refuse recognition of a judicial decision if it is manifestly contrary to public order, or the rights of the defense, or conflicts with existing decisions.²²¹ In matters of parental responsibility, the recognition and enforcement can be refused if the decision is manifestly contrary to public order, taking into account the superior

²¹⁵ Case C-492/93 *Magdalena Pedoo Fernandez* ECLI:EU:C:1994:332.

²¹⁶ Case C-497/10 *Barbara Mercredi* ECLI:EU:2010:829

²¹⁷ Case C-376/14 *C. M.* ECLI:EU:C:2014:2268.

²¹⁸ Report on France, 61, Report on the Czech Republic, 8.

²¹⁹ Report on the Czech Republic, 8.

²²⁰ Report on Spain, 6-7, 11.

²²¹ However, the fact that the law of the state required to grant recognition does not allow for divorce, separation or marriage annulment in such circumstance does not offer a ground for not recognizing the decision (Article 25).



interest of the child, or if the child did not have the possibility to be heard where this is required by the fundamental rules of procedure of that state (except in case of emergency) or if the rights of the defense of the defendant have not been respected.

The grounds are restrictive, thus leading to high recognition rates. Non-recognition of the enforceability of a foreign judgment is largely limited to serious violations of rights of the defense (or conflicts with existing decisions), as well as the right of the child to be heard.

The right of the child to be heard, and whether the non-hearing of a child can be relied on to refuse the recognition and enforcement of judicial decision in matters of parental responsibility, is a particularly delicate matter. In some countries, like Germany, the right of the child to be heard is protected in the Fundamental Law. German courts would thus have to refuse to recognize decision on parental responsibility from another Member States in which a child was not given the chance to express his or her views. The prospect of one ever moving to Germany with children following a separation places a certain pressure on other legal system to secure similar guarantees, if they want their courts' decision on parental responsibility to be enforced there. We thus observe a trend towards the more systematic hearing of children in a number of Member States (eg France, Spain), although there is variation in its scope of application.

French law recognizes the right of a minor 'capable of discernment' to be heard if he or she so wishes. The *Cour de Cassation* reasserted that there are no specific age conditions, and that it is for the judge to assess the discernment capacity, and justify his or her determination in an appropriate manner. A Decree specifies the modalities of notification and information of the child in relation to his right to be heard, and instructs judges to make systematic mention in their decisions of the opportunity to be heard offered to the child, through the use of a special form.²²² In Spain, the law imposes a duty to hear the child, in accordance with his or her maturity and provided he or she is over 12; however, there are no clear rules as to whether a child under 12 should be heard. In the *Agurri* case, a Spanish court had granted temporary custody to a Spanish father whilst the mother went back to Germany. After her visit to her mother, the daughter did not come back to Spain. The father applied for her return but it was denied because the daughter was opposed to it. He then sought a new decision on custody from the Spanish court. The daughter was asked to appear at the hearing, but her mother did not let her come, as she feared the daughter would not be allowed to come back to Germany after the hearing. The Spanish court granted custody to the father, and ordered the daughter's return to Spain. The mother objected to the recognition and enforcement of the decision, based on the fact that the

²²² Report on France, 64-65.



daughter had not been heard in the Spanish custody proceedings. The German court agreed and refused to enforce the Spanish custody decision.²²³ The CJEU found that the Spanish court had complied with the Regulation in that it did give the child the opportunity to be heard.²²⁴

2.2.2.3.3 ADMINISTRATIVE HURDLES

Sometimes, like in France, national courts imposed additional conditions on the systematic recognition, and enforcement on access orders under the Regulation. These have been punished by the *Cour de Cassation*.²²⁵ Italy has removed the requirement for legalization of documents.²²⁶ In some countries translation may be required. However, many states do away with the need for translation in matrimonial matters.²²⁷

The reports provide no evidence that the development of e-Justice across Europe have led to specific changes in matters related to divorce, separation or custody, although in France it is possible to apply for joint custody on line in some regions only. It is however possible, in some countries, to obtain a executory copy of a court decision, including in matrimonial and custody matters, using online forms (eg in France).

2.2.2.3.4 DELAYED OR NON-ENFORCEMENT AND THE RIGHT TO AN EFFECTIVE REMEDY

Although Brussels I and II bis Regulations provide for the enforceability of foreign judicial decisions, enforcement itself follows domestic rules (eg Article 47 Brussels II bis).²²⁸ Actual enforcement is done using national enforcement mechanisms (eg bailiffs). The ECtHR interprets Article 6 as including a right to the enforcement of final and binding judicial decision,²²⁹ and hold state's responsible for the failures of agents in charge of the enforcement of judicial decisions.²³⁰

²²³ Report on Spain, 9-10.

²²⁴ Case C- 491/10 *Joseba Andoni Aguirre Zarraga v Simone Pelz* ECLI:EU:C:2010:828.

²²⁵ Report on France, 66.

²²⁶ Report on Italy, 20.

²²⁷ Report on Italy, 20.

²²⁸ For an overview, see Report by the Commission Européenne Pour L'efficacite De La Justice, http://www.coe.int/t/dghl/cooperation/cepej/series/Etudes8Execution_fr.pdf

²²⁹ ECtHR, 19 March 1997, *Hornsby v Greece*, App. 18357/91 and 26 September 1996, *Zappia v Italy* App. 15797/89.

²³⁰ ECtHR, 11 January 2001, *Plakatou v Greece* 38460/97.



Depending on national traditions, public authorities may nonetheless be more or less pro-active, which can cause difficulties for citizens who may not know to whom to turn for assistance.

In relation to children return in case of abduction, challenging a return decision does not, in principle, prevent its enforcement; however, in practice, if the parties apply for it, and the judge accepts it, enforcement is stayed. Delays are also exacerbated by individuals' behaviour, such as one parent hiding the child or his domicile. The more a child stays away, the more delicate the return. A Spanish court, for example, took into account the time passed since the return order had been issued (8 years, the time it took to locate the child) to refuse to return a child to another Member State.²³¹ This would, formally, be in breach of the Regulation.

2.2.2.3.5 BARRIERS TO THE EXERCISE OF CIVIL RIGHTS IN THE APPLICATION OF BRUSSELS II BIS

Most of the barriers that result from the application of Brussels II bis for the effective exercise of civil rights, in particular the right to a fair trial, the right to an effective remedy, due process rights and the right to family life result from difficulties related to the attribution of jurisdiction, which led to parallel and competing jurisdiction, as well as issues related to the practical enforcement. National courts appear particularly vigilant that the recognition and enforcement of foreign decisions in family matters are not to the detriment of the right of the child and his best interest, and that parents cannot use these EU mechanism to profit from their own wrongdoing against the other parents, but in practice, it often works out differently.

²³¹ Report on Spain, 13.



2.3. EU CRIMINAL LAW MEASURES AND CIVIL RIGHTS PROTECTION

As border-controls have been removed in the Schengen area, and travel is facilitated amongst the Member State of the EU, it has become also easier for criminals to cross-border in attempts to commit crimes, or avoid prosecution and sentencing. In the wake of 9/11 and in a context of resurgence of the terrorist threat, Member States introduced the European Arrest Warrant.²³² It replaces extradition by a simplified and quasi-automatic surrender of alleged or convicted criminals to the state in which they committed a crime to face trial or serve a jail sentence. It was followed by other instruments for judicial cooperation concerning the transfer of prisoners,²³³ probation and alternative sanctions,²³⁴ freezing and confiscation order,²³⁵ or the European evidence warrant.²³⁶ Whilst these measures certainly contribute to the fight against crime in Europe, and should improve EU citizens' security and sense that justice is done, concerns have been raised about their impact on core civil rights. Indeed, national criminal procedures vary significantly from one state to the other, and afford different standards of protection to accused persons, even if all should respect the minimum requirements set out by the ECHR and the ECtHR case law.

The development of EU judicial cooperation and mutual recognition tools is thus accompanied by attempts at partially harmonizing criminal procedure to foster mutual trust between judicial authorities of the Member State, which is necessary for mutual recognition, as well as to ensure the confidence of EU citizen in judicial institutions, wherever they are or move in the EU, in line with the EU aim to be an 'Area of Freedom, Security and Justice.' Some of these measures are aimed at securing minimum requirements regarding the rights of the defense. We find, for example, Directives on the right to information or the right to translation and interpretation of

²³²Framework Decision 2002/584/JHA of 13 June 2002 on the *European arrest warrant* and the surrender procedure between Member States (EAW) OJ L 190, 18.7.2002, 1–20.

²³³ Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition for judgments imposing custodial sentences or measures involving deprivation of liberty (Transfer of Prisoners), OJ 2008 L 327 of 2008-12-04, 27-4.

²³⁴ Framework Decision 2008/947/JHA of 27 November 2008 on probation decisions and alternative sanctions (Probation and Alternative Sanctions), OJ L 337, 16.12.2008, 102–122

²³⁵ Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence (Freezing orders); Framework Decision 2006/783/JHA on the application of the principle of mutual recognition for confiscation orders (Confiscation orders), OJ L 196, 2.8.2003, 45–55

²³⁶Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant *for* the purpose of obtaining objects, documents and data for use in criminal proceedings (replaced by Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters), OJ L 350, 30.12.2008, 72–92.



accused persons.²³⁷ Moreover, with increased mobility, it is more likely that one will be victim of a crime in a Member State other than their own. The EU thus adopted measures to ensure the minimum protection for victims.²³⁸ Although the questionnaire included questions on all those measures, most of the answers focused on the problems encountered in the application of the European Arrest Warrant, to which the section below is thus dedicated. The national application of the EAW will be scrutinized, to assess to what extent EU criminal law measures further protect civil rights, or on the contrary, undermine them.

2.3.1. FRAMEWORK DECISION ON THE EUROPEAN ARREST WARRANT AND SIMPLIFIED SURRENDER OF ACCUSED AND CONVICTED PERSONS

The Framework Decision on the European Arrest Warrant requests the Member States to introduce a simplified procedure to surrender to another Member State a person to conduct criminal investigations or to execute a custodial sentence or detention order. It applies in cases where a final sentence is at least four months jail sentence or for offences which are subject to a maximum of at least one year. Special forms and transmission modes (eg through Interpol or the Schengen information system) are used to facilitate its effective and rapid execution. Arrested individuals should be informed about the warrant and be entitled to a lawyer. The arrested person may consent to the warrant. The executing authority has sixty days to make a final decision on the execution of the warrant.

Under the Framework Decision, a warrant must be refused if the alleged offence comes under the jurisdiction of the courts of the executing state and is the subject of an amnesty there, the requested person has been acquitted in another Member State of an offence in respect of the same acts as contained in the arrest warrant or was convicted of that offence and has served the sentence imposed (if any) for that offence (non bis in idem), or the requested person is below the age of criminal responsibility in the executing state. It also allows for member states to add additional mandatory or optional grounds. The EAW Framework Decision was amended through

²³⁷Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings OJ L 280, 26.10.2010, 1–7; Directive 2012/13/EU of 22 May 2012 on the Right to Information in Criminal Proceedings OJ L 142, 1.6.2012, 1–10.

²³⁸Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings OJ L 82, 22.3.2001, 1–4; Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (Victims) OJ L 315, 14.11.2012, 57–73; Directive 2011/99/EU of 13 December 2011 on the European Protection Order, OJ L 82, 22.3.2001, 1–4



the adoption of Framework Decision 2009/299/JHA of 26 January 2009, which specified that the executing authority can not refuse to execute a EAW to surrender someone sentenced in absentia if that person was informed of the about the place and date of the trial, that the decision would be made with or without his or her presence, and being informed, was represented by a lawyer. The decision to execute or the refusal to execute a European Arrest Warrant can be appealed. The implementation of the EAW is facilitated by handbooks published by the Council or practitioners..²³⁹

The Commission assessed on a number of occasions the operation of the EAW (2006, 2007, 2011);²⁴⁰ its reports emphasize the effectiveness of the instrument, but also highlight a number of concerns, including regarding the respect for fundamental rights. The 2011 report confirms that the EAW is routinely used (54689 EAW had been issued, 11630 executed with fourteen to seventeen days in case of consent, forty eight days without consent, compare to one year in case of classic extradition). It however notes that fundamental rights are not always respected (eg no entitlement to legal representation during the surrender procedure, detention conditions, long pre-trial detention, pre-trial detention for non-nationals, disparate application of proportionality checks, etc). It finds that too many warrants are issued for minor offences, and requests issuing Member State to carry out proportionality checks before sending a EAW. Other organizations have also stressed further problems related to the respect of the right of the defense, such as difficulties in accessing quality legal advice.²⁴¹ A reform of the EAW has been engaged, but is not progressing.²⁴²

A Framework Decision needs to be transposed into domestic law in order to acquire legal effects. This transposition is all the more crucial to its effective application that according to the Treaty, Framework Decisions do not have direct effect, and can therefore not be applied by national courts in place of conflicting national measures. Domestic judges may, nonetheless,

²³⁹ Eg 'European Handbook on How to Issue a EAW (17195/1/10) of 17 December 2010; R. Blekxtoon, W. van Ballegooij, *Handbook on the European Arrest Warrant* (TMC Asser Press, 2005);

²⁴⁰ Report from the Commission on the European Arrest Warrant and the surrender procedure in the Member States (COM(2005) 63); Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (COM(2007) 407 final); Report from the Commission to the European Parliament and Council on the implementation since 2007 of the Council Decision on the European Arrest Warrant and surrender procedure between the Member States (COM(2011) 175 final).

²⁴¹ ECBA, *European Arrest Warrant: providing an effective defence* (2013).

²⁴² See progress on the European Parliament website, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0174&language=EN&ring=A7-2014-0039>.



where room for manoeuvre exists, interpret national laws in a manner which is compatible with a Framework Decision, in accordance with the principle of conform interpretation (*Pupino*).²⁴³

2.3.2. THE NATIONAL IMPLEMENTATION OF THE FRAMEWORK DECISION ON THE EUROPEAN ARREST WARRANT AND THE PROTECTION OF CIVIL RIGHTS.

The transposition of the EAW has faced difficulties in a number of Member States, some of which concern the potential impact of civil rights (although the Framework Decision, in its Article 1(3), provides for the respect of fundamental rights). The most problematic provisions concerned the surrender of own nationals, which many national constitutions prohibited, and the abolition of the double criminality rule in relation to a large range of crimes which were ill-defined in the Framework Decision. The CJEU, on a reference from a Dutch court, nonetheless confirmed the validity of the measure, but reminded the Member State of their duty to respect fundamental rights in the implementation of the Framework Decision.²⁴⁴ National legislators have, at times, taken some liberty in the transposition of the Framework Decision to integrate better guarantees for the respect of the right to a fair trial. National courts have displayed different attitudes, either trying to bring national legislation more in line with the spirit of the Framework Decision when legislators had added further conditions to surrender, and in doing so, allegedly curtailing the right to a fair trial or rights of the defense, or on the contrary developing mechanisms, such as proportionality, to refuse surrender for minor offenses.

2.3.2.1. THE LEGISLATIVE TRANSPOSITION OF THE EAW FRAMEWORK DECISION

Member States eventually all transposed the Framework Decision, although in some countries, it took some time as national constitutions needed to be amended, to prevent, or following, constitutional challenges. It was transposed in 2003 in Denmark and Belgium, the United-Kingdom and Hungary, in 2004 in the Netherlands and France, in 2005 in Italy, in the Czech Republic and Spain through a series of legislative amendments and instruments. Note that the United-Kingdom opted in to the EAW as well as more than 30 other EU policing and justice measures.²⁴⁵

²⁴³ C-105/03 *Criminal proceedings against Maria Pupino* ECLI:EU:C:2005:386.

²⁴⁴ C-303/05 *Advocaten voor de Werel VZW v Leden van den Ministerrad* ECLI:EU:C:2007:261.

²⁴⁵ Report on the United Kingdom, 8.



In some countries, the transposition caused little difficulties. For example, in Denmark, the discussions were technical, rather than political or constitutional. The legislator left it to the courts to decide on the use of optional grounds on a case-by-case basis. However, the legislator made sure to include safeguards for fundamental rights into the transposition measures. It is, in that regard, interesting to note that in Denmark, more than 50% EAW request lead to a surrender.²⁴⁶ However, transposition did not always go that smoothly. In the United-Kingdom for example, they was strong opposition to giving jurisdiction to the CJEU in criminal matters.²⁴⁷ In France, it required a constitutional revision, since it conflicted with a constitutional principle that prohibited extradition when sought for a political purpose.²⁴⁸

National legislators often added mandatory or optional grounds for refusal of a EAW request. The Italian transposition law added mandatory grounds for the non-execution of a EAW (eg violation of human rights and fundamental freedoms, risk of torture or other inhuman and degrading treatment; not sufficient evidence of guilt; if under Italian law the offence represents the exercise of a right, the fulfilment of a duty, accident or force majeure; if the issuing state does not provide for a limit on preventive detention; if it concerns a pregnant women or mother of young children living with her.²⁴⁹ France added three mandatory grounds, when the crime is statute-barred), where the EAW has been issued in order to condemn someone because of his sex, race religion, ethical origin, nationality, language, political opinion or sexual orientation or identity and where the facts do not constitute a criminal offence in France, except for the crimes listed under Article 4 of the EAW decision. It also included four optional grounds, eg if the person is prosecuted in France, if the person is French, if the crimes were committed in France, where crimes have been committed in a state other than the requesting state and not subject to prosecution under French law.²⁵⁰ Note that, sometimes, these additional grounds aimed at protecting fundamental rights, such as the rights of the defense, the right to family life, or non-discrimination.

One particular problematic issue, from the point of view of EU citizenship, was the unequal treatment between EU citizens, as many Member States laws included provisions which enabled the executing authority to refuse the surrender of their own nationals to serve a sentence or condition surrender of their own nationals for prosecution purposes to guarantees that they

²⁴⁶ Report on Denmark, 11.

²⁴⁷ Report on the United Kingdom and Scotland p. 8.

²⁴⁸ Report on France p. 69.

²⁴⁹ Report on Italy, 37-38.

²⁵⁰ Report on France, 72-73.



would return in order to serve their sentence in their Member State of nationality.²⁵¹ At first, most did not extend this possibility to non-national resident EU citizens. Dutch legislation provided for three conditions under which the surrender of a non-national EU citizen to serve a sentence could be refused: they needed to have an indefinite residence permit, the potential sanction could be executed in the Netherlands and the sanction would not deprive the foreign national of his or her residence in the Netherlands.²⁵² In the *Wolzenburg* case, referred by a Dutch court, the CJEU issued a ruling on these differentiated rules based on nationality,²⁵³ It found them discriminatory but agreed that Member States could require a real link with the society to extend protective provisions to non-national EU citizens (ie through residence requirements). Some domestic legislators extended the application of the rule to foreign citizens who fulfil certain residence conditions. In France, a legislative amendment followed from the preliminary ruling based on a reference from the *Cour de Cassation*, which targeted the French discriminatory approach. The law now extends the application of the optional ground for refusal to surrender to those who have been resident in France for an uninterrupted period of at least five years.²⁵⁴

A particular problem in the Netherlands was that it has extraterritorial jurisdiction over certain crimes committed by its citizens abroad, with the result that it would prevent the surrender of Dutch citizens' for prosecution abroad. However, non-Dutch EU citizen residing in the Netherlands would, for similar crimes, not fall under the jurisdiction of Dutch court, and thus be surrendered. The Supreme Court finally held that the Dutch transposition law was contrary to the principle of equal treatment between EU citizens.²⁵⁵ Since July 2014 Dutch law has been amended to provide jurisdiction over similar crimes committed abroad by foreign nationals who are commonly resident in the Netherlands. Note that French courts, which follow similar international jurisdiction rule over certain crimes committed by French abroad have, apparently, not extended jurisdiction in the same way.²⁵⁶

²⁵¹Report on Italy, 48-49, Report on Hungary, 10, Report on France, 79.

²⁵²Report on Netherlands, 4.

²⁵³Case C-123/08, *Dominic Wolzenburg*, ECLI:EU:C:2009:616.

²⁵⁴ Report on France, 79.

²⁵⁵Report on the Netherlands, 9.

²⁵⁶ Report on France, 80.



2.3.2.2. ADMINISTRATIVE IMPLEMENTATION OF THE EAW

National authorities have released guidelines on how to issue or execute a EAW and fill the relevant forms and certificates (eg Report on Italy p. 46-47, Report on Denmark p.11, Report on France p. 70). The EAW should be translated in the language of the executing state. States, like Italy, have internal translators for the most common languages, and hire external translators for others (Report on Italy p. 46).

Surrenders would not proceed before the delay for appeal has expired, or the person subject to the warrant decided not to appeal, or pending a decision on appeal.²⁵⁷ They may be delayed in case of serious medical reasons.²⁵⁸

2.3.2.3. COURTS, THE EAW AND THE PROTECTION OF CIVIL RIGHTS

National judicial courts have played an important role, either towards reinforcing European criminal cooperation by interpreting inconsistent national rules in conformity with the EAW Framework Decision, and usually minimizing the impact of additional grounds for refusing surrender. However, many will verify that the implementation of the EAW respects fundamental rights, and have sanctioned or fleshed out national legislation which did not provide sufficient guarantees for fundamental rights, in particular the right to a fair trial and effective remedy, but also the right family life or the rights, for refugees, not to be subjected to inhuman and degrading treatment. The routine release and execution of EAW for minor cases, which may have disproportionate effects on the life of the accused as well as imposes administrative burdens, is particularly problematic. There is, however, little evidence in the reports that executing authorities apply any kind of proportionality test to prevent surrender for minor offenses.

2.3.2.3.1 CONSTITUTIONAL REMEDIES

Despite concerns raised as to the constitutionality of transposition acts and their compatibility with due process guarantees and rights of the defense, national constitutional courts have generally supported this European instrument for judicial cooperation and endorsed the transposition measures, sometimes even when these lowered protection standards. They have, however, also interpreted national transposition measures to offer better protection to the right to an effective remedy.

²⁵⁷Report on the United Kingdom 9.

²⁵⁸Report on France p. 74.



In the Czech Republic, when transposition measures were discussed in parliament, the proposal to amend the constitution to allow for the surrender of nationals under an EAW was rejected. Members of parliament then challenged the transposition of the EAW, which provided for nationals to be surrendered. The Constitutional Court however rejected the request for annulment, because the EAW provided only for the temporary removal of a citizen. It considered that the Czech charter of rights must thus be construed in the light of the investigation and suppression of criminality in the EU, also taking into account the fact that all Member States are parties to the ECHR and their relations are governed by mutual trust. It confirmed this position on various occasions.²⁵⁹

In Hungary, the President of the Republic brought a case before the Constitutional Court not on the EAW transposition law but the law transposing the agreement on the surrender procedure between Iceland, Norway and Member States of the EU. The ruling seems to suggest that the EAW conflicts with national constitutional provisions, although opinions diverge on the matter. In a constitutional complaint against the EAW, which argued that it allowed too much discretion to the executing state in determining when the crime was committed to decide if it is statute-barred, and that it did not provide sufficient guarantees in case of trial in absentia, the Constitutional Court considered the provisions compatible with the constitutional due process and legal certainty requirements. In a more recent case, which concerns the limits placed by the Hungarian transposition law on the choice of liberty-depriving measures compared to the range of measures which Hungary judges would normally apply, the Court found that these restrictions, which did not result from the Framework Decision, were in any case compatible with the constitution.²⁶⁰

In the United-Kingdom, the Supreme Court considered that there was an assumption that inconsistencies between the Framework Decision and the national transposition regulation were considered by Parliament as necessary to protect the right to liberty, but that national rules should still be interpreted in conformity with the Framework Decision. In the high-profile *Assange* case, it found the EAW regime, which had removed the extradition safeguards, was compliant with fundamental rights, without a detailed examination.²⁶¹

The *Melloni* case, which was referred to the CJEU from Spain, challenged the compatibility of the EAW and its domestic transposition based on the strong protection afforded by Spanish constitutional law to the right to a fair trial, which considers as inalienable core of this right the

²⁵⁹Report on the Czech Republic, 12-13.

²⁶⁰Report on Hungary, 11-13.

²⁶¹Report on the United Kingdom, 10.



right to be present at a hearing in criminal proceedings related to a serious offence.²⁶² The CJEU considered that the surrender obligation of the EAW, given the surrounding safeguards, is compatible with EU standards of fundamental rights set out in the EU Charter of Fundamental rights, and should thus prevail over higher national constitutional standards for the protection of the rights of the defense.²⁶³ The Spanish constitutional court accepted the CJEU ruling and modified its case law.²⁶⁴

The French *Conseil Constitutionnel*, for the first time sent a preliminary ruling to the CJEU which concerned the interpretation of the Framework Decision. The case concerned an English teacher who came to France with his 15 year old pupil. An EAW was issued against him for abduction; he was arrested in France and transferred to the UK, where he was questioned for another offence. The UK authority asked their French counterparts for an extension of the mandate, which they granted. However, this extension decision could not be challenged (unlike a decision to execute a EAW). The *Conseil Constitutionnel* found this provision contrary to the right to an effective remedy and asked the CJEU whether the Framework-Decision prevented appeal in such circumstances. The CJEU replied it did not,²⁶⁵ and the French court invalidated the French rule which precluded the appeal.²⁶⁶

The Italian constitutional court considered the national transposition law contrary to the Italian constitution, since it did not provide that precautionary detention period served abroad be taken into account in relation to maximum limits to such detention under Italian procedural rules.²⁶⁷

2.3.2.3.2. THE APPLICATION OF THE EAW BY ORDINARY COURTS AND ITS IMPACT ON CIVIL RIGHTS

In general, courts enforce quite zealously the EAW, in line with CJEU guidance.²⁶⁸ However, Supreme courts have reaffirmed, and controlled, that in the application of the EAW, minimum fundamental rights standards must be guaranteed.

²⁶² Confirmed in the context of the application of the EAW (STC 177/2006, STC 199/2009).

²⁶³ C-399/11 *Melloni* ECLI:EU:C:2013:107.

²⁶⁴ SCT 26/2014.

²⁶⁵ C-168/13 *F. PPU* ECLI:EU:C: 2013:358.

²⁶⁶ Report on France, 76-77.

²⁶⁷ Report Italy, 48.

²⁶⁸ For an interesting media assessment and statistics, see Euronews, 'Reform calls after figures highlight fundamental flaws of the European Arrest Warrant, 27 April 2015, at <http://www.euronews.com/2015/04/27/reform-calls-after-figures-highlight-fundamental-flaws-of-european-arrest/>



Italian courts have neutralized many of the additional grounds which the national legislator had written in to refuse surrender: regarding the question of serious evidence of guilt, the Italian court considered that the national executing authority should only check that the EAW request is grounded on evidence on a criminal act committed by the accused persons; they also minimized the requirement of provisional detention limits, by considering it sufficient that it provided for a maximum duration until initial conviction or mechanisms for regular judicial verification; they also enforce a minimal motivation requirement, considering that a detailed exhibition of factual evidence would suffice; finally, the Supreme court interpreted the ground for refusal based on due process guarantees as referring to common principles under Article 6 TEU, in line with the *Melloni* approach.²⁶⁹

The French *Cour de Cassation* reaffirmed that executing authorities could not refuse to surrender on any other grounds than those stated in the Framework Decision and the national transposition laws, provided that fundamental rights referred to in Article 1(3) of the Framework Decision and Article 6 TEU are respected. Thus, they cannot refuse to surrender in case they have doubt as to the proper gathering of evidence, where allegations related to evidence obtained through torture or inhuman and degrading treatment are not substantiated, or where the accused had not been heard before the issuance of the EAW. They cannot require from the issuing state guarantees that a sentence be revised. In case of refusal for prescription, they need to verify that French court had jurisdiction. Regarding the *non bis in idem* ground for refusal, in a case concerning an alleged terrorist, the French court, controversially, surrendered the accused as the criminal facts on which the EAW were based were different from those on which the accused had been condemned in France.²⁷⁰

Courts also appear relatively relaxed with information formalities, unless failure to respect them jeopardises the rights of the defense. Belgian courts, like French courts, appeared satisfied where the minimum information requirements in the EAW were fulfilled;²⁷¹ the submission of further information through the Schengen information system, or via e-mail was considered sufficient.²⁷² French courts have however been careful that all formalities are respected to prosecute someone following a EAW for acts which were not included in the warrant, as failing to do so would jeopardize the interests of the accused.²⁷³

²⁶⁹ Report on Italy, 49-50.

²⁷⁰ Report on France, 73-78.

²⁷¹ Report on Belgium, 20, Report on France, 70-71.

²⁷² Report on France, 70.

²⁷³ Report on France, 71.



They also aligned with the CJEU narrow interpretation in *I.B.* of provisions allowing the refusal to surrender someone tried in absentia.²⁷⁴ French courts surrender persons tried abroad in absentia, if they have been notified of the date and place of the hearing or that they can oppose or appeal the decision.²⁷⁵ A Belgian court ruled that an EAW issued pursuant to a judgment in absentia but which is subject to appeal is comparable to an EAW for prosecution purpose, and that as such, the ground for refusal to surrender nationals or residents, which is restricted to the surrender to serve a sentence, does not apply.²⁷⁶

Even when national courts must check double criminality, they stick to formal control. French authorities would surrender someone prosecuted in France, if the facts listed in the EAW are those which benefit from the double criminality waiver and no mandatory grounds of refusal apply. The French *Cour de Cassation* sanctioned the competent judicial authority for having refused to surrender someone who was prosecuted for trafficking hashich on the ground that in France, unlike in the issuing state, this criminal offense was punished by less than three years imprisonment;²⁷⁷ Hungarian courts too enforced the double criminality waiver.²⁷⁸ French courts do not assess the soundness of the issuing state's prosecution. The *Cour de Cassation* also instructed them not to appreciate the qualification of facts by the issuing authorities, unless there was a manifest error.²⁷⁹

National courts do however pay attention to the respect of the right to fair trial, and take account in the calculation of sentence time pre-trial detention executed abroad.²⁸⁰ The French *Cour de Cassation* however refused to assimilate EAW retention and custody, even if many of the same safeguards apply.²⁸¹

National courts also watch out for the respect of the rights of the defense in the execution of the EAW. The *Cour de Cassation*, invoking Article 6 ECHR, verifies that a person wanted for the execution of a EAW has the time and facilities necessary to prepare his or her defense; these conditions would not be fulfilled if that person was not assisted by a lawyer when he or she was interrogated and had appeared before the executing authority without his state-appointed lawyer having the time to submit a brief. When an accused and her lawyer are not duly and timely advised about the date of the hearing, they are allowed to submit the brief on hearing day.

²⁷⁴ C-306/09 *Criminal proceedings against I.B.* ECLI:EU:C:2010:626.

²⁷⁵ Report on France, 73.

²⁷⁶ Report on Belgium, 19.

²⁷⁷ Report on France, 71.

²⁷⁸ Report on Hungary, 14.

²⁷⁹ Report on France, 71.

²⁸⁰ Report on Hungary, 14.

²⁸¹ Report on France, 75.



The hearing will be held in public, unless it would jeopardize the proceedings, third parties interests or human dignity.²⁸²

Moreover, courts check that the execution will not constitute a disproportionate interference with family life. In France, such case concerned a mother with a residence permit raising five school age children. The *Cour de Cassation* also sanctioned a lower court for not verifying if a jail sentence could be served in France, following a request based on family situation.²⁸³

The status of political refugee does not prevent the execution of a EAW; however the executing authorities should request necessary information and guarantees to ensure that the refugee's fundamental rights will not be infringed before executing the EAW. The *Cour de Cassation*, invoking the Geneva Convention and Article 3 ECHR, sanctioned the French executing authority for not seeking clarification from the issuing authority as to what would happen to an Iranian refugee whose surrender was requested to serve a sentence, once his sentence served.²⁸⁴

Concerning the important question of the equal treatment of EU citizens, one should highlight the decision of the Italian constitutional court, which went further than the *Wolzenburg* ruling that the Italian provision which allowed national courts to condition the surrender of their nationals to a guarantee that they would return to Italy to serve their sentence, was unconstitutional in that it did not extent its benefits to all EU citizens resident or domicile in Italy.²⁸⁵

High profile cases tend to prove particularly problematic, suggesting that the application of the EAW is not the same for all. For example, Hungarian courts refused to surrender the head of MOL, the Hungarian oil company, following a request by Croatia who wanted to prosecute him for corruption, on the ground that proceedings against him for corruption had been closed in Hungary, by the prosecution.²⁸⁶

Cases highlighted by the NGO Fair Trial International reveal the extent to which the routine operation of the EAW in Europe may serious jeopardizes citizens' right to a fair trial as well as their right to move freely within the EU. Some of them are particularly telling. A grand-mother found herself arrested and detained in different countries, following the issuance, without her knowledge, by the French authorities, of a EAW for a drug related offence for which she had been sentenced in absentia and without ever being informed about either the trial or the

²⁸²Report on France, 74-76.

²⁸³Report on France, 78.

²⁸⁴Report on France, 78.

²⁸⁵Report on Italy, 49.

²⁸⁶Report on Hungary, 14.



sentence more than a decade before. Although Spanish and British courts refused to surrender her, she could not travel abroad to visit her family for fear of being arrested again, because it took years for the French authority to withdraw the EAW (and they only did so after intense NGO campaign).²⁸⁷

Another emblematic case in France was that of a member of a Basque militant who was surrendered without the double criminality check to Spain for having participated in demonstrations which in Spain amounted to participation in terrorist activities, whilst in France would have most likely qualified as the exercise of freedom of expression.²⁸⁸

The 2011 Commission report suggested that some executing judicial authorities applied proportionality tests, to refuse surrender, although that it not a ground allowed under the Framework Decision (2011 Report). French courts do not apply such test, considering that proportionality testing is a matter for the issuing court.²⁸⁹

2.3.2.3.3. BARRIERS TO THE EXERCISE OF CIVIL RIGHTS IN THE APPLICATION OF THE EAW

Most barriers result from the routine use of the European Arrest Warrant, and its too systematic execution.. In too many cases, the surrender can result in disproportionate interferences with the right to a fair trial,, the right to family life and the right to free movement.of EU citizens. National courts are applying safeguards clauses in an inconsistent manner, which means that individuals in different member states will be treated differently, an undesirable outcome when it comes to the protection of core civil rights.

²⁸⁷ See Fair Trials webpage on Clark, at http://www.fairtrials.org/documents/Deoborah_Dark_complete.pdf

²⁸⁸ Report on France, 78.

²⁸⁹ Report on France, 79.



2.3.3. OTHER MEASURES ON CRIMINAL COOPERATION

Most of the other measures have been transposed, although some with delays, but few judicial decisions have been identified in the national reports. The Belgian *Cour de cassation* however faithfully applied the Framework Decision on Probation and Alternative Sanctions, in the light of safeguards clause, and the Constitutional court concluded that the manner in which these legal obligations are construed by national courts complied with ECHR standards.²⁹⁰ It also reviewed the national implementing measures of the European Evidence Warrant Framework Decision and found that the right to private life was violated by intelligence services.²⁹¹

2.3.4 EU DIRECTIVES ON THE RIGHTS OF THE ACCUSED

The Directive on interpretation and translation in criminal proceedings, as well the Directive on the Right to information in criminal proceedings are recent instruments, but most of them have been transposed already. They seek to facilitate judicial cooperation and improve the protection of the rights of the defense and the right to a fair trial. The NGO Fair Trials offers a training program on how to use the Right to Information Directive.²⁹² There have been hardly any cases so far, but it is assumed that, if applied, they would trigger improvement, as the situation in some Member States is not satisfactory.²⁹³

2.3.4.1 THE APPLICATION OF THE *DIRECTIVE ON INTERPRETATION AND TRANSLATION* IN CRIMINAL PROCEEDINGS

In Italy, there are issues with the quality of interpretation and translation, as there is no requirement to appoint registered professionals, in breach of the Directive. Moreover, Italian law defines materials which required translation, and leaves some discretion to judges regarding the translation of other essential documents. The denial of translation can only be challenged together with the judgment. An accused person who had not received translation for certain

²⁹⁰ Report on Belgium, 21.

²⁹¹ Report on Belgium, 24.

²⁹² See Fair Trial website at, www.fairtrials.org

²⁹³ L.Kalinka, 'The Impact of the Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings' [2014], at openstarts.units.it



important documents since the judge had considered them as non-essential by the judge, could not challenge the decision.²⁹⁴ Moreover, the Supreme Court considered that in the execution of a EAW, the accused has a right to translation regarding the surrender procedure only if he or she requests it specifically.²⁹⁵ A Belgian court found that neither the fairness of the trial as guaranteed under Article 6 ECHR nor the rights of the defense required that the accused and his lawyer have all parts of the criminal file translated; it only guarantees translation as necessary for the effective exercise of the rights of the defense, to be appreciated by the judge.²⁹⁶

A Scottish court cited the Directive as supportive authority to enforce the obligation to provide an interpreter throughout the trial, and including for the foreign witness testimony, in order to guarantee the right to an effective defense.²⁹⁷

2.3.4.2 THE APPLICATION OF THE DIRECTIVE ON THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS

A constitutional complaint addressed to the Czech constitutional court asked whether the fact that an accused could waive her right to translation where she did not have access to a lawyer was consistent with EU Law. The claimant asked for a preliminary reference to the CJEU, but the Constitutional Court found it unnecessary, as the conditions under which an accused could waive their right to translation had already been clarified in earlier case law. It found that the constitutional rights of the claimants had been violated.²⁹⁸

A Belgium court outlined the conditions under which the right to information of a suspect would be respected, and assessed them as conform to EU law and the ECtHR jurisprudence.²⁹⁹

2.3.3.4. BARRIERS TO THE EFFECTIVE RESPECT OF THE RIGHT OF THE DEFENSE IN CRIMINAL MATTERS

Although these measures contribute to improving the legal protection of the rights of the defense across the EU, an assessment of how these are respected in practice is needed. The rights of the accused remain very much rooted in national criminal law traditions, and EU measures do yet address some of the most problematic issues identified by civil society

²⁹⁴Report on Italy, 62-63.

²⁹⁵Report on Italy, 68.

²⁹⁶Report on Belgium, 25.

²⁹⁷Report on the United Kingdom and Scotland, 18.

²⁹⁸ Report on the Czech Republic, 18.

²⁹⁹ Report on Belgium, 25.



organizations active in the field, as well as some of these reports, namely the abuse of pre-trial detention,³⁰⁰ which compromise individual freedoms, or the conditions of police custody,³⁰¹ notably the right of access to a lawyer, protected under the ECHR case law (*Saluz case*).³⁰²

2.3.5 VICTIMS' RIGHTS

The Framework Decision on the standing of victims in criminal proceedings was not transposed in many Member States, and was replaced by the Victims Directive adopted in 2012. This Directive, which provides for assistance and support to victims in criminal proceedings, has been transposed in many Member States, or is in the process of. Many countries already have a Victims support scheme in place.³⁰³ In others, the transposition of the Directive will require some adjustment. In the Netherlands, one of the issues concerns the scope of the notion of 'victim', which would need to be expanded, in order to comply with the Directive.³⁰⁴ In Hungary too, existing legislation provides for a too narrow definition of victim, not including families, in breach of the Directive.³⁰⁵ In Italy, the criminal system focused on prosecution and suspects and accused persons, and not on victims, despite some special protection afforded to children and victims of gender-based violence, access to free legal aid in judicial proceedings. Recent reforms introduced special protection for vulnerable victims in questioning and testifying.³⁰⁶ National courts have used the technique of conform interpretation to read into national law the requirements of the Directive, and apply case in cases before them. For example, they extended the notion of vulnerability to make it more inclusive than was traditionally the case. An Italian trial court sanctioned a victim's exclusion from plea-bargaining as inconsistent with the Directive.³⁰⁷ In Czech Republic, the government established special program with interrogation rooms for traumatized victims and witness of criminal activities, with emphasis on protection of women and children (Report on the Czech Republic p 14). Denmark has an opt-out. The Danish Government decided not to opt it, to the disappointment of victim support organizations as Danish legislation in certain areas does not afford as much protection as the Directive, as regards for example *inter alia* Article 5 of the Directive on the victims' right to receive written

³⁰⁰ Report on France, 45-48 ; See also Fair Trial website at, www.fairtrials.org

³⁰¹ Report on France, 45-48, Report on the Netherlands, 12-14.

³⁰² ECtHR, 27 November 2008, *Salduz v Turkey* App. 36391/02.

³⁰³ Report on France, 83.

³⁰⁴ Report on the Netherlands, 15.

³⁰⁵ Report on Hungary, 19.

³⁰⁶ Report on Italy, 52-53.

³⁰⁷ Report on Italy, 58-59.



acknowledgment of their complaint and to receive information in a language they understand, and Article 7 on the right to interpretation and translation.³⁰⁸

The Directive on Compensation of Victims has been transposed in most countries, except in Italy. Remarkably, an Italian court held the state liable to pay victims compensation for its failure to set up a compensation scheme for victims of violent intentional crimes, as required under the Directive.³⁰⁹ However, a Spanish court rejected a claim for damages for failure to implement the Directive which left parents of a minor killed by another child without compensation.³¹⁰ A Czech court refused to apply the Directive to a claim for compensation as a result of traffic accident involving a French couple, as the facts dated back to prior to the adoption of the Directive.³¹¹

The Directive on the European Protection Order has been or is being transposed. Denmark has an opt-out. In the Czech Republic, it took some time as domestic legislation did not provide for the protection of victims moving out, or to, the Czech Republic. There were also concerns about the respect of the principle of *non bis in idem*, in a situation when a person with protection order breaks it in the state of execution whilst also committing a crime. However, the Directive and transposition measures were eventually assessed as conform to the EU Charter, ECHR and Czech Charter of Rights.³¹²

The main barriers to the protection of victims (and their right to security) results from deficiencies in victims support schemes at national and local level, as well as, some of the Member States from the absence of special compensation fund, in breach of EU obligations. Older EU instruments were never properly implemented, and more recent measures are only starting make an impact on the field. The remaining divergences between national systems means that victims can be treated very differently depending of where they find themselves in the EU.

³⁰⁸Report on Denmark, 16.

³⁰⁹ Report on Italy, 60.

³¹⁰ Report on Spain, 19.

³¹¹ Report on the Czech Republic, 16.

³¹²Report on the Czech Republic, 15.



3. ENFORCEMENT OF SELECTED CIVIL RIGHTS

This part of the report follows a more *bottom up* approach. Each country rapporteur was asked to identify three civil rights, irrespective of their source of protection, which are particularly salient and problematic from the point of view of the ability of EU citizens and other persons in the EU to effectively exercise them in the country under study. The country rapporteurs, were able to identify the issues which are most pressing in their country from the perspective of barriers to civil rights.

3.1. CONCEPTUAL ISSUES RELATED TO THE SELECTION OF RIGHTS: RELIGION, COMMUNICATIVE FREEDOMS, EQUAL TREATMENT, PRIVACY AND AUTONOMY, DUE PROCESS, AND PROPERTY

The types of civil rights identified as especially problematic from the perspective of enforcement by the national experts vary significantly from one country to the other.³¹³ These differences derive from conceptual differences, and from the specific socio-political context of each country.

Conceptual differences arise from the absence of shared notion of ‘civil rights’ in the EU Member States covered in the study.

The United Kingdom distinguishes between civil liberties (rooted in domestic sources) and human rights (derived from international sources, but internalised by the Human Rights Act). In contrast, the openness of the Dutch legal system towards international law, coupled with the lack of a domestic constitutional rights doctrine, merge these two categories. In Belgium, which shares a similar understanding of the relationship between international and national law, the constitutional awareness, is a stronger one, which frames the understanding of civil rights. The direct applicability of international law contributes to a unified concept of rights in the Netherlands, while in Belgium it requires distinction.³¹⁴

France, characterised by a legicentrist tradition hostile to both international human rights norms or the constitutional protection of fundamental rights, has gradually evolved towards a

³¹³ We realise that the particular area of expertise or sensibilities of the national rapporteurs may have had a part to play in the selection of the rights, in addition problems relation to their enforcement.

³¹⁴Report on Belgium, 31.



system in which civil rights standards are increasingly determined by reference to both European (EU and ECHR) and constitutional norms. It has been accompanied by an expansion of the range of remedies available to enforce civil rights, which now include access to constitutional review (*Question Prioritaire the Constitutionnalité*) and effective interim and emergency proceedings to prevent actions or measures by public authorities (*référé-liberté*) or private actors (*référé civil*), which could lead to serious and irreparable interference with civil rights.

Countries where constitutional rights doctrines were strongly influenced by the jurisprudence of the German Constitutional Court, and which therefore have a highly legalized or 'juridified' constitutional system, such as Italy, Spain, the Czech Republic and Hungary, share important concepts such as the self-determination of the individual. Whilst these countries rely on European and international norms, they display a marked tendency towards developing their own constitutional doctrines, including through the use of comparative constitutional law. The transformation Hungary has gone through lately cannot be easily explained along traditional lines, but appears as the result of almost unconstrained political power, accompanied by clumsy external (including European) interventions. These have serious implications for the effective exercise of core civil rights at all levels, including at the conceptual one.

Despite contextual differences, some of the rights appear particularly vulnerable in many of the selected countries. One of the oldest civil rights, which goes back to the origins of a rights-based Europe following devastating religious wars, **freedom of religion**, seems under particular pressure. In four out of the nine countries examined (Denmark, France, Hungary, Italy), it was highlighted as particularly problematic. In the three Western European countries, the difficulties arise from perceived or real conflicts between the majority and minorities resulting from immigration, whilst in Hungary, governmental support of some religions structurally underlies the decline of freedom of religion. In any case, religion is an issue which governments are inclined to manipulate for political purposes perhaps as easily as no other right, since populations perceive it as a question related to national identity, even if that national identity is structurally anti- or at least a-religious, such as in principle *laïcité* in France.

Another set of core civil rights, essential to the exercise of democracy and citizens' engagement, which appear under particular threat, are **expressive freedoms**, ie freedom of association (Spain and the Netherlands), freedom of expression (France and the Netherlands), and freedom of information (Hungary).³¹⁵

³¹⁵Media freedom was left out of the scope of the national reports for this deliverable, for it will be dealt with elsewhere in the project.



Privacy related rights are also under strain in many member states. In Italy, self-determination, informed consent and reproductive freedoms all relate to private life understood as arising out of the **autonomy** of the person. The right to dignity in Belgium relies on the idea that to live an autonomous life, certain material preconditions must be met. In Denmark, the right to family life includes reunification and societal dimensions without which there cannot be privacy. The right to private and family life of third country nationals is affected by serious hurdles in the context of health care in the Czech Republic. In the United Kingdom, the fragmented nature of privacy *rights* (plural) contributes to enforcement deficiencies. In the Netherlands, there are risks associated with defining privacy as negative right.

Equal treatment is not achieved either. A panoply of concerns, which stress the interrelatedness of civil and other rights, have been identified. In Denmark, the deficient protection of right to equal treatment regardless of *ethnicity* spills over to discrimination based on religion, while in the Czech Republic and the United-Kingdom, citizens do not all have the same access to public health care. In the United Kingdom, ethnic minorities experience discrimination in court proceedings. In Belgium, the characteristic feature of the constitutional regime which provides for wide-ranging language rights of ‘autochthonous’ communities in pursuance of equal treatment results in side-lining other communities..

While freedom of association (especially in relation to political parties) and expression are frequently related to political rights, in turn, other, more explicitly **political rights**, have **civil rights dimension**, as a result of European integration. In the Czech Republic, ‘the right to vote and to stand as candidates in municipal election of EU citizens, as guaranteed in the TFEU, is closely interconnected with the civil rights of mobile EU citizens which are at the heart of this study, namely the right to free movement and the right to equal treatment’.³¹⁶ Moreover, discussing the loss of nationality when dealing with civil rights is necessary because ‘an understanding of the nature of citizenship in the United Kingdom’ which “essential to the understanding of the state of civil rights in the UK’.³¹⁷ In relation to Spain, the right to diplomatic protection is considered within the scope of civil rights, in that it contributes to upholding civil rights of citizens abroad.

³¹⁶ The right of freedom of movement of EU citizens within the territory of the Member States is provided for in Article 20 para. 1 let. b) TFEU. The right of EU citizens to equal treatment is stipulated in Article 18 TFEU (ex article 12 TEC) which prohibits any discrimination on grounds of nationality in relation to EU citizens.

³¹⁷ Report on the United Kingdom, 50.



There have been serious concerns in relation to the effective enjoyment of **due process rights**. Most reports brought up concerns with regard to access to justice. The Belgian report, although generally considering the state of civil rights ‘rosy’³¹⁸ in the country, nonetheless note the Belgian courts deferential approach in matters of due process.³¹⁹ In the Czech Republic, migrants face particular obstacles in accessing the visa and residence permit application system, in breach of due process.

Finally, the protection of the right to **property** is particularly problematic in Hungary, where the constitutional protection of property largely collapsed as a result of partly contradictory, partly overlapping efforts of constitution-makers and -interpreters.

3.2. DIFFICULTIES RELATED TO SOURCES OF PROTECTION

Most of the selected rights are protected at the constitutional level (all selected rights in Belgium, Hungary, and Italy, two out of the three in France, the Czech Republic and Spain, one out of the three in Denmark), and that raise few problems as such.

Hungary stands out. There, constitutional amendments are used to overrule Constitutional Court decisions which do not please the political majority in power (‘superconstitutionalisation’), illustrating how constitutional protection, or rather regulation, does not necessarily go in pair with higher civil rights’ protection. Moreover, the constitutional limitations of competence of the Hungarian Constitutional Court to review budget and financial laws deprives any future simple majority in Parliament to restore the full competence of the Court in an area which affects the protection of the right to property. The Hungarian constitutional tradition which required an enhanced majority for the statutory *regulation* of some rights has now been abolished in relation to many rights in the new Fundamental Law.

Where it remains, the supermajority requirement – which in ‘normal’ times provides a guarantee in terms of civil rights protection – now entrenches restrictions on civil rights. For example, concerning freedom of religion, the enhanced majority requirement was applied to the adoption of a – discriminatory – law on churches, with the consequence that any future simple majority in Parliament will not be able to reverse it. The ECtHR found that the law deprived more than 300 churches from their church status without justification, and imposed a re-

³¹⁸Report on Belgium, 78.

³¹⁹Report on Belgium, 46-48.



registration system which is politically biased and discriminatory, in violation of the ECHR.³²⁰ Although more than a year passed since the ECtHR condemnation, and more than 9 months since the Grand Chamber rejected the Government's request for referral, nothing has changed. The supermajority diversion also affects freedom of information: as the law on the Freedom of Information Authority can only be passed by two-third of the MPs present, any future simple majority is barred from restoring its independence.

In other countries, in contrast, constitutional courts are developing constitutional rights through interpretation. In Italy, the constitutional court fleshed out reproductive freedom and informed consent; in France courts read a panoply of rights in a skeleton constitution forming a 'block of constitutionality'), despite an a priori adverse legal culture and political tradition.

In some of the countries however, certain rights are guaranteed neither in the formal sense, nor through constitutional interpretation at the constitutional level, and some not even at the level of ordinary legislation.

For example, in Italy, the right to refuse medical treatment is only defined in the Italian Code of medical professional ethics.³²¹ In the Czech Republic, the right of mobile EU citizens to vote and stand as a candidate in municipal elections is not implemented in any act, despite the fact that it is stipulated in Article 20 TFEU,³²² and Directive 94/80/EC.³²³ Judicial decisions directly applied EU law, and thus remedied the lack of a guarantee of an active electoral right with regard to the particular plaintiffs. In reaction, the Ministry of Interior instructed municipalities to add EU citizens with a temporary residence permit to the list of permanent voters. Whilst ministerial instruction practically addressed the matter, the lack of an express legal guarantee of active *and passive* electoral rights of EU citizens is a cause for concern.³²⁴ The

³²⁰ *Magyar Keresztény Mennonita Egyház And Others v. Hungary* (Application nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12) judgment of 8 April 2014.

³²¹ Report on Italy, 98.

³²² The electoral rights in municipal elections are further elaborated in Article 22 TFEU (ex Article 19 TEC): "Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State." - as cited by Report on the Czech Republic, 24.

³²³ Report on the Czech Republic, 24.

³²⁴ Report on the Czech Republic, 24 and 28.



Czech Republic disqualifies foreign citizens, including EU citizens from the exercise of another right, too: they are banned to form and join political parties and political movements.³²⁵

The Belgian constitution does not include a fundamental right to appeal, and Belgium made reservations to the ICCPR in this regard. Still, the right to appeal is embedded in ordinary legislation, and 'it can be claimed as a corollary of the rights bestowed by Articles 6 and 13 ECHR and 47 of the EU Charter'.³²⁶ The lack of constitutional guarantee is compensated at a lower level, through right-friendly interpretation, open towards international law.

In the United Kingdom, the right to private and family life is protected by the Human Rights Act, a legislative act with constitutional significance in the sense that it is not subject to the doctrine of implied repeal), the principle of equal treatment and access to citizenship by specific laws (Equality Acts 2006 and 2010,³²⁷ and the British Nationality Act 1981)³²⁸ and aspects of privacy by the common law.³²⁹

In Denmark, freedom of religion is granted in the constitution, but the right to ethnic equal treatment in a statute, even though the two are strongly interrelated.³³⁰ There is however no express right to family life spelled out in either the constitution or ordinary laws.³³¹ Article 72 of the Danish Constitution only guarantees the right to the inviolability of the home and privacy of correspondence. Family reunification is regulated by a complex provision of the Aliens Consolidation Act, which is not easy to apply.³³² Because of its opt-out from JHA, Denmark is not bound by EU directives in this area either.³³³ Therefore, 'there are ... no direct obligations stemming from a supranational or national legal context for Denmark to grant a permission to stay to protect the family life of a foreigner (TCN) residing in the country.'³³⁴ Even though Article 8 ECHR – only indirectly, but still - commits Denmark to the protection of family life of

³²⁵ Report on the Czech Republic, referring to Section 2 para. 2 and section 6 para. 2 of the Act No. 424/1991, on Association in Political Parties and Political Movements, as amended by later regulations, restricts the exercise of these rights only to the Czech citizens.

³²⁶ Report on Belgium, 69.

³²⁷ Report on the United Kingdom, 41.

³²⁸ Report on the United Kingdom, 50.

³²⁹ Report on the United Kingdom, 46, esp. [113].

³³⁰ Report on Denmark, 38.

³³¹ Report on Denmark, 22-23.

³³² Id.

³³³ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, see point 18 in the preamble, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, see point 26 in the preamble, both as cited by the Report on Denmark, 23.

³³⁴ Silvia Adamo (2007), The Legal Position of Migrants in Denmark: Assessing the Context around the "Cartoon Crisis" European Journal of Migration and Law 9 (2007) 1-24, as cited by the Report on Denmark, 23.



certain categories of individuals,³³⁵ '[this] lack of transparency in the legal foundation for a right to family life in Denmark is the first great obstacle to its implementation and enforcement.'³³⁶

In the Netherlands, it appears, that the selected rights have their source in directly applicable international law, especially the ECHR.³³⁷

3.3. RESTRICTIONS AND EXPANSIONS OF THE SCOPE OF CIVIL RIGHTS

The majority of the reports did not elaborate on the delineation of the scope of civil rights. Where the source of protection of a right is weak, it also normally results in restrictions in the exercise of a right (eg family reunification in Denmark, the right to vote of EU citizens in the Czech Republic, freedom of religion or right to property in Hungary). Beyond this however, the determination of the scope of civil rights has led to few serious problems, even if restrictive approaches do limit the exercise of specific civil rights in a number of countries.

In Belgium, scholarship and jurisprudence have engaged in the collaborative act of expansion of the scope of the right to dignity. In Italy, constitutional interpretation – following a condemnation by the ECtHR – mitigated legislative deficiencies regarding reproductive freedom.³³⁸

In contrast, in the United Kingdom, the legislator intervened to overwrite interpretation mitigating reverse discrimination.³³⁹ Amendments to immigration legislation now exclude UK nationals from generating derived-residency rights for their family members, by going to work for three months in another member state in order to bring themselves under the more generous EU residency rule for families of migrant EU workers.³⁴⁰

In France, Hungary and Italy, the scope of freedom of religion, affected by principles governing the relation between state and church, results in restrictive or discriminatory treatment. In the United Kingdom, courts often construe the scope of the privacy very narrowly.

³³⁵ Id.

³³⁶ Report on Denmark, 23.

³³⁷ Report on the Netherlands, 20.

³³⁸ Report on Italy, 107.

³³⁹ *R v Immigration Appeal Tribunal and Surinder Singh ex parte Secretary of State for the Home Department*, [1992] 3 CMLR 358. As cited by the Report on the United Kingdom, 52.

³⁴⁰ Report on the United Kingdom, 52.



For instance, strip searches and stop-and-search powers are considered compatible with Article 8 HRA.³⁴¹

In Denmark, before the Act on Ethnic Equal Treatment came into force, the Ombudsman had treated complaints on discrimination on grounds of ethnicity on the labour market, stating that there was reason to assume that the legislation at that time was in breach of international law.³⁴² The wider protection afforded by international legal sources is to this day hardly applied by national courts, which mainly rely on Danish legal sources for the protection of equal treatment. Danish scholars have also, in vain, argued for a wider protection of privacy rights.³⁴³

Apart from these specific and sometimes serious problems, in most countries, limitations would be acceptable under the ECHR (protection of the rights of others, public order, national security and so on). While this is a welcome development from the perspective of harmonious European rights doctrines, it also might be due to the extreme deference with which the ECtHR deals with government appraisal of the legitimate aim on restrictions on the exercise of civil rights.

³⁴¹ Report on the UK, 47 with reference to *R. (Gillan) v. Commissioner of Police for the Metropolis* [2006] U.K.H.L. 12, [2006] 2 A.C. 307.

³⁴² Report on Denmark, 39.

³⁴³ Report on Denmark, 23-24.



3.4. RESTRICTIVE INTERPRETATIONS AND APPLICATIONS

3.4.1. COMMON STANDARDS OF INTERPRETATION

There is much consensus on the type of interpretative tools used by courts in interpreting civil rights. Most courts rely on some kind of purposive or teleological interpretation, apply a proportionality test to the classic civil rights, and engage in balancing rights with other rights and important interests. In France, the earlier deferential approach has given way to more robust proportionality checks.³⁴⁴The Supreme Court of the United Kingdom had disagreements with the ECtHR regarding the proportionality standard used to examine evictions under Article 8 ECHR, but they now seem to have come to terms with it.³⁴⁵

In contrast, the Hungarian Constitutional Court, after more than two decades of application of the proportionality test, appears to have now abandoned it, at least in relation to the right to property: in recent cases, the Court left out the most demanding step of the review, namely the examination of whether the intervention was proportionate to the aim pursued. Unsurprisingly, it regularly finds the measure compatible with constitutional requirements.³⁴⁶

3.4.2. BARRIERS IN INTERPRETING FREEDOM OF RELIGION

Judicial interpretations diverge, depending on the constitutional traditions on the relation of state and churches.

France stands out with its religious neutrality principle and definition of laicite, which although prima face neutral, have adverse consequences for minority religions.³⁴⁷ Indeed, *in practice*, the state's neutrality towards religion still allows indirect state support for many, usually more established religions through tax exemptions, free land or building use, or building maintenance,

³⁴⁴DC No 10-3 QPC of 28 May 2010, *Union des Familles en Europe* as cited by the Report on France, 136.

³⁴⁵ Report on the United Kingdom, 37, referring to *Manchester City Council v Pinnock* [2010] U.K.S.C. 45; *Mayor and Burgesses of the London Borough of Hounslow v Powell* [2011] U.K.S.C. 8; and *Kay v UK* [2010] E.C.H.R. 1322.

³⁴⁶Report on Hungary, 30-34.

³⁴⁷Report on France 149-150.



mostly in indirect ways.³⁴⁸ French law confers special status, which includes tax advantage, to recognised religious associations. This status is granted upon application, to religious associations which fulfil non-discriminatory conditions, and is subject to judicial control. However, the government's fight against sects or sectarian movements, supported by the courts, prevents the conferral of such status to the many organisations which are qualified as such.³⁴⁹

Furthermore the French state owns, and thus maintains, many religious buildings, which it places at the disposal of churches. Most are Catholic churches, Protestant temples and synagogues which were confiscated following the French revolution. Mosques, which did not exist two centuries ago, do not fall under this regime, with the result that they must be built and maintained through private funding (ie 'private donations from the faithful or from abroad').³⁵⁰ French authorities nonetheless try to level the playing field for Islam and other religions. The French state and localities contribute to the building of mosques by allowing, and then co-financing dual-purpose buildings and providing land for long term lease, etc. That way, the constitutional principle of state neutrality is partially circumvented in lower level norms and practice, building down barriers to the effective enjoyment of freedom of religion, freer from discrimination.

In contrast, the evolving interpretation of the principle of *laïcité* poses serious difficulties in relation to the right to religious expression. Whilst the French Conseil d'Etat had first sought to leave it to specific institutions (eg school directors) to find the right balance between *laïcité* and freedom of expression, the legislator intervened to impose strict restrictions regarding religious clothing. These are gradually extended, with judicial endorsement, in terms of the persons affected (including civil servants, providers of public services, and users of such services, such as pupils), the activity performed (public sector, private sector in charge of a public service, and even the purely private sector, as with the private crèche in the *Babyloup* case),³⁵¹ and the space in which it applies (eg ban on the wearing of the burqa ban in the public places). Beyond religious clothing, the Council of State, in the name of *laïcité*, allows public authorities to take into account *radical religious practices*, when for instance deciding on placement of a child in a

³⁴⁸Report on France, 150.

³⁴⁹ CE, 18 mai 2005, n° 259982, *Assoc. spirituelle de l'église de scientologie d'Île-de-France, Assoc. spirituelle de scientologie Celebrity Centre*, Circulaire du 27 mai 2005 relative à la lutte contre les dérives sectaires JORF n°126 du 1 juin 2005 page 9751, Law n° 2001-504 of 12 June 2001 aiming at reinforcing the prevention and repression of sectarian movements which undermine human rights and fundamental freedoms, all as cited by the Report on France, 153.

³⁵⁰ See Letteron 2012, 518. as cited by the Report on France, 150.

³⁵¹Report on France, 159.



Jehova witness family opposing blood transfer,³⁵² or accepting that the wearing of the burqa amounted to a 'lack of assimilation' and thus "incompatible with essential values of the French community and equality between sexes", which precluded the naturalisation of the spouse of a French citizen.³⁵³

At the level of principles, the Italian understanding of *laicità positiva* 'implies non-interference by the state with regard to religions but a state guarantee for safeguarding religious freedom in a regime of denominational and cultural pluralism.'³⁵⁴ Yet, this approach comes in par with the overt preference for the Catholic Church via the Concordat agreement, and other denominations via the *intese* agreements.³⁵⁵ 'A common barrier concerns beliefs that are not linked to recognised confessions or, more generally, religious confessions that do not rely upon a recognised representative which can easily conclude agreements with the Italian State, pursuant to Article 8 of the Constitution. Only Confessions whose legal status has been acknowledged under law no. 1159/1929 may indeed conclude such agreements (*intese*).'³⁵⁶

Like in France, in Denmark, judicial decisions grapple with the issue of wearing religious symbols, especially the Islamic veil, in the workplace. Apparently, the Danish courts do not argue these cases on the basis of the liberty aspect of freedom of religion, but only examine whether discrimination based on religion can be established on the basis of the circumstances of the case. While in 2000, the Supreme Court found a refusal to hire a trainee who wore a headscarf discriminatory, in later cases courts accepted the employer's reference to hygienic rules and to the need for politically and religiously neutral appearance of employees in contact with the public.³⁵⁷ The Supreme Court has not argued at all along the lines of Article 9 ECHR, and appears to rely on the protestant view that religion is a private matter; the labour market, as non-private sphere, can require 'neutral' uniforms.³⁵⁸ Legal scholarship disagrees on whether the outcome would have been different, had the issue been framed as ethnic discrimination, and whether the decisions were in line with EU principles on equal treatment.³⁵⁹

³⁵² CE 24 April 1992 *Departement du Doubs v Epoux F.*, No 110178 as cited by the Report on France, 165.

³⁵³ CE 27 2008 *June Mme M.*, as cited by the Report on France 165,

³⁵⁴ See Constitutional Court, decision no. 203/1989 and, among others, O. Chessa, *La laicità come uguale rispetto e considerazione*, in *Rivista di Diritto Costituzionale*, 2006, 27, as cited by the Report on Italy, 86.

³⁵⁵ Report on Italy, 84.

³⁵⁶ Id. 94.

³⁵⁷ See the references in the Report on Denmark, 40.

³⁵⁸ Ketscher, K. (2005) *Etnisk ligebehandling, religionsfrihed og ligestilling mellem kvinder og mænd – set i lyset af Føtex-sagen*, U.2005B.235. as cited by the Report on Denmark, 40.

³⁵⁹ Roseberry, L. (2004), *Tørklædediskrimination på arbejdsmarkedet*, U.2004B.189., and Ketscher, K. (2005), as cited by the Report on Denmark, 40.



In Hungary, a particular barrier to the freedom of religion consists in the procedure by which a religious entity is recognized as a church, which comes with wide-ranging privileges. It is notably the Parliament, by a two-third majority, which determines that status. After two annulments by the Constitutional Court, the ECtHR found this procedure to be of political nature, which carries a risk of discrimination in violation of Article 11 read in the light of Article 9 of the Convention.³⁶⁰ On the basis of the Constitutional Court's ruling, several ordinary court cases found in favour of the plaintiffs, but the problem remains, as the parliament did not reintegrate the excluded churches, despite the fact that the constitutional decision 'reinstated' them.³⁶¹ Instead, it changed the constitution.

3.4.3. BARRIERS IN THE INTERPRETATION OF COMMUNICATIVE FREEDOMS

The exercise of communicative freedoms encounters quite a few barriers resulting from the weaknesses of judicial interpretation, or from the lack of legislative reaction following a court case.

In the Netherlands, a political party which excluded women as not suitable for public tasks, was denied *state funding* for violation of equal treatment; it changed its statutes, and eventually allowed women to join, but kept the exclusionary rule in the principles of the party. That was, apparently, tolerated.³⁶² The question of the legality of the dissolution of a 'paedophile' association triggered serious legal debates in Dutch courts and academia.³⁶³ In comparison, in Spain, the adoption of new legislation was required for the dissolution of secessionist/extremist/terrorist parties (later confirmed by the Constitutional Court and the ECtHR).³⁶⁴

In Hungary, the interpretation of freedom of information was one of the few inspiring legal developments in recent years, at least in terms of judicial practice and civil activity. Here, ordinary courts hand down decisions on politically sensitive (often corruption-related) issues almost every week, and regularly oblige government, politicians, authorities, and contractual

³⁶⁰*Magyar Keresztény Mennonita Egyház And Others v. Hungary* (Application nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12) judgment of 8 April 2014.

³⁶¹See Júlia Mink, *A vallásszabadság a vélt közérdek oltárán -- A Magyar Keresztény Mennonita Egyház kontra Magyarország ügy*, *Fundamentum*, 2014/3. 62. as cited by the Report on Hungary, 80.

³⁶²Report on the Netherlands, 21-24.

³⁶³*Id.* 31.

³⁶⁴Report on Spain, 32-34.



partners of the state to publish public interest data as requested. Courts have even managed to rectify manipulations of the law whereby the government sought to hide away from public scrutiny. This intense litigation nonetheless signals systematic barriers to enforcement: the law obliges to give access to such data without the need for judicial intervention, a rule which the government and its partners regularly violate, and then wait for the predictable result of judicial proceedings, financed by tax-payers' money. In addition, the government very recently introduced a new bill binding the access to public data to vaguely formulated payment requirements. The head of Data Protection and Freedom of Information Authority – which was established in violation of EU law, but still operates – already issued a statement that no constitutional concerns arise at the moment in this regard.³⁶⁵

In France, freedom of expression is in some regards quite liberal, especially when it comes to blasphemy, as it became well-known in light of the Charlie Hebdo attack. The country's defamation laws, however, impose significant barriers on freedom of expression. The Constitutional Council eliminated some of them recently, for example annulling exceptions to the possibility of proving the truth,³⁶⁶ and brought French law in line with ECtHR requirements.³⁶⁷ These cases highlight the importance of the new QPC procedure for the protection of freedom of expression.³⁶⁸

The criteria for establishing good faith are however still very demanding, and might harm especially satirical or critical magazines or statements made on-air.³⁶⁹ Criticism of institutions was sometimes seen in the past as subject to prudential limitations by some courts,³⁷⁰ although the Court of Cassation strengthened protection in the context of political campaigns.³⁷¹ Online defamation is seen as more dangerous and assessed in a stricter manner.³⁷²

Other strongly problematic provisions of French quasi-defamation law, notably on offences to heads of states, were eventually abolished, after condemnations from the ECtHR.³⁷³ French law is

³⁶⁵Report on Hungary, 82.

³⁶⁶Decision of 20 May 2011, No 2011-131 QPC; Decision No 2013-319 QPC of 7 June 2013 *M. Philippe B.* as cited by the Report on France, 121.

³⁶⁷ECtHR 7 Nov 2006, *Mamere v France* Applic. No 12697/03, as cited by the Report on France, 121.

³⁶⁸Patrick Wachsman, 'Section 6 – Liberte d'expression' in Remy Cabrillac (ed) *Libertes et droit fondamentaux* (10th ed., 2014, Dalloz). 484-522, 487.

³⁶⁹Wachsman 2013, 648 as cited by the Report on France, 121.

³⁷⁰Crim 23 March 1978 *Foyer* (criticism of judges trade unions); contrast with Crim 12 June 1978 (criticism of the functioning of police services) as cited by the Report on France, 121.

³⁷¹Ch. Mixe 24 Nov 2000 *BICC* 15 Jan 2001 as cited by the Report on France, 122.

³⁷²For example, they did not hesitate to condemn an internet site accusing someone of sexual agressions on minors. CE 20 Feb 2007, No 06-84310 as cited by the Report on France, 122.

³⁷³ECtHR of 25 June 2002 *Colombani v France*; ECtHR of 31 Jan 2006 *Giniewski v France*, ECtHR 15 Jan 2009 *Orban v France*, Law No 2004-204 of 9 march 2004, Article 52. JORF 10 march 2004, ECtHR *Eon v*



increasingly restrictive in the area of hate speech. Until recently, the mushrooming, but largely non-normative memorial laws, prohibition of denial of genocide and reasonably construed incitement provisions fit within international human rights law, especially in case there was constitutional review.

Since the January 2015 attacks on Charlie Hebdo new criminal offenses (ie apology of terrorism) have been introduced by anti-terrorist legislation, with heavier fines, expedited procedures, and administrative blocking of websites without judicial validation. The law was adopted, despite having been strongly criticized by the National Consultative Commission on Human Rights.³⁷⁴ In the future, it will be up to the courts to limit the impact on freedom of expression of these new provisions in a politically sensitive context.

3.4.4. OBSTACLES IN THE INTERPRETATION OF EQUAL TREATMENT

In matters of equal treatment, we observe a trend for judicial interpretation to seek to correct legislative failures, but judicial powers remain confined within the limits of interpretation. Czech courts have not hesitated to directly apply EU law to remedy discrimination arising from the non-implementation of EU provisions on voting rights for EU citizens, but the law remains in place. With regard to access to health care for third country nationals, courts have more limited options. Czech law excludes from public health insurance third country nationals³⁷⁵ who do not have a permanent residence permit and are not employed irrespective of whether they had in the past been working in Czech Republic in the past and made monthly payments to health insurance. This affects particularly negatively migrant women working on fixed-term contracts.³⁷⁶ A complaint is pending before the Constitutional Court.

The Hungarian church deregistration calvary, which span over two-and-half years, two constitutional court decisions, two constitutional amendments, a highly critical Venice Commission opinion, and an ECtHR condemnation, cannot be discussed in detail here. The

France of 14 March 2013 appl. 26118/10, Law No 2013-711 of 5 Aug 2013, Article 21(V) as cited by the Report on France, 129.

³⁷⁴Report on France, 133.

³⁷⁵ Different rules apply to mobile EU citizens and their family members, as well as the third country nationals exercising the right to free movement within the EU, as their insurance is based on the Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, and on the Regulation (EU) No 1231/2010 of the European Parliament and of The Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality. See Report on the Czech Republic, 52, n 166.

³⁷⁶ See Report on the Czech Republic, 52-53.



ECtHR, although it did not examine the complaint under Article 14 (prohibition of discrimination), nonetheless found a violation of Article 11 (association) in the light of Article 9 (religion) and insisted on the discriminatory nature of the de-and re-registration scheme. Thereby, the ECtHR did not recognise a right to a religious group which clearly fulfils all statutory conditions to be granted church status. In any case, this omission does not have any practical effect, since the Hungarian government does not *execute* judicial decisions in this area.

As mentioned in the previous section, Danish scholars debate whether the cases on religious clothing in workplaces would have turned out differently, had they been argued and decided on the basis of ethnic discrimination.

3.4.5. BARRIERS REGARDING THE INTERPRETATION OF PRIVACY AND AUTONOMY-RELATED RIGHTS

In Belgium, the extensive interpretation of the right to human dignity enabled the judiciary to review the material conditions of a life worthy of living (e.g. access to water), or their conditions (e.g. social assistance cannot be conditioned upon whether the applicant is willing to give up her right to choose a doctor).³⁷⁷ Still, as the rapporteur puts it ‘the smooth interplay with other (international and supranational) rights, which can give rise to a denial of claims nonetheless, shines through in multiple other judgments.’³⁷⁸ When Belgian courts want to restrict the exercise of civil rights, they look for legitimate grounds in international human rights law. In this vein, the Constitutional Court referred to the Convention of the Rights of the Child to authorize the detention of minors.³⁷⁹

In the United Kingdom, restrictive interpretation limits the exercise of privacy rights: for instance, strip searches, stop-and-search powers, or data retention regulation have been assessed differently in the United-Kingdom than in Strasbourg.³⁸⁰ Following condemnation, the United Kingdom adjusted to European standards.

In Italy, the constitutional interpretation of reproductive freedom is highly sophisticated, and has probably gone as far as judicial interpretation can. However, ‘new legislative or regulatory

³⁷⁷Report on Belgium, 44, with reference to District Court of Mouscron-Comines-Warneton, 24 May 2004, published in *Revue générale de droit civil belge* 2008, 273. Similarly see Civil Court of Charleroi, 19 January 2000, *Revue générale de droit civil belge* 2000, 593. and Council of State, judgment nr. 64.554 of 17 February 1997 (*Mourad*).

³⁷⁸Report on Belgium, 44.

³⁷⁹Id. citing case number 166/2013, decided on 19 November 2013.

³⁸⁰Report on the United Kingdom, 47.



interventions are ... needed, in order to ensure legal certainty and full, and coherent implementation of rights.’³⁸¹ Regarding informed consent and end-of-life decisions, there is no doctrinal or even societal consensus, on the basis of which one could argue that the ban on assisted suicide – upheld by the Constitutional Court – constitutes a barrier to the enforcement of a civil right.

3.4.6. LIMITS OF INTERPRETATION REGARDING THE CIVIL RIGHTS DIMENSION OF POLITICAL RIGHTS

Recently, the British authorities have neglected the human right dimension of citizenship. The government sought to expand the powers of the Home Secretary to revoke citizenship even in cases when that would result in statelessness, in clear violation of the UK’s international obligation under the UN Convention on Statelessness. The bill was returned to the House of Commons by the House of Lords. In 2013, the Supreme Court declared that revoking citizenship was illegal if that would leave the individual stateless.³⁸² So far, however, the bill has not been dropped.

Czech courts compensated for the lack of implementation of EU law regarding voting rights as much as they could, but that by far did not result in the possibility for all EU citizens to vote and stand as a candidate in Czech municipal elections.

These cases show again that courts often do not have sufficient influence on legislation, even if they try their best in upholding civil rights standards in interpretation.

3.4.7. BARRIERS IN THE INTERPRETATION OF DUE PROCESS RIGHTS

In Belgium, like with human dignity, courts use international human rights law, especially the ECtHR jurisprudence, as legitimizing lower due process standards which otherwise could have proven unconstitutional. For instance, the Court of Cassation relied on the ECtHR’s *Salduz* ruling to argue that: ‘[...] The rights of defense and the right to a fair trial are violated when a suspect made statements during the hearing by the police in violation of the duty of information and without the possibility to be assisted by a lawyer, but that fact does not

³⁸¹Report on Italy, 104.

³⁸² *Secretary of State for the Home Department v. Al-Jedda* [2013] U.K.S.C. 62, [2014] A.C. 253. as cited by the Report on the United Kingdom, 51.



automatically means that it is definitely impossible to investigate fairly the cause of an accused defendant. When the statements are not used as evidence by the judge determining that no abuse or coercion has clearly taken place, and that the defendant was not located in a vulnerable situation at the time of the hearing or during instruction, or has been remedied to the vulnerable situation of the accused to an effective and adequate manner, the fairness of the trial is ensured [...].³⁸³

In contrast, in the Czech Republic, judicial interpretation works in a protective rather than restrictive mode. The Constitutional Court³⁸⁴ interprets the right to a fair trial as covering a fundamental procedural right to file an application for starting a procedure and also a right to have a decision issued and be informed about it.³⁸⁵ In relation to visa application, the Supreme Administrative Court argued that, although there is no right to be granted visa, there is a right to a fair 'trial' when processing applications for a visa. This includes such procedural conditions that are predictable and are generally possible to fulfil, including an opportunity to submit an application in a reasonable time and in a way respecting human dignity, without having to turn to unofficial agents.³⁸⁶ This clear and sensible judicial interpretation has however not been followed through in legislation and administrative practice, and applicants are being clearly deprived of a right to which they are clearly entitled to.

3.4.8. BARRIERS IN INTERPRETATION OF THE RIGHT TO PROPERTY

The Hungarian Constitutional Court has now abandoned any serious proportionality analysis when reviewing legislation affecting property, including in areas not affected by the limitation of its competence. In deviation from an earlier activist property jurisprudence, and especially since members elected solely with the votes of the governing parties became the majority, the Court regularly finds compatible with the constitution measures which in the past would have without doubt be found in breach property rights, legitimate expectations or rule of law standards. For instance, in 2013, it assessed a law which provided for the immediate termination of the operation of gambling machines in other places than casinos as constitutional. The majority

³⁸³Court of Cassation of 13 November 2012 in case number RG.P.12.1082.N, English translation of the summary accessible at <www.jura.be>., as cited by the Report on Belgium, 46.

³⁸⁴ Czech Constitutional Court, File No. IV. US 114/96, judgement of 25 September 1997 as cited by the Report on the Czech Republic, 40.

³⁸⁵*Id.*

³⁸⁶ Report on the Czech Republic, 40, with reference to Supreme Administrative Court, File No. 8 As 90/2011-62, judgment of 30 August 2012.



found no property issue involved as the legislator was free to regulate the gambling market (the dissenting judges understood the measure as interfering with acquired rights). The lack of any transitional period during which operators could have adjusted and found alternate source of income, 'problematic' from the point of view of legal certainty, was seen as justified for reasons of urgency due to (unrevealed) national security concerns....³⁸⁷ The court's interpretation hence departed from the constitutional text, and established jurisprudence. The case came before the CJEU which applied a proportionality test: it declared that while the protection against gambling addiction and criminal activities might be a legitimate aim, the restrictions must pursue those objectives in a consistent and systematic manner (which the issuing of new casino operating licences in 2014 contradict). The CJEU also stated that the reregulation might well violate the principles of legal certainty and the protection of legitimate expectations and the right to property of amusement arcade operators. When the national legislature revokes licences that allow their holders to exercise an economic activity, it must provide a reasonable compensation system or a transitional period of sufficient length to enable that holder to adapt.³⁸⁸ In fact, these are exactly the principles and considerations which would have governed the decision of the Constitutional Court under its previous jurisprudence.

Another area of commercial activity, the tobacco retail sale, was also recently re-regulated. All previously held permits were revoked, and new permits issued under questionable circumstances and based on unclear criteria.³⁸⁹ This measure deprived many people from their main source of income. The ombudsman (who only issues recommendations) found that the re-regulation in itself did not violate either the right to property or the freedom of enterprise, as their limitation is justified by the state interest in protecting children. However, he considered that the procedure for issuing the concession was capable of violating the right to fair procedure.³⁹⁰ The Constitutional Court found otherwise:³⁹¹ it assessed the regulation as constitutional because it served the legitimate interest of protecting the health of the youth. The Court omitted the second step of constitutional review, and did not check whether the interference was necessary and proportionate to the aim pursued. In contrast, the ECtHR found the tobacco retail scheme violated the right to property (Article 1 Protocol 1 ECHR), as 'the measure did not offer a realistic prospect to continue the possession because the process of

³⁸⁷26/2013. (X. 3.) AB határozat as cited by the Report on Hungary, 32.

³⁸⁸C-98/14, *Berlington v. Hungary*, Judgment of 11 June 2015.

³⁸⁹ The conditions under which the new retail shop would operate were not clearly defined (eg what kind of products they could sell, margin levels, etc); there were serious allegations that licences were attributed based on political affiliation (only to supporters of the governmental party), etc.

³⁹⁰ Report of the ombudsman in case AJB-3466/2013 as cited by the Report on Hungary, 32.

<http://www.ajbh.hu/documents/10180/111959/201303466.pdf>

³⁹¹ 3194/2014. (VII. 15.) AB határozat as cited by the Report on Hungary, 32.



granting of new concessions was verging on arbitrariness.’³⁹² Still, the decision has no impact as the new concessions will not be revoked and no new system has been introduced to rectify the violation.

A further strain of massive reregulation affected service pensions and early retirement schemes for civil servants. A 2011 law eliminated service pensions in three weeks, transforming it into service allowances, subject to personal income tax. The reform also meant that affected persons (policemen and women, fire fighters, militaries, etc.) lost their status of pensioner, and accompanying benefits. The Constitutional Court rejected the complaints,³⁹³ finding the changes necessary to counter the economic crisis and other changed circumstances, and to improve the pension system. The Court majority did not discuss earlier case law related to acquired rights and legitimate expectations, but only echoed the government’s arguments. Dissenters applied the previous jurisprudence and found a violation of rule of law requirements.

In contrast with the collapse of constitutional interpretation of the right to property in Hungary, in the Czech Republic, the Constitutional Court remedied the situation in which some categories of third country nationals were excluded from the public health insurance, relying on a broad and strict interpretation of the right to property.

3.5. CASE LAW PROTECTING CIVIL RIGHTS

In most countries examined, there is no such thing as a strict doctrine of precedent, since these countries belong to the ‘civil law’ tradition. However, case law, in particular from supreme and constitutional courts, significantly shape the protection of civil rights, and are de facto setting precedents. Still, in the absence of a strict precedent system, this jurisprudential protection of civil rights can be fragile, as exemplified in the Hungarian context (e.g. annihilation of the judicially constructed protection of legitimate expectation leading to violation of the right to property).

In contrast, in the United Kingdom, common law contributed in an essential manner to the development of civil liberties.³⁹⁴ Among civil rights, the concept of procedural fairness (an aspect of the right to a fair trial) has been a customary feature of a common law legal system. Property,

³⁹²*Vékony v. Hungary*, Application No. 65681/13, Judgment of 13 January 2015.

³⁹³ 23/2013. (IX. 25.) AB határozat.

³⁹⁴ Report on the United Kingdom, 34, with reference to Clayton & Tomlinson, *The Law of Human Rights*, 37 et seq.; and T. Allen, *Constitutional Rights and the Common Law: Law, Liberty and Justice* (Wotton-under-Edge: Clarendon Press, 1993), Ch. 6.



the enforcement of agreements, reputation and fair procedures,³⁹⁵ have received protection under the common law for ages. The common law traditionally protects *negative* liberties,³⁹⁶ with the consequence that positive aspects of civil rights as understood in the continent and by the ECtHR are sidelined. The Human Rights Act's incorporating the ECHR is supposed to make up for this blindspot (not in primary legislation though).

3.6. JUDICIAL ENFORCEMENT INSTITUTIONS AND PROCEDURES

While courts systems vary to a significant extent in member states studied, when it comes to the enforcement of civil rights, their constitutional status and governing principles appears quite similar. The most important among these principles are independence and impartiality.

3.6.1. INDEPENDENCE

Formally, judicial independence is guaranteed at either the constitutional or the statutory level in all countries. There are, furthermore, institutional guarantees of independence, through the appointment of courts' members, the impossibility of removal except for serious fault, etc. The judiciary does not seem subject to serious threat on its independence in the member states, except in Hungary and Spain, and partially, France and the Netherlands.

In Spain, like in France, the cause for concern is the fact that the nomination of constitutional judges emanates from the Government and Parliament which results in a serious risk of politicization.³⁹⁷ Similar politicization might affect the promotion of ordinary judges to higher Courts and the Supreme Court, because that depends from the General Council on Judiciary, whose members are also partially elected by the Government and Parliament.³⁹⁸

³⁹⁵ Report on the United Kingdom, 34, with reference to H. Davis, *Human Rights and Civil Liberties* (Milton: Willan Publishing, 2003), 16.

³⁹⁶ Report on the United Kingdom, 34, with reference to F. Klug, K. Starmer & S. Weir, *The Three Pillars of Liberty* (Routledge 1998), though please note this publication is prior to the Human Rights Act 1998. See also: Gearty, *Civil Liberties*.

³⁹⁷ For instance, the current President of the Constitutional Court -- who was appointed as a Judge by the Government -- is a former affiliate of the People's Party, the governing Party today. See Report on Spain, 42.

³⁹⁸ *Id.*



The principle of independence and impartiality of justice are under serious threat in Hungary in both the formal and substantive sense.³⁹⁹ The law nullifying condemnations related to the 2006 riots, the premature removal of the Chief Justice of the Supreme Court in violation of the ECHR, the sudden forced retirement of hundreds of senior judges in violation of the constitution and EU law, and the arbitrary case reassignment powers criticized by the Constitutional Court, and the Venice Commission, and lately the political packing of the Constitutional Court, signal a heavy politicisation of the judiciary, which threatens its independence.⁴⁰⁰ Once these measures, and damage done, it cannot be undone. Neither the former chief justice, nor the former senior judges have been reinstated in their previous positions, which had already been filled with others. The consequence of the partisan nomination process and appointments to the Constitutional Court are there to stay. Many cases – including high-profile political ones– have been reassigned to different courts (although this practice was stopped, and rules were aligned as a result of repeated criticisms from the Venice Commission). Given this context, it is still remarkable that courts, in particular ordinary ones, but also on occasion the Constitutional Court, manage to operate with some apparent degree of independence, and remain attentive to European standards of human rights protection. This is less true of the supreme court (renamed and recomposed as Kúria), which recently confirmed the legality of school segregation, and maintains the possibility for life sentence without parole, even though Hungary was in both areas found in violation of the the ECHR. Independence, of course, has its limits in another aspect as well: if the government tends to rewrite the laws and the constitution every time it does not like a decision, then independence becomes an empty vessel. In fact, this happened to the Constitutional Court regarding the church law and other laws. Since members elected solely by the votes of the governing parties are in the majority, no instance of superconstitutionalization (i.e. overruling of decisions by constitutional amendment) occurred.

Regarding the French *Conseil d'Etat*, the rapporteur notes that 'at first sight, the combination of advisory and judicial functions within a single organ, and the professional mobility between administrative courts and state administration, could appear problematic, from the point of view of judicial independence. However, the internal functional separation and

³⁹⁹ See Act CLXI/2011 on the Organisation and Administration of the Courts, and Act CLXII/2011 on the Legal Status and Remuneration of Judges, and the (highly critical) opinions by the Venice Commission: Opinion on the Legal Status and Remuneration of Judges Act (Act CLXII of 2011) and the Organisation and Administration of the Courts Act (Act CLXI of 2011), adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012, CDL-AD(2012)001).

⁴⁰⁰ See Report on Hungary, 35-38.



visible independence of the positions adopted by the *Conseil d'Etat* have pacified concerns, including those of the Strasbourg court.⁴⁰¹

The Netherlands Council of State has dual functions without proper internal division, and administrative courts in general seem to be intransparently organized, which endangers the uniform application of law, in effect, equality before the law. A reform process was launched, but currently it seems to be halted.⁴⁰²

3.6.2. COMPETENCES

The main avenue for adjudicating civil rights is the constitutional court, if there is one. This is the case in the Czech Republic, in Italy, and, at least traditionally or theoretically, in Hungary.

In France and Belgium, the situation is more complex. In France, the constitutional review of legislative provisions belong solely to the Constitutional Council through an a priori norm control procedure (initiated by political actors, and, since 1974, the parliamentary opposition), or since 2010, upon referrals from the country's two supreme courts through a new a posteriori control mechanisms, the priority question on constitutionality (French acronym: QPC). The QPC differs from usual judicial referrals in that even if the trial judge considers there is a serious constitutional issue, the Court of Cassation or the Council of State as supreme courts can still block its transmission to the Constitutional Council (acting therefore as negative constitutional judges). Although this filtering system has its flaws, it nonetheless represents an improvement on the pre-existing situation, where the many legal provisions which had not been submitted for a priori review to the Constitutional Council could never be challenged. While the Council exercises constitutional review, which results in the invalidity of legislative provisions incompatible with constitutional norms, it is for ordinary courts to ensure that national provisions, including legislative ones, which are incompatible with international treaties, are set aside and disapplied.⁴⁰³

⁴⁰¹ *L'Union fédérale des consommateurs Que choisir de la Côte d'Or v. France*, 30 June 2009, application n° 39699/03, decision on the admissibility, as cited by the Report on France, 16.

⁴⁰² See Reforming Appeal in Administrative Law at <https://www.rechtspraak.nl/English/Judicial-System/Special-Tribunals/Pages/Reforming-appeal-in-Administrative-Law.aspx>.

⁴⁰³ Report on France, 7-8.



Similarly, in Belgium, fuzzy control results in non-application, while concentrated or constitutional control in nullification.⁴⁰⁴ The Belgian Constitutional Court rules on preliminary references from Belgian courts related to the compatibility of a statute, act or other law with the Constitution and with civil rights of international and European origin, but also directly receives individual complaints from public entities or national/private parties (who can show an interest) bringing forth alleged infringements of constitutional rights.⁴⁰⁵ While the Constitutional Court has broad and significant powers, the bulk of the civil rights jurisprudence lies with ordinary and administrative courts. The Council of State has a dual (advisory and judicial) function. It is a body advising the government, including on the compatibility of a proposed measure with domestic or international civil rights standards; it also acts as supreme administrative court against actions of public authorities.⁴⁰⁶ The Council of State only has review jurisdiction (*cassation*), but lower courts are entitled to overturn administrative decisions (reformatory jurisdiction). Disputes relating to civil and political rights are assigned to the ordinary courts.⁴⁰⁷ This results in complicated jurisdictional delineations: for example, the Council of State cannot decide on omissions of administrative authorities if that affects a subjective right of a claimant.⁴⁰⁸

In contrast to the complex set of judicial actors contributing to civil rights protection in France and Belgium, in Italy and the Czech Republic it is the Constitutional Court that plays a central role. The Czech Constitutional Court has wide powers, however, with regard to civil rights, the most important avenue is the constitutional complaint mechanism. In Italy, the Court has powers only in concrete posteriori review in the form of judicial referral,⁴⁰⁹ with incidental norm control effects,⁴¹⁰ and to this extent ordinary courts are also involved in the process.

In Hungary, there is an interesting evolution in relation to the authority of constitutional court decisions. In the past, ordinary courts were often infamously disregarding both Constitutional Court and ECtHR judgments which has not been handed down in the specific case before them; in recent years, parallel to the decline of constitutionalism, including constitutional review, ordinary courts appear to align themselves more with (earlier, or residual) constitutional doctrine and European human rights standards. This is an important development, as the accessibility of the Constitutional Court was reduced since the abolition of the *actio popularis* in

⁴⁰⁴Report on Belgium, 56.

⁴⁰⁵Report on Belgium, 56.

⁴⁰⁶Report on Belgium, 57.

⁴⁰⁷ Id.

⁴⁰⁸Id.

⁴⁰⁹Report on Italy, 91.

⁴¹⁰Id. 89.



the Fundamental Law. Other avenues to the constitutional court exists on paper, but are largely neutralised by the fact that the person entitled to initiate it has been put in place by the governing parties.⁴¹¹ The newly introduced constitutional complaint mechanism against decisions of interpretation of ordinary courts cannot compensate, in particular as its admissibility conditions are interpreted narrowly.⁴¹² Besides, using this mechanism may actually led to a downgrading of civil rights protection, given the deficiencies in the Fundamental Law and the composition of the Court, as the (removed) former Chief Justice of the Supreme Court, András Baka argued.⁴¹³ In general, regarding severe inconsistencies and deficiencies of the constitutional text, it is not clear whether procedures and constitutional remedies ought to be improved at all, or rather 'the less effect the Fundamental Law has, the better it is for fundamental rights.'⁴¹⁴ The Czech Constitutional Court, unlike its Hungarian counterpart, appears to be well preserved from such overt politicisation.

Some might think that in Hungary, the post-1989 (over?)constitutionalisation triggered a 'backlash' and facilitated the post-2010 constitutional dismantling. The Netherlands and Denmark, which never had constitutional courts, manage to offer sufficient protection for civil rights, through other modes of control. In the Netherlands, courts are entitled to review compatibility with international treaties, EU law, and their interpretation; they set aside the law transposing the data retention directive, along the lines of the *Digital Rights Ireland* CJEU ruling.⁴¹⁵ What is more, the decision was issued in the context of preliminary injunction proceedings in a lower court; remarkably, the government announced that it would not appeal it.⁴¹⁶ In Denmark, ordinary courts ensure compliance with civil rights, be they guaranteed at international, European, or national level. Danish courts – unlike their Dutch counterparts, which are constitutionally barred from doing so – carry out, although rarely, constitutional review of legislation, apart from judicial review of administrative acts, and resolve criminal or civil law disputes.⁴¹⁷

⁴¹¹Report on Hungary, 40.

⁴¹² See, eg, Bernadette Somody, Újmagyar alkotmánybírászkodás, *Fundamentum*, 2014/1-2, 77, Beatrix Vissy, Megkötözött szabad kezek, *Fundamentum*, 2014/1-2, 81 as cited by the Report on Hungary, 40.

⁴¹³ On the occasion of a book launch. The video is available here

<http://www.ekint.org/ekint/ekint.head.page?nodeid=649#konyvbemutato> as cited by the Report on Hungary, 43-44.

⁴¹⁴Report on Hungary, 44.

⁴¹⁵Rechtbank Den Haag, 11 March 2015, ECLI:NL:RBDHA:2015:2498,

<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:2498>. As cited by the Report on the Netherlands, 19.

⁴¹⁶Id.

⁴¹⁷ Melchior, T. (2002), The Danish Judiciary, in Dahl, B. et al. (eds.) *Danish Law in a European Perspective*, 2nd ed., Forlaget Thomson 111, as referred to by the Report on Denmark, 27.



The United Kingdom, as is well known, does not know constitutional review; even under the Human Rights Act, courts cannot strike down or disapply primary legislation contrary to the European Convention of Human Rights. For subordinate legislation, courts exercise *ultra vires* control.⁴¹⁸

3.6.3. PROCEDURES

Administrative decisions are perhaps most prone to interfere adversely with civil rights. In all countries examined, administrative decisions are subject to **judicial review**. In some countries, such as in France or Belgium, this happens in specific administrative courts, while elsewhere in (specialized chambers of) ordinary courts. Normally, it is possible to ask for a review of administrative decision by the administration itself at least once, before it is submitted to court for judicial review.

Emergency proceedings are usually available to prevent serious damage, including those resulting from civil rights violations, which lead to the adoption of interim measures (Hungary,⁴¹⁹ Spain,⁴²⁰ Belgium⁴²¹, Netherlands). Dutch courts can set aside administrative measures in preliminary injunction proceedings.⁴²² Emergency measures can also be ordered in *administrative procedure*; for instance Hungarian authorities are even obliged to *ex officio* take a temporary measure if otherwise the occurrence of damage, violation of personality rights or danger cannot be averted.⁴²³

In France, a specific emergency remedy has been introduced with regard to fundamental rights, the *référé-liberté*. It is a fast and effective judicial procedure, which covers a broad array of rights, including those derived from EU law. Whilst judicial practice on the *référé-liberté* has elevated for instance the protection of dignity and privacy in prisons, in other contexts, for instance in asylum procedures, their use has been less protective.⁴²⁴

⁴¹⁸ Report on the United Kingdom, 35.

⁴¹⁹ Report on Hungary, 42.

⁴²⁰ Report on Spain, 43.

⁴²¹ Report on Belgium, 58.

⁴²² Report on the Netherlands, 36.

⁴²³ Section 22 (3) of Act CXL/2004 on the Code of Administrative Procedure.

⁴²⁴ See Report on France, 25, referring to CE, ref., 15 février 2013, *ANAFE et Gisti*, Req. n° 365709, CE, ord., 19 novembre 2010, *Ministre de l'intérieur, de l'outre-mer, des collectivités territoriales et de l'immigration c/ Panokheel*, n° 344286, Lebon ; CE, ord., 8 septembre 2005, *Garde des Sceaux c/ M. Bunel*, n° 284803, Lebon, 388.



3.6.3. REMEDIAL ACTIONS

As to **particular remedial actions** a court can take, in most jurisdictions (for instance in Belgium,⁴²⁵ France, Hungary,⁴²⁶ or Spain), the court might annul or suspend the illegal administrative decision, order that the violation be stopped, and impose reparation for material and immaterial damages. Constitutional courts where they exist can invalidate statutes as well.

In Belgium, in this regard as well, there are complicated rules on jurisdictional competence which might hamper the enforcement of rights, although this concern was not explicitly spelled out in the report. In Denmark, a final decision on refusal of family reunification by the administrative Immigration Board can be brought to the ordinary courts under general constitutional rules, but chances of winning are low.⁴²⁷

In Hungary, individuals may claim *Schmerzensgeld*-type damages (“damages for pain and suffering”) under the Civil Code, if they can prove a violation of a personality right, without needing to establish actual harm (unlike in general tort liability). Personality rights are rights related to human dignity; their exact scope is unclear and evolving, but does not cover all civil rights. The data protection law also provides for this possibility.⁴²⁸ Personality right actions are frequently initiated by politicians against the press, thus producing a chilling effect on freedom of expression.⁴²⁹

Naturally, general civil or specific public law **tort rules** apply to violations of civil rights, whether committed by public or private actors (e.g. in Belgium, France, or Hungary). In Hungary, or in France, tort action can be even brought against legislation.⁴³⁰ Note however that there is no rule according to which the violation of *civil rights as such and in itself* amounts to immaterial damage anywhere.

Equal treatment rights might be enforced in specific procedures providing for enhanced protection. In this area, EU law imposes a reversal of the burden of proof and more relaxed

⁴²⁵Report on Belgium, 57.

⁴²⁶Report on Hungary, 39.

⁴²⁷ Report on Denmark, 27.

⁴²⁸Art. 23. of Act CXII/2011, as cited by the Report on Hungary 77.

⁴²⁹Report on Hungary, 42.

⁴³⁰ 1/2014 decision in principle, <http://www.lb.hu/hu/elvdont/12014-szamu-polgari-elvi-dontes> as cited by the Report on Hungary, 41.



standing rules.⁴³¹ A Hungarian constitutional court inadmissibility decision reveals however how compliance with European legal standards does not guarantee a very high enforcement standard, which will have a direct impact on the level of substantive protection. The Court refused to rule on the merits of a constitutional complaint by an equal treatment NGO against a Kúria decision on school segregation, for lack of standing.⁴³² While according to the Equal Treatment Act, NGOs have standing to turn to court as 'litigants enforcing claims of public interest' (*actio popularis*) in their own name, the Constitutional Court found this standing possibility inapplicable to constitutional complaint. EU law does not put any obstacle in the way of such a restrictive interpretation of standing rules.

3.7. NON-JUDICIAL ENFORCEMENT INSTITUTIONS AND OTHER BODIES RELEVANT FOR THE ENFORCEMENT OF CIVIL RIGHTS

There are a number of non-judicial bodies which contribute to the enforcement and effective exercise of civil rights. The most important – and effective – appear to be **ombudspersons**. Some country reports have not provided details as to their status, appointment, removal, and decision-making powers, but did not signal any serious problems with the independence of this institution.

In Spain, ombudspersons' election are politicised, but strive to strike a balance. In the Principality of Asturias the ombudsman was a member of the then-governing party, while his assistant a member of the main opposition party. This has not resulted in a substantive distortion of their roles.⁴³³

In France, the independence of the Defender of Rights might be cast into doubt by the mode of nomination. He or she is appointed by decree of the President of the Republic (whilst almost all his/her foreign counterpart emanate from the parliament); since 2008, the competent parliamentary committees can block the appointment by a qualified majority. In any case, organizational features (ie non-renewable mandate, incompatibilities, removal conditions, etc)

⁴³¹E.g. Arts 7 and 8 of the 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

⁴³²3133/2013. (VII. 2.) AB végzés, decision on the admissibility of 17 June 2013.

⁴³³Report on Spain, 49.



offer certain guarantees of independence, even if the guarantee against removal is only provided by a decree.⁴³⁴

In contrast, in Hungary, the ombudsman's system is spelled out in the Fundamental Law and regulated in a law, with formal guarantees of independence. The earlier requirement of an enhanced majority for the law on the ombudsman was abolished, but the ombudsman is still elected by two-third of MPs (which however does not fulfil its original function of political consensus in case the governing parties have two-third majority). The *ombudspersons* have traditionally been active and well-regarded in Hungary, and even after the restructuring in 2010 where one ombudsman remained out of the previous four, there were still important strengths in the system. While in the new format it would certainly not be possible to achieve the level of activist rights protection which have earlier characterised the work of (some) ombudspersons, an extremely important and special power of the ombudsman in Hungary is the initiation of posterior norm control before the Constitutional Court. The ombudsman in office since September 2013 has initiated constitutional review less than his predecessor, but this might relate also to external factors, such as the changed composition of the Constitutional Court.

The French Defender of Rights has also powers going beyond classic ombudsman powers: in case his or her requests are not met, he or she can turn to the administrative emergency judge who may order interim measures.⁴³⁵ Despite these extensive powers, the Defender of Rights has not yet offered an effective mechanism against serious civil rights violations, although its interventions have improved the daily operation of public administration and services.⁴³⁶

The Czech ombudsman took an active stance and produced serious monitoring, which makes it an essential institution in upholding civil rights in the country. The Parliamentary Ombudsman in Denmark is also well-regarded. The complex and multi-layered system of ombudspersons in Belgium, to no surprise, has been known 'to carry a sizeable weight with regard to minor or major adjustments of public policy, in the legislative, regulatory, administrative as well as the judicial sphere.'⁴³⁷

In Spain, the ombudsman does not appear to play such a major role as in Belgium or the Czech Republic, and in Italy, there is no ombudsman-like institution.

⁴³⁴Decree No 2011-905 of 29 July 2011 as cited by the Report on France, 38.

⁴³⁵Report on France, 39.

⁴³⁶Report on France, 40, referring to Wachsmann 2013, 287,

⁴³⁷ Report on Belgium, 66-67.



In the United Kingdom, while there are several ombudsmen,⁴³⁸ it appears the Equality and Human Rights Commission (EHRC), created in 2007, plays a more important role.⁴³⁹ As the funding of this equality body was cut down, there are concerns regarding its effective operation.⁴⁴⁰

Apart from ombudsman-like institutions, all countries examined have an array of so-called **independent administrative agencies**, committees of varying status and degree of independence. **Equality bodies** are designated in every country, but in some of them (as in the Czech Republic or France), this function is fulfilled by the ombudsperson institution.

Parliamentary committees, and **citizens' petitions** appear to play an important role in the effective enjoyment of civil rights in Belgium.⁴⁴¹

In many countries, like in France or the United Kingdom, the trend has been towards regrouping of various independent agencies dealing with various human rights issues under a single umbrella. There are debates about the pros and cons of single versus multiple body monitoring, but there seem to be no serious concerns as to the capacity of either system to contribute to civil rights protection. In Hungary however, the mandate of the ombudsman was reduced to exclude data protection and freedom of information, entrusted to a newly established authority, whose head is appointed by the president upon proposal by the prime minister for nine years (the president can only deny an appointment if it would result in serious disturbance of the democratic functioning of the state organization or formal conditions are not fulfilled). Contrast this with the election of the head of the previous data protection body, i.e. the ombudsman who *was nominated by the president, and then elected by two-third in the parliament for six years*, without the involvement of the prime minister.⁴⁴² As the data protection ombudsman's office was closed down, the ombudsman's six years mandate expired prematurely after three years. The CJEU declared violation of the data protection directive;⁴⁴³ but had no power to reinstate the ombudsman, or oblige the government to change the nomination procedure. At the pressure of the Commission, the rules for *removal* of the head of the authority were changed, but not the nomination procedure. A side-effect of this EU-induced correction is that the current head of the authority, entrenched in violation of independence under EU law, can now not easily be removed. As a result, standards of data protection have lowered.

⁴³⁸Report on the United Kingdom, 44.

⁴³⁹ Id. 43.

⁴⁴⁰ Id.

⁴⁴¹ Report on Belgium, 62-63.

⁴⁴² Art. 9 (6) Fundamental Law, Report on Hungary, 78.

⁴⁴³ C-288/12, *Commission v. Hungary*, Report on Hungary, 78.



3.8. ACCESS TO JUSTICE

Access to justice is restricted in several regards in the examined member states. Sometimes it appears formally insufficiently guaranteed, but still works in practice; it may also be denied to specific categories of persons (such as people outside the country, or people with insufficient financial means) even though formal protection is guaranteed. Systematic deficiencies arise in case proceedings drag on for excessively long periods of time, or if the court lacks jurisdiction to review certain acts, where standing to sue is too restricted, where time limits are too short, and so on.

Formally, in France, the **right to appeal** is not a constitutional principle, neither a general principle of law.⁴⁴⁴ In Belgium, it is guaranteed only in ordinary legislation.

A more severe and practical hurdle to access to justice in the United Kingdom is faced by those deprived of citizenship. Dual citizens can be stripped of nationality in case the Home Secretary deems it 'conducive to the public good', and such order can be made without judicial approval and with immediate effect. Although the decision can be challenged in court, this is almost impossible for those who are not permitted to return to the country.⁴⁴⁵ The Czech visa application system's flaws also remain beyond judicial control, since those affected are outside the country.

Legal aid systems appear to be well-functioning in wealthier countries, especially in Denmark and Belgium, but are seriously deficient in Eastern Europe.

In the United Kingdom, despite its general wealth, legal aid was cut in most housing, welfare, medical negligence, employment, debt and immigration cases. This, together with the cuts on funding of the Equality and Human Rights Commission is likely to impact on the availability of vulnerable groups to enforce their civil rights.⁴⁴⁶

Legal aid does not function in Hungary, as legal aid payments to lawyers are so low compared to market prices that no one is interested. Moreover, legal aid is not available for constitutional complaints even though the new system, unlike the old *actio popularis*, imposes legal

⁴⁴⁴ CE, 17 December 2003, *Meyet*, as cited by the Report on France, 14.

⁴⁴⁵ K. Bennhold, 'Britain Increasingly Invokes Power to Disown its Citizens' (New York Times, 9 April 2014) as cited by the Report on the United Kingdom, 50.

⁴⁴⁶ Report on the United Kingdom, 43-44.



representation. The ombudsman turned to the Constitutional Court, which found it incompatible with the principle of access to justice.⁴⁴⁷

In the Czech Republic, the responsibility for legal aid has been transferred to the Bar Association without compensation; it does not work well, and many people are not even aware of its existence. Moreover, legal aid is not available in the pre-trial phase, despite a bill pending since 2008.⁴⁴⁸

Pro bono organizations are trying to improve the situation in both the Czech Republic and Hungary, but their reach is quite limited.⁴⁴⁹ Quality legal expertise for the poor might be somewhat restricted in Belgium as it is often junior lawyers who engage in pro bono work.⁴⁵⁰

Access to justice might be hampered in a myriad of other ways: in Hungary, the Constitutional Court upheld a law which restricts the range of judicial decisions which must be made public, even *in anonymized form*. These concern family status disputes, and cases concerning state secrets. This prevents the public from accessing prevailing legal interpretation.⁴⁵¹

The length of proceedings is a problem in the majority of examined countries (Czech Republic,⁴⁵² Hungary,⁴⁵³ Italy,⁴⁵⁴ France⁴⁵⁵, Spain⁴⁵⁶), except in Belgium.⁴⁵⁷

In Hungary, access to justice is seriously restricted in matters concerning property rights and legitimate expectations. Indeed, as long as the state debt exceeds half of the GDP (which will remain so in the foreseeable future), the Constitutional Court may not review fiscal legislation for conformity with the Fundamental Law, except if the complaint alleges the violation of the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or the rights related to Hungarian citizenship, and it may annul such acts only for the violation of these rights.

Neither the right to property, nor legal certainty, the two most frequent grounds for constitutional challenges before the (old) Hungarian Constitutional Court can be relied on to challenge legislative acts. The Court after 2010 tried to construct the limitation in a narrow way. For instance, it ruled that discrimination is a violation of human dignity, thus it can review fiscal

⁴⁴⁷ 42/2012. (XII. 20.) AB határozat as cited by the Report on Hungary, 51.

⁴⁴⁸ Report on the Czech Republic, 35.

⁴⁴⁹ Id. and Report on Hungary, 51.

⁴⁵⁰ Report on Belgium, 79.

⁴⁵¹ 3056/2015. (III. 31.) AB határozat as cited by the Report on Hungary, 51.

⁴⁵² Report on the Czech Republic, 61.

⁴⁵³ Report on Hungary, 41.

⁴⁵⁴ Report on Italy, 91.

⁴⁵⁵ Report on France, 47.

⁴⁵⁶ Report on Spain, 43.

⁴⁵⁷ Report on Belgium, 83.



laws for discrimination between natural persons,⁴⁵⁸ but not between legal persons. This way the provision allows the government to levy extra taxes on banks, the telecom business, media actors, or large retail companies without fear of constitutional litigation. The nationalization of (mandatory) private pension funds (amounting to 10 % of GDP), whereby individual pension savings were transferred to the state budget went ahead undisturbed (although litigation is pending before Strasbourg). Politically, this move came after the European Commission had denied a request for easement of the deficit target for Hungary.⁴⁵⁹

3.9. SUPPORT STRUCTURES

When asked about the engagement of human rights NGOs and other civil society actors, country rapporteurs in general painted a very positive picture. In all countries, enforcement of various rights are supported by human rights NGOs with specialized legal expertise in the field, and supporting in particular the more vulnerable groups. Their relationship with the government however varies. While the government in Belgium or Spain takes into account the suggestions of civil society actors,⁴⁶⁰ in the Czech Republic, the attitude of politicians towards civil rights NGOs, at least when it comes to the protection of foreigners, is more negative.⁴⁶¹ In Hungary, the government (and pro-government media) engage in a very explicit fight with civil society actors, from classic human rights NGOs to migrants' organisations to students' movements and organizations protecting the homeless. They are portrayed as 'foreign agents'. Although police raid against an NGO distributing Norway Fund grants and criminal investigations into allegedly illegal financial activities were finally found to lack legal basis, they create a climate of intimidation.⁴⁶² During a stakeholder event, several NGO representatives confirmed that plaintiffs are increasingly seeking anonymity or opt away from litigation. It is, apparently, more and more difficult to find volunteers for strategic litigation.

The precarious financial situation of NGOs is evident in Hungary and the Czech Republic. In the latter one, NGOs providing legal assistance to foreigners are dependent on projects funded by European Commission's Refugee Fund, Integration Fund or Return Fund. However, as it is the

⁴⁵⁸1132/D/2007. AB határozat as cited by the Report on Hungary, 51.

⁴⁵⁹ Marie-Pierre Granger, All sisters in tears – my right to be treated equally badly, January 19, 2015, <http://beucitizen.eu/all-sisters-in-tears-my-right-to-be-treated-equally-badly/>

⁴⁶⁰Report on Spain, 55.

⁴⁶¹Report on the Czech Republic, 36.

⁴⁶² Report on Hungary, 80.



Ministry of Interior which approves financial support, NGOs which take action against the Ministry of Interior, like migrants' organizations, are at a disadvantage.⁴⁶³

Academic scholars' influence in the promotion of civil rights is meagre in Hungary despite their efforts, as well as in the Czech Republic, but more pronounced in France, Spain and Belgium.

⁴⁶³ Report on the Czech Republic, 35.



CONCLUSIONS

Barriers to the effective protection of civil rights show significant variations from country to country and from field to field.

EU data protection Directives were generally transposed in domestic law. However, this does not necessarily mean that national law complied with their provisions across the board. Sometimes, the police can use data to search for missing person without judicial authorization, or data must be kept longer than necessary with no minimum or maximum period set, which gives wide discretion to the data controller; the data protection authority has limited powers; implied consent may be sufficient; there is a lack of transparency on privacy policy, or lack of security of data which are transferred outside of the EU; the law might grant access to the data not only to the law enforcement authority, but also to other authorities.

The findings on national judicial application of data protection legislation generated through the questionnaire are inevitably impressionistic, but may nonetheless point to particular difficulties in the respect of the right to data protection and privacy.

A general impression is that the number of cases is very small compared to the scale of violations, and that violations of data protection rule remain under-prosecuted and not sufficiently sanctioned, even if some courts have been more proactive and protective of privacy. Other courts have been reluctant to effectively stand up against governmental and corporate data collection and processes practices, partly depending on the extent to which a member state recognizes the right to privacy as an important civil right.

Data protection litigation faces particular obstacles. The field is complex, the financial stake usually small for individuals, damage is difficult to establish, lawyers costs high, making individuals reluctant to sue. Given the scale and systematic nature of data collection and processing, the availability of class action would help challenge excessive corporate or governmental intrusion with privacy. Even in countries where sanctions for violations of the right to data protection are very severe, these are no deterrent in comparison to the economic benefits derived from illegal data processing. In countries in which data protection authorities are weak and in which legal aid is not available or sufficient and NGO litigation is not possible, costs act as a powerful deterrent, as the financial stakes for individuals are usually low.



Obstacles to civil rights in procedures for the mutual recognition of judicial decisions in civil matters come from many angles. Although the Brussels I Regulation supports the right to an effective judicial remedy, lacuna in the scope of the Regulation, and its interpretation by the CJEU, which condones delaying and obstructive tactics by parties to the dispute, jeopardize individuals' right to a fair trial and effective remedies. National courts have sometimes tried to mitigate these negative effects of the Regulation, but were forced to align on the CJEU approach, although there are signs that the CJEU is more willing to address abuses and the Recast Regulation should also remedy some of the current flaws. The Regulation is also problematic from the point of view of freedom of expression, in that it allows suits for defamation in countries other than the one in which words have been expressed, and easy enforcement of the judgment across the EU. However, courts have been vigilant in trying to prevent harmful forum-shopping. The analysis also highlighted costs related barriers (eg translation, legal fees).

Most of the barriers that result from the application of Brussels II bis for the effective exercise of civil rights, in particular the right to a fair trial, the right to an effective remedy, due process rights and the right to family life result from difficulties related to the attribution of jurisdiction, which led to parallel and competing jurisdiction, as well as issues concerning practical enforcement. National courts appear particularly vigilant that the recognition and enforcement of foreign decisions in family matters are not to the detriment of the right of the child and her best interest.

Concerning the European Arrest Warrant, most barriers result from the too systematic execution of it, which can undermine the rights of the defense and rights to a fair trial of the accused parties. The abolition of the double criminality check for a large range of ill-defined criminal acts is problematic, as it leads to the routine issuance of EAW for offences which are something minor ones. In such case, the surrender constitutes a disproportionate interference with the rights of the defense as well as the right to family life of the accused. Courts have however verified that surrenders do not lead to severe violations of the right to family life, or the right not to be tortured or subject to inhuman and degrading treatment.

As to rights of the accused, much remains to be done. Although these measures contribute to improving the legal protection of the rights of the defense across the EU, an assessment of how these are respected in practice is needed. Moreover, they do not yet address some of the most problematic issues identified by civil society organizations active in the field, as well as some of the national reports, namely the abuse of pre-trial detention, which compromised individual freedom, or the conditions of police custody, notably the right of access to a lawyer, protected under the ECHR.



The protection of victims and their right to safety are hampered by deficiencies in victims support schemes at national and local level, as well as, in some of the member states, by the absence of special compensation fund, in breach of EU obligations.

When it comes to the effective enjoyment of selected civil rights, national reports revealed a wide variety of potential problems. The examined countries strongly differ in the source and level of protection granted to the selected rights. Even within one country, the different rights might be located at different levels in the hierarchy of norms, or, in the most problematic cases, there might not even be a guarantee at any level of the legal system. The source of protection has in some cases a direct impact on the enforcement of the right. At the extreme, in the case of Hungary, constitutional and statutory norms often serve to restrict, instead of protecting, the right, often in violation of international human rights law or EU law. In the Czech Republic, the lack of implementation at all level causes a legal vacuum not fully reparable by judicial interpretation and ministerial instructions. In cases of judicially developed or external human rights, the uncertain status of a right endangers legal certainty, which could be, but not necessarily is, remedied by legislative action (as in Belgium or Italy), or renders the right vulnerable to legislative manipulation (such as in Denmark). The Netherlands appears to be the only country where the solely international or European grounding of rights do not have a direct negative impact on the enforcement of the right.

A few problems have arisen regarding the national determination of the scope of the rights, but in most cases, slowly but surely, courts finally managed to eliminate undue restrictions in this regard. Sometimes, however, legislative steps do not follow.

In matters of interpretation, courts generally manage, although slowly, to adjust – and elevate – *standards and tests* they use in determining whether a measure violates civil rights. There is evidence of this process taking place even if it goes against deeply rooted legal traditions of a member state. Only in Hungary, and there also ‘only’ with regard to property jurisprudence, an opposite, and worrying trend is observable.

In the different categories of selected rights, freedom of *religion* appears to be the one facing (and/or ‘causing’) most troubles in EU member states’ courts’ interpretation and application. The relation of state and religions is still not clarified, and that has repercussions on the status of the individual’s freedom of religion, especially regarding equal treatment. European supervision from either the EU or the Council of Europe legal framework is weak, or almost non-existent in this very important area of civil rights law. EU law (and EU citizenship) simply does not reach into the area of religion according to the country reports, despite the commonality of problems



faced. Interestingly, while religion is an issue which defined the birth of modern Europe, it is still taken care of almost exclusively within the nation state. The European Court of Human Rights usually confirms member states' margin of appreciation. Where it does not, such as in the case of the Hungarian church law, the Strasbourg court was unable to provide an effective remedy, and thus remained without any practical effect so far.

In the category of *communicative freedoms*, controversies taken to court have much less in common with each other according to the country reports than in freedom of religion law. An area very much influenced by specific legal traditions is the relation of non-discrimination and expressive freedoms. In the Dutch cases, classic negative liberalism had to be adjusted to the expectation of non-discrimination especially as the scheme involved state subsidy in the one, and paedophilia in the other case. French legal interpretation in contrast moved or was forced to move to a more liberal freedom of expression jurisprudence in some areas, such as defamation, but currently undergoes a drastic restructuring of expression law allegedly in the interest of fighting terrorism. Spain has struggled to eliminate preferential treatment of associations related to the Catholic church, and has had a hard time finding ways to counter terrorism-related associational activities while maintaining at least some constitutional standards. Intervention of the Spanish legislator was needed, and European intervention was limited to confirming the domestic solutions in this area as well. In contrast, the ECtHR was instrumental in shaping common standards in freedom of information law, an essential means in the hands of civil society to fight for democratic accountability and against corruption. It remains to be seen how the newly introduced Hungarian restrictions on access to public data will be countered in European courts.

In case of *equal treatment* issues, judicial interpretation tends to rectify as much as possible legislative failures, but courts' powers are clearly limited for reasons of the nature of the judicial process. When it comes to Hungary, domestic judicial decisions are overwritten by legislative and even constitutional amendment if needed, while elsewhere necessary legislative steps are not taken. A particularly interesting debate in Denmark in this regard is to what extent litigation and judicial strategies in picking grounds of discrimination impact on the substantive level of protection. Surely this is an issue which could (and perhaps should) be settled at the European level since racial and religious discrimination are also prohibited in EU instruments.

In the area of *privacy and autonomy* rights, the otherwise very generous Belgian courts tend to justify restrictions on the Belgian right to human dignity by reference to international and European human rights law. In contrast, the Italian court had a reason to stand up for reproductive freedom especially after the ECtHR handed down a condemnation. The UK



Supreme Court brought its case law in line with ECtHR standards when it comes to privacy, too. The lack of proper legislative protection was most frequently mentioned in country reports in relation to privacy rights.

When it comes to the *civil rights dimension of political rights*, courts tend to uphold standards, too. However, legislations often do not adhere or even attempt to overwrite judicial interpretation, such as the United Kingdom legislatively reintroducing reverse discrimination regarding UK nationals' free movement rights.

Belgian courts rely on ECtHR jurisprudence also to justify restrictions on *due process* rights. In contrast, in the Czech Republic, the inadequacies of the administration deprive visa applicants of due process rights which they are clearly entitled to according to the highest judicial authorities of the country. This is likely the case also with *property rights* in access to public health care by foreigners. In contrast, property protection in Hungary comes under fire from both the Constitutional Court and the legislator. European institutions are slowly picking up some of the most egregious abuses, both the ECtHR and CJEU having handed down important decisions in this regard lately. While the ECtHR spotted, but has no competence to remedy systematic deficiencies in the procedure redistributing property rights in the tobacco business, the CJEU's recent preliminary ruling might in fact induce changes by supporting ordinary courts in interpreting laws redistributing the gambling market.

While independence of the judiciary appears to be taken for granted in most countries, in Spain and especially Hungary very severe doubts prevail. In none of the cases have European courts managed to effectively remedy these deficiencies.

Country rapporteurs signalled little problems in relation to the independence of ombudspersons, equality bodies, and other administrative bodies designated for the protection of civil rights either. While the restructuring in Hungary necessarily brought about significant problems in this area as well, the authors of this report do have a sense that part of the problem might lie with an insensitivity of EU and member states' legal communities towards institutional guarantees. Country rapporteurs in most cases did not provide details about nomination, election, and removal rules and competences, and seemed in general to be content with repeating announcements of independence from the laws, likely because they simply have not detected problems in the activities of these bodies in terms of *substance*. Only the reports on Hungary, Spain, and France signalled potential shortcomings in the way independent bodies are established, members appointed, promoted or removed. This clearly relates to the interdependencies and balance between the strength of political culture and the strength of legal



culture, which diverges from state to state. It is likely nowhere so distorted as has been in Hungary due to the fact that the governing parties had a constitution amending majority, which translates into unlimited power. This imbalance is however further distorted by the transnational and comparative nature of European legal argumentation on which both the EU and the Council of Europe relies when assessing the independence of an institution. Minimum institutional standards, as much as they became visible on the basis of national reports, are also strictly formal and focus on a single institution: they are set without regard to the surrounding legal-constitutional context, and are therefore unable to counter (even to criticize) an across-the-board sudden change in the personal composition of every single 'independent' institution. There is no solution visible to this problem other than the – clearly unlikely - strengthening of institutional protection all over the member states.

In terms of procedures and remedial actions, national reports displayed a strong focus on constitutional review mechanisms. Constitutional litigation however is only the tip of the iceberg, and is often quite limited, or might easily collapse in the face of a constitution-amending majority. More focus should be placed in legal academia on how ordinary courts in civil, criminal and administrative procedures enforce civil rights, and what obstacles are there to the effective enforcement. A few impressions gained on the basis of national reports can be still summarized here.

There is no unequivocal evidence that administrative decisions affecting civil rights can be easily and effectively challenged in courts. Judicial review might be limited in substance, when the court is not allowed to overturn and replace the decision of the administrative authority, and it might be hampered by narrow standing rules, the costs and length of litigation.

While in all countries, courts might award damages in case of civil rights violations, this happens most of the time within the general tort framework, and the fact of violation of civil rights in itself does not amount to damage. In the limited area of personality right violations in Hungary, where damage is automatically assumed, the threat of damages has a chilling effect on the freedom of the press. Enhanced procedural protections against violations of equal treatment, although generally assumed to be guaranteed in the EU, cannot necessarily be invoked at every instance and in front of every institution.

While institutional and procedural deficiencies also endanger access to justice, more substantive issues have been detected in the country reports which are common problems in the examined countries.



The two most important are insufficient (quality) legal aid in some countries, and the excessive length of proceedings in many of them.

Finally, again the Hungarian Fundamental Law needs to be specifically mentioned, as it stands out by essentially excluding constitutional review in fiscal matters. Thereby access to justice is derogated at the highest level of law, and unconstitutional laws are openly authorized in the constitutional text itself. While European courts have dealt with cases coming out of this legal blackhole a few times, none of them so far resulted in remedying the situation.

If there is any hope for EU citizenship that shone through the national reports regarding enforcement of civil rights the most clearly, it relates to the role civil society actors and human rights NGOs. All countries, even those with otherwise very passive and apathetic societies, appear to have vigorous human rights NGOs with superior expertise and commitment. Even in cases of open governmental hostility and under worsening financial circumstances, NGOs appear to stay on the surface, and litigate intensely civil rights, if nowhere else, than in ordinary courts and in Strasbourg.

The obstacles to the effective enjoyment of civil rights in the European Union come from many perspectives, angles, layers or dimensions. It is very hard on the basis of this study to organise them in a systematic manner. The following general conclusions therefore look more like a mosaic.

Sometimes, obstacles are rooted in EU instruments themselves. This is the case with some of the mutual recognition instruments as explained above in detail. While some developments have been taken place in this regard, there is no obstacle in the way of European institutions to tackle the specific problems in the future.

Further systematic obstacles arise from member states' constitutional deficiencies, i.e. when a member state's legal order is unwilling or unable to properly integrate civil rights concerns. This can again happen at various levels in the member states' legal system. In Hungary, many of the problems clearly arise at the constitutional level, both in terms of substance and procedure or competence issues. In many other countries, such as the United Kingdom (where constitutional level is not clearly discernible), or Denmark, obstacles are entrenched at the legislative level, and there is little leeway for courts to eliminate them. Legislators may also do too little to effectively protect civil rights; often legislative steps are not taken even where they would be clearly needed or even mandated by the (constitutional) court. In only Hungary, this goes to the extreme by the sheer and simple non-execution of judicial decisions, either by omission or by the method of superconstitutionalization.



At the level of judicial (including, where possible, constitutional) interpretation, the overall picture emerging from this study is positive: courts, even in very strained situations, do make serious efforts to uphold and enforce civil rights, even if their own traditional legal understanding would predestine them not to. The occasional failures in this regard, one is tempted to say, remain within business as usual within a proud legal community as diverse as Europe is.

A much more problematic phenomenon emerges again at various levels of the European legal construct, which could perhaps called ‘the lowering of standards with reference to European law’, arising out of the interaction of domestic and European law and its necessarily transnational and comparative interpretation. This came to the fore in the *Melloni* case. However, EU citizens in all member states may fall victim to this trend. The Hungarian government strategically, systematically, and successfully investigates and finds avenues and ‘legal blackholes’ in European or other European member states law, which it can use to justify lowering of standards at home. While some might think the Hungarian case should not bother the rest of Europe, it is noteworthy that Belgian courts seem to refer to European human rights jurisprudence whenever they want to justify a restriction on a civil right. There is a real risk of European minimum standards creating a race to the bottom.

In other, perhaps the majority, of cases, European standards and interpretation prove supportive of civil rights, although this study focused on the barriers, and in this sense, did not undertake to draw a general picture and overall assessment. Regarding many of the selected rights, the problems lie not so much in judicial interpretation, but in mal-administration and legislative omissions, about which courts cannot dispose efficiently or at all. In any case, as again the many Hungarian examples testify, the European legal construct, both in its Council of Europe, and European Union dimension, fails when it comes to enforcement in the face of an unwilling government backed by constitution-amending majority. This has a lot to do with lacking the enforcement capacity powers of the CJEU, and the ECtHR, but it also has a policy dimension. No constitutional or human rights lawyer would ever forgive the Commission for not arguing in the court the forced retirement of judges with reference to the – clearly applicable – Charter rights. EU institutions should be able to do more to guarantee that member states’ government respect fundamental European values, including the rights of their citizens, who are all EU citizens. Otherwise, one fundamental principle of citizenship, the equality of all citizens before the law, is jeopardized, which does not bode well for to the development of a real EU



citizenship, beyond market freedoms. The envisaged Copenhagen mechanism is a step in the right direction.⁴⁶⁴

⁴⁶⁴ V. Reding, 'Safeguarding the rule of law and solving the "Copenhagen dilemma": Towards a new EU-mechanism' (speech, 23 April 2013) at http://europa.eu/rapid/press-release_SPEECH-13-348_en.htm; see also S. Carrera, E. Guid, and N. Henranz, 'Rule of Law or Rule of Thumb? A New Copenhagen Mechanism in the EU, CEPS Policy brief No 303, 20 November 2013, at http://www.ceps.eu/system/files/No%20303%20Copenhagen%20Mechanism%20for%20Fundamental%20Rights_0.pdf



ANNEXES: NATIONAL REPORTS

WP 7 Civil Rights

Deliverable 7.2: Mechanisms for enforcing civil rights

Report on Belgium

CONTRIBUTOR: UA



PART I

THE (LEGISLATIVE) TRANSPOSITION, (EXECUTIVE/ADMINISTRATIVE) IMPLEMENTATION AND (JUDICIAL) APPLICATION OF EU LEGISLATIVE INSTRUMENTS WHICH PROVIDE PROTECTION FOR SPECIFIC CIVIL RIGHTS

1.1 EU legislation affording protection or potentially undermining civil rights in judicial proceedings

1.1.1 Protection of rights in civil proceedings (mutual recognition instruments)

- Regulation (EC) No 44/2001 of 22 December on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Brussels I Regulation) – in particular articles 1, 2, 3, 4, 5, 6, 7, 31, 23-56, 57-58, 61.
- Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ('Brussels IIa Regulation'). All provisions.
- Regulation No 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters. All provisions.

A. TRANSPOSITION OF THE ABOVE EU INSTRUMENTS PROTECTING OR POTENTIAL AFFECTING CIVIL RIGHTS

The abovementioned instruments are all directly applicable in Belgium, without any transposition being required or having taken place. This not only flows from the nature of the Regulations concerned, but also results from the generously monist tradition of the country itself (described earlier in the country report for *Questionnaire task WP 7.1*). The Brussels IIa Regulation has nevertheless been partially implemented by the Belgian Judicial Code (*'Gerechtigd Wetboek' / 'Code judiciaire'*) in the articles 1322 and following, in relation to the application of measures involving parental responsibility and child protection. It adjusted the division of competences between the relevant

tribunals, and concentrated jurisdiction with the courts at first instance established at the locations of Courts of Appeal (Brussels, Mons, Liège, Antwerp and Ghent).

B. EXECUTIVE/ADMINISTRATIVE IMPLEMENTATION OF EU INSTRUMENTS AFFECTING CIVIL RIGHTS

Pursuant to the direct applicability of the three Regulations, their executive or administrative implementation takes place immediately through courts and lawyers when they seek to invoke the civil rights protected there under when necessary. Thus, no separate executive or administrative implementing acts have been adopted in Belgium.

C. JUDICIAL INTERPRETATION AND APPLICATION OF EU INSTRUMENTS AFFECTING CIVIL RIGHTS

Reproduced here below are excerpts from salient recent judicial pronouncements on the aforementioned EU instruments, showcasing how they are interpreted and applied by Belgian courts.¹The excerpts are interspersed by analyses connecting the various threads that can be discerned in the domestic case law. While certain deviations can and will be indicated, the judicial interpretation and application of these instruments appears overall to be faithfully securing their civil rights protection, without raising great immediate concerns.

Judgment of the Court of Cassation of Belgium (*'Hof van Cassatie'/'Cour de Cassation'*) N° C.11.0172.F. of 19 September 2013:²

"[...] In divorce proceedings between the parties, the parties agreed on 29 February 2000 that the appellant, Mr. S. F. would pay a monthly alimony to the defendant, Mrs. C. R., and also that he would cede his rights in the property co-owned by them to her. The property is situated in France. The divorce was finalized on 6 April 2000. The parties seized the Justice of the Peace of Mons by voluntary appearance on 26 October 2000. The Justice of the Peace implemented the agreement between the parties and decided that Mr. S. F. would have to

¹ ECLI numbers are unfortunately not yet in general use, nor assigned retroactively, in the Belgian judicial system.

² English summary of judgment made available by the research group 'Persoon & Vermogen' of the Faculty of Law of the University of Antwerp (see <www.eurprocedure.be>).

appear before a notary to sign the authentic documents to transfer the ownership of the property within a month. On appeal, the Court of First Instance of Mons confirmed that the first judge had jurisdiction to oblige Mr. S. F. to sign those documents even if they relate to a property situated in France. Mr. S. F. lodged an appeal against this judgment before the Court of Cassation. The Court of Cassation considers that Art. 22(1) Brussels I Regulation (which provides that in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property the courts of the Contracting State where the property is situated are to have exclusive jurisdiction) must not be given a wider interpretation than is required by its objective, since it results in depriving the parties of the choice of forum which would otherwise be theirs and, in certain cases, results in their being brought before a court which is not that of any of them. As regards the objective pursued by Article 16(1)(a) of the Brussels Convention [now Art. 22(1) Brussels I Regulation] it is clear that the essential reason for the exclusive jurisdiction of the courts of the Contracting State where the property is situated is that the court of the place where property is situated is best placed to deal with matters relating to rights in rem in, and tenancies of, immovable property. Article 16(1)(a) of the Brussels Convention must be interpreted as meaning that the exclusive jurisdiction of the courts of the Contracting State in which the property is situated does not encompass all actions concerning rights in rem in immovable property, but only those which both come within the scope of the Brussels Convention and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with protection for the powers which attach to their interest [...]"

In close conjunction, mention has to be made of the judgment of the Commercial Court of Tongeren (*Rechtbank van Koophandel te Tongeren*), deciding in similar vein in case number A/09/2197 of 4 May 2010:³

"[...] The defendant is one of the shareholders of the bankrupt company BVBA P. It appears that the defendant still owes an amount of 13,236.17 EUR. The defendant retorts that the company owes it an amount of 28,000 EUR plus interest. First, the defendant contests the jurisdiction of the Belgian courts, since it is a company domiciled in The Netherlands.

The Brussels I Regulation is applicable. It is true that Art. 1(2)(b) Brussels I Regulation provides that the Regulation shall not apply to bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings. However, the Court considers that the Brussels I Regulation is applicable to proceedings that are instituted by the bankruptcy administrators when these proceedings could in fact have been instituted by the company itself, so that the bankruptcy administrators are merely its representatives.

³English summary of judgment made available by the research group 'Persoon & Vermogen' of the Faculty of Law of the University of Antwerp (see <www.eurprocedure.be>).

Art. 5(1)(a) Brussels I Regulation confers jurisdiction in matters relating to contract to the courts for the place of performance of the obligation in question. First, the Court needs to determine which is the obligation in question. Then, it has to examine which is the law applicable to that obligation according to its own conflict-of-law rules, so that finally, the place of performance of the obligation can be determined in conformity with that law applicable law. This is the so-called Tessili method (cf. the Tessili case of the ECJ of 6 October 1976). In this case, the contract is neither a service contract nor a sales agreement. It should be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence (cf. Art. 4(2) European Contracts Convention). It is generally admitted that the characteristic performance of the contract is the performance for which the payment is due. In the case at hand, payment is due for a performance by a Belgian firm so that Belgian law is applicable. The amount is the result of a loan made by the legal predecessor of BVBA P. to a Mr. S., a loan which was partly acquired by the defendant during the share transfer.

Art. 1247 Belgian Civil Code stipulates that debts are to be paid at the debtor's place of residence. The obligation is to be performed in The Netherlands, so that the Dutch courts have jurisdiction as opposed to the Belgian courts. The bankruptcy administrators further refer to Art. 5(5) and Art. 22(2) of the Brussels I Regulation. Art. 5(5) grants jurisdiction to the courts for the place in which a branch, agency or other establishment is situated for disputes arising out of the operations of that branch. The concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body (see case 33/78, Somafer v. Saar Ferngas). The BVBA P. is an independent enterprise and not the subsidiary of a parent company. Neither is Art. 22(2) applicable. The grounds of exclusive jurisdiction of Art. 22(2) receive a restrictive interpretation. The present case is not concerned with the validity of the constitution, the nullity or dissolution of companies or the validity of the decisions of their organs."

Consequently, the Court declined jurisdiction, in line with the system and rationale of the aforementioned EU instruments. A favourable decision was reached by the Commercial Court of Hasselt ('*Rechtbank van Koophandel te Hasselt*') in case number A.R.03/4286, on 11 February 2004:

"[...] The claimant performed construction work on the account of the defendant in Geleen, The Netherlands. Almost all the materials were delivered by the client. The parties entered into an agreement by telefax on 15 May 2003. This agreement referred to the general terms and conditions of the defendant, including an arbitration clause. Art. 1(2)(d) Brussels I Regulation excludes arbitration from the scope of the Regulation. The validity of the arbitration clause is a question of national law. In this particular case, the law applicable to the contract and the law of the forum are the same. The law applicable to the contract is Belgian law, according to Art. 4(2) European Contracts Convention (the characteristic obligation is performed by the Belgian constructor). The validity of the arbitration clause must be considered under Belgian law. Under Belgian law, such a clause is not enforceable as against the other party if a document coming from one of the parties merely refers to the general terms and conditions without containing a copy of those conditions in the

document. The construction contract is neither a sales nor a service agreement. The Court applies Art. 5(1)(a) Brussels I Regulation. The "obligation in question" is the obligation to pay the price of the construction works. Under Belgian law, the place of payment can be determined by the terms and conditions of an uncontested invoice. The invoice which is the object of the claim was only partially contested: the place of payment was left uncontested. The defendant had even confirmed it would wire a certain sum into the Belgian bank account of the claimant. Therefore, the courts of Belgium have jurisdiction [...]"

Conversely, in summary proceedings, jurisdiction has more frequently been denied. As illustration may serve the interim judgment delivered by the President of the Commercial Court of Brussels ('*Voorzitter van de Rechtbank van Koophandel te Brussel*') in case number C/12/00117, decided on 26 March 2013:⁴

"[...] On 12 October 2009, the plaintiff, Dredging International NV, entered into a public works contract worth 38.7 million EUR with LSEZ (the Authority of the Special Economic Zone of Liepaja). The plaintiff was to carry out dredging works in the port of Liepaja, Latvia. The plaintiff had to issue two bank guarantees in favour of LSEZ. On 29 October 2009, the plaintiff contacted BNP Paribas Fortis ("Fortis") with the request to instruct Swedbank AS to issue a contract performance bond and a prepayment return guarantee in favour of LSEZ. Fortis counter-guarantees Swedbank. Later, a dispute arose between the plaintiff and LSEZ over the performance of the contract. After failed negotiations, LSEZ terminated the contract on 29 February 2011. The plaintiff brought proceedings against LSEZ before the courts of Kurzeme, Latvia to enforce the performance of the contract and to ban LSEZ from calling on the bank guarantees. An ICSID arbitration case was initiated as well. It is unclear whether these proceedings are still pending. LSEZ called the bank guarantees on 18 June 2012 and the next day Swedbank called the counter-guarantees of Fortis. The plaintiff's counsel sent notice to Fortis not to execute the guarantee. On 20 June 2012, the plaintiff seized the president of the commercial court of Brussels in summary proceedings. The parties decided to temporarily suspend the execution of the guarantees until 22 April 2013. The plaintiff claims that the parties agreed on a settlement in December 2012, which is contested by LSEZ. Before the President of the Commercial Court of Brussels, the plaintiff seeks to obtain an injunction to prevent LSEZ from demanding payment under the guarantee, and Fortis and Swedbank to execute the guarantees, at least until the end of the proceedings in Kurzeme and the ICSID arbitration proceedings. The defendants contest the jurisdiction of the court.

The forum selection clauses do not apply. Swedbank invokes a clause included in the counter-guarantees issued by Fortis conferring jurisdiction on the courts of Riga. However, this only concerns its relationship with Fortis and is not binding on the plaintiff in this case. LSEZ invokes a forum selection clause in the agreement with the plaintiff. However, the plaintiff rightly states that this clause is applicable only to disputes arising

⁴English summary of judgment made available by the research group 'Persoon & Vermogen' of the Faculty of Law of the University of Antwerp (see <www.eurprocedure.be>).

from the performance to the contract, and is unrelated to the present proceedings concerning the bank guarantees and counter-guarantees. [...]

The defendant Fortis is a bank domiciled in Brussels, Belgium. At the moment the proceedings against Fortis were initiated, by writ of summons on 20 June 2012, the case did not have a foreign element. The case became international with the order for joinder of third parties LSEZ and Swedbank. The international jurisdiction of the court must be determined in accordance with Arts. 31 and 6(2) Brussels I Regulation.[...]

The injunction requested by the plaintiff is a provisional or protective measure. Therefore, Art. 31 applies. There should be a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought. To assess the existence of such a real connecting link, the president of the Commercial Court takes into account the place of payment of the bank guarantee. The guarantees mention an account number of Swedbank in Latvia. Therefore, the place of payment is in Latvia. There is no real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Brussels Commercial Court.[...]

Art. 6(2) Brussels I Regulation provides that "A person domiciled in a Member State may also be sued as a third party in an action on a warranty or guarantee or in any other third party proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case". The president of the Commercial Court follows the argument of the defendants according to which the plaintiff is guilty of forum shopping, by initiating the proceedings against Fortis before involving Swedbank and LSEZ. Indeed, at the time of service of the writ of summons, LSEZ had already called on the bank guarantee. The plaintiff already knew it would have to involve LSEZ and Swedbank. In the writ of summons, the plaintiff referred to LSEZ's actions to establish the urgency of the proceedings, and reserved the right to join LSEZ and Swedbank. If the plaintiff had sued the three defendants at the same time, it could not have done so before the courts of Brussels. In conclusion, the president of the Commercial Court dismisses the case for lack of jurisdiction. [...]"

Similar decisions like the abovementioned were rendered by *inter alia* the Court of Appeal of Brussels ('*Hof van Beroep te Brussel*' / '*Cour d'appel de Bruxelles*') on 1 March 2013 in case number RG.09.AR.2011, the Court of Appeal of Antwerp ('*Hof van Beroep te Antwerpen*') on 13 September 2010; the Decision of the Court of First Instance of Brussels ('*Rechtbank van eerste aanleg te Brussel*' / '*Tribunal de première instance de Bruxelles*') in case number 2003.2429.A of 13 October 2004.⁵

⁵English summary of judgment made available by the research group 'Persoon & Vermogen' of the Faculty of Law of the University of Antwerp (see <www.eurprocedure.be>). The judgment of the Antwerp Court of Appeal was unfortunately not assigned a case number, but was published in *RDC – Revue de droit commercial belge / Tijdschrift voor Belgisch Handelsrecht* 2012, nr. 8, p. 804.

All the above mentioned decisions, in sum, adhere to a similar interpretation of the Brussels I Regulation. The Belgian Court of Cassation has provided guidelines in this respect. One of the most important ones concerns the adversarial principle, which is as such not part of Belgian public policy, as the Court has also underlined in its case law. In this respect, Article 34(1) of the Brussels I Regulation indicates that a judgement shall not be recognised if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought. The application of Article 34 (1) has thus been conditioned by the Belgian concept of public policy, whereby though the principle of adversarial proceedings cannot be qualified.

The Brussels IIbis Regulation has figured in the case law of Belgian Courts in numerous different cases. It possibly constitutes the instrument that has been most frequently applied of all, since its entering into force. A first illustration can be found in the judgment of the Court of First Instance of Ghent (*Rechtbank van eerste aanleg te Gent*) of 15 January 2015:⁶

"[...] Both parties were born in Rwanda and currently reside in Belgium. The claimant seeks the annulment of their marriage which was celebrated in Kimisagara, Rwanda, on 20 October 2012. Pursuant to Art. 17 Brussels II, the Court must determine its jurisdiction of its own motion. Pursuant to Art. 3 of the same Regulation, jurisdiction shall lie with the Belgian courts since the spouses were last habitually resident in Belgium."

A second prominent judgment exemplifying the faithful interpretation of the instrument is that of the Brussels Court of Appeal (*Hof van Beroep te Brussel* / *Cour d'appel de Bruxelles*) of 25 April 2013:⁷

"[...] The parties were married in 2005 in Tangier, Morocco. In 2006, Mrs. A. came to Belgium, where Mr. B. was already residing. In 2008, an inquiry is opened for fraud (marriage of convenience). It appears the parties never actually resided at the same address. On 25 October and 10 November 2010, the public prosecutor brings an action in annulment of the marriage and serves the parties with a writ of summons for

⁶English summary of judgment made available by the research group 'Persoon & Vermogen' of the Faculty of Law of the University of Antwerp (see <www.eurprocedure.be>). The judgment of the Antwerp Court of Appeal was unfortunately not assigned a case number, but was published in *Tijdschrift@ipr.be* 2015, nr. 1, p. 122.

⁷English summary of judgment made available by the research group 'Persoon & Vermogen' of the Faculty of Law of the University of Antwerp (see <www.eurprocedure.be>). The judgment of the Antwerp Court of Appeal was unfortunately not assigned a case number, but was published in the *Revue trimestrielle du droit familial* 2013, nr. 4, p. 935.

proceedings before the Brussels Court of First Instance. The parties fail to enter an appearance, and on 15 May 2012 the Court grants the annulment. Mrs. A. files an appeal against this judgment. The Court of Appeal declares it has jurisdiction pursuant to Art. 3(1)(a), first indent. The spouses are habitually resident in Belgium, even if it has not been proven they lived together. The applicable law is determined according to the provisions of the Belgian Code on Private International law. The formal validity requirements of the act of marriage are governed by Moroccan law, and the substantial requirements are governed by Moroccan law in the case of Mrs. A. and by Turkish law in the case of Mr. B. The Court of Appeal confirms the first judgment: the marriage is annulled [...]."

Other examples of judicial interpretations of this instrument constitute the judgment of the Court of First Instance (*'Tribunal de première instance'*) of Liège of 16 April 2013 and the Decision of the Brussels Court of Appeal (*'Hof van Beroep te Brussel'* / *'Cour d'appel de Bruxelles'*) of 11 March 2013.⁸ In total, up until February 2015, 67 relevant precedents could be identified.⁹ A closer study of these pronouncements has revealed no particular anomalies in the construction of the relevant provisions in domestic judicial practice.

1.1.2 Protection of rights in criminal proceedings (due process, right to a fair trial, etc.)

A. TRANSPOSITION OF THE FOLLOWING EU INSTRUMENTS PROTECTING OR POTENTIAL AFFECTING CIVIL RIGHTS

1.1.2.1. Mutual recognition instruments in criminal matters

- Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between member states: all provisions potentially relevant.

This Framework Decision entered into force on 7 August of 2002, was published in the Official Journal of the European Union on 18 July of 2002.¹⁰ The deadline for its transposition into national law was 31 December 2003.

⁸ Published in *Tijdschrift@ipr.be* 2013, nr. 2, p. 47, respectively *Tijdschrift@ipr.be* 2013, nr. 2, p. 40.

⁹ Comprehensive search through <www.eurprocedure.be>.

¹⁰ O.J. [2002] L 190/1.

This Framework Decision was implemented by the Belgian legislator in Belgium national law just before the expiry of the transposition deadline by virtue of the Law of 19 December 2003 on the European Arrest Warrant, which entered into force on 1 January 2014.¹¹

- Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition for judgments imposing custodial sentences or measures involving deprivation of liberty, in particular Arts 1, 2, 3, 6, 7, 8, 9, 10, 11, 14, 18, 19, 29.

This Framework Decision entered into force on 5 December 2008, was published in the Official Journal of the European Union on 5 December 2008.¹² The deadline for its transposition into national law was 5 December 2011.

Belgium implemented this Framework Decision by the Law of 15 May 2012 on the principle of mutual recognition to sanctions or deprivation of liberty imposed in a Member State of the European Union, which entered into force on 18 June 2012.¹³

With regard to the articles suggested to be taken into special consideration, in general terms, all of these have been faithfully implemented in the Law of 15th of May of 2012. Taking into consideration most specifically Article 2 of the Framework Decision concerning the competent authorities, mention may be made of the fact that the competent Belgian authority for forwarding a judgement to another Member State of the European Union (the issuing authority) is the Minister of Justice when the sentenced person is being detained in Belgium; the public prosecutor of the judicial district in which the sentence was issued, when the sentenced person is not being detained in

¹¹ Loi du 19 décembre 2003 relative au mandat d'arrêt européen / Wet betreffende het Europees aanhoudingsbevel, *Moniteur Belge / Belgisch Staatsblad* 22 December 2013. The full text can be consulted from <www.ejustice.just.fgov.be>.

¹² O.J. [2008] L 327/27.

¹³ Loi relative à l'application du principe de reconnaissance mutuelle aux peines ou mesures privatives de liberté prononcées dans un Etat membre de l'Union européenne / Wet inzake de toepassing van het beginsel van wederzijdse erkenning op de vrijheidsbenemende straffen of maatregelen uitgesproken in een lidstaat van de Europese Unie, *Moniteur Belge / Belgisch Staatsblad* 8 June 2012. The full text can be consulted from <www.ejustice.just.fgov.be>.

Belgium. The competent Belgian authority for recognising and executing a judgement forwarded to Belgium (the executing authority) is the public prosecutor of Brussels.

By and large, it can be considered that the Belgian transposition of this Framework Decision complies with and reinforces judicial cooperation in penal matters, contributing to the realisation of genuine common judicial space within the EU and its Area of Freedom, Security and Justice.¹⁴

- Framework Decision 2008/947/JHA of 27 November 2008 on probation decisions and alternative sanctions, in particular Arts 1, 2, 3, 4, 10, 11, 19.

This Framework Decision entered into force on 16 December 2008, was published in the Official Journal of the European Union on 16 December 2008.¹⁵ The deadline for its transposition into national law was 6 December 2011.

On 21 June 2013, i.e. 18 months after the expiry of the transposition deadline, Belgium enacted the Law of 21 May 2013 on the application of the principle of recognition of mutual judgements and probation decisions with a view of the supervision of probation measures and sentences substitution pronounced in a Member State of the European Union.¹⁶ This Law in effect complemented the Law of 15 May 2012 on the principle of mutual recognition to sanctions or deprivation of liberty imposed in a Member State of the European Union. With the enactment of this law, Belgium also proceeded to transpose Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering

¹⁴ EuroPris newsletter, September 2013, accessible at <<http://www.europris.org/>>.

¹⁵ O.J. [2008] L 337/102.

¹⁶ Loi relative à l'application du principe de reconnaissance mutuelle aux jugements et décisions de probation aux fins de la surveillance des mesures de probation et des peines de substitution prononcées dans un Etat membre de l'Union européenne / Wet inzake de toepassing van het beginsel van de wederzijdse erkenning op onnissen en probatiebeslissingen met het oog op het toezicht op de probatievoorwaarden en de alternatieve straffen uitgesproken in een lidstaat van de Europese Unie, *Moniteur Belge / Belgisch Staatsblad* 13 June 2013. The full text can be consulted from <www.ejustice.just.fgov.be>.

the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.¹⁷

- Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in criminal proceedings, in particular Arts 1-19.

This Framework Decision entered into force on 19 January 2009, and was published in the Official Journal of the European Union on 30 December of 2008.¹⁸ So far, Belgium has not proceeded to implement it. In 2010, the Ministry of Justice has made known the intention to transpose the relevant provisions in the 'Wederzijdse Erkenningswet'.¹⁹ The first steps have yet to be taken however.²⁰

- Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence, in particular Arts 1-2-3, 7,8, 10, 11.

This Framework Decision entered into force on 2 August 2003 and was published in the Official Journal of the European Union on the same day.²¹ The deadline for its transposition into national law was the 2 August 2005.

The implementation of this Framework Decision in Belgium took place through the adoption of the Law of 5 August 2006 concerning the application of the principle of mutual recognition of judicial decision in criminal matters between the Member States of the EU, as amended by the law of 26 November 2011 amending the law of 5 August

¹⁷O.J. [2008] L 81/24. It should be pointed out though that the traditional system of the law of 23 May 1990 on the transfer of sentenced persons between states continues to apply in the relations between Belgium and the EU Member States that have not (yet) transposed Framework Decision 2008/947/JHA.

¹⁸ O.J. [2008] L 350/72.

¹⁹Wet van 5 augustus 2006 inzake de toepassing van het beginsel van de wederzijdse erkenning van rechterlijke beslissingen in strafzaken tussen de lidstaten van de Europese Unie / Loi relative à l'application du principe de reconnaissance mutuelle des décisions judiciaires en matière pénale entre les Etats membres de l'Union européenne, *Moniteur Belge / Belgisch Staatsblad* 7 September 2006. See Written Question Nr. 5-182 of Senator Guido De Padt (Open VLD) to the Minister of Justice, 20 September 2010, available via <<http://www.senate.be/>>.

²⁰ Belgium has established a reputation for being a notable laggard in the transposition of EU directives on the internal market as well, as emerges from the Commission's most recent Reports on the application of EU law <http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/annual-reports/index_en.htm> (with the country currently ranking among the six most deficient Member States).

²¹O.J.[2003] L 196/45.

2006 on the application of the principle of mutual recognition of judicial decisions in criminal matters between the Member States of the European Union.²²

- Framework Decision 2006/783/JHA on the application of the principle of mutual recognition for confiscation orders, in particular Arts 1, 2, 6, 7, 8, 9, 11, 14, 18.

This Framework Decision entered into force on 24 November 2006 and was published in the Official Journal of the European Union on 24 November of 2006.²³

The implementation of by Belgium took place through the adoption of the Law of 26 November 2011 amending the law of 5 August 2006 on the application of the principle of mutual recognition of judicial decisions in criminal matters between the Member States of the European Union.²⁴

1.1.2.2. 'Approximation' measures

1.1.2.2.1. Victims' rights

- Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings

In order to implement this Framework Decision, Belgium applied the definitions already present in its national laws instead of adopting new ones. More in particular, Belgian authorities have incorporated the notions in relevant provisions concerning the

²²Loi du 5 Août 2006 relative à l'application du principe de reconnaissance mutuelle des décisions judiciaires en matière pénale entre les Etats membres de l'Union européenne / Wet inzake de toepassing van het beginsel van de wederzijdse erkenning van rechterlijke beslissingen in strafzaken tussen de lidstaten van de Europese Unie, *Moniteur Belge / Belgisch Staatsblad* 7 September 2006, as amended by Loi du 26 Novembre 2011 modifiant la loi du 5 août 2006 relative à l'application du principe de reconnaissance mutuelle des décisions judiciaires en matière pénale entre les États membres de l'Union européenne / Wet tot wijziging van de wet van 5 augustus 2006 inzake de toepassing van het beginsel van de wederzijdse erkenning van rechterlijke beslissingen in strafzaken tussen de lidstaten van de Europese Unie (II), *Moniteur Belge / Belgisch Staatsblad* 4 April 2012. The full text of both acts can be consulted from <www.ejustice.just.fgov.be>.

²³O.J. [2006] L 328/59.

²⁴Loi du 26 Novembre 2011 modifiant la loi du 5 août 2006 relative à l'application du principe de reconnaissance mutuelle des décisions judiciaires en matière pénale entre les Etats membres de l'Union européenne / Wet tot wijziging van de wet van 5 augustus 2006 inzake de toepassing van het beginsel van de wederzijdse erkenning van rechterlijke beslissingen in strafzaken tussen de lidstaten van de Europese Unie (II), *Moniteur Belge / Belgisch Staatsblad* 4 April 2012. The full text can be consulted from <www.ejustice.just.fgov.be>.

standing of victims in criminal proceedings.²⁵ Consequently, the national laws which “implement” this Framework Decision are:

- The Belgian Criminal Code;²⁶
 - The Belgian Criminal Procedural Code, in particular article 3*bis*, section 5 of the Preliminary Title;²⁷
 - Alongside these core documents, other provisions in the Belgian legal system also ensure and recognise rights in general that also extend to victims in criminal proceedings.²⁸
-
- Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

This Directive has currently not yet been transposed into domestic law. Nevertheless, considering that the deadline for implementation stands at 16 November 2015, Belgium may yet be in time.

- Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims

Said Directive has been transposed into domestic law through the Act of 13 January 2006 to transpose Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims.²⁹

- Directive 2011/99/EU on 13 December 2011 on the European Protection Order

²⁵ B. VRELUST, *The implementation of European standards on crime victims in the Belgian criminal justice system*, p. 5.

²⁶ Code Penal du 8 Juin 1867 / Wetboek van Strafrecht van 8 juni 1867, *Moniteur Belge / Belgisch Staatsblad* 9 June 1867. The full text can be consulted from <www.ejustice.just.fgov.be>.

²⁷ Loi contenant le Titre Préliminaire du Code Procédure Pénale / Wet houdende de Voorafgaande Titel Van het Wetboek van Strafvordering, *Moniteur Belge / Belgisch Staatsblad* 25 April 1878. The full text can be consulted from <www.ejustice.just.fgov.be>.

²⁸ E.g. the Law of 7 December 1998 on establishing an integrated police service, or the Law of 5 August 1992 on the police which obliges the Belgian police forces explicitly to respect the rights of crime victims; see B. VRELUST, *op. cit.*, p. 10.

²⁹ Loi du 13 janvier 2006 visant à transposer la directive 2004/80/CE du Conseil du 29 avril 2004 relative à l'indemnisation des victimes de la criminalité / Wet tot omzetting van de richtlijn 2004/80/EG van de Raad van 29 april 2004 betreffende de schadeloosstelling van slachtoffers van misdrijven, *Moniteur Belge / Belgisch Staatsblad* 31 January 2006. The full text can be consulted from <www.ejustice.just.fgov.be>.

This Directive has currently not yet been transposed into domestic law. As the deadline for implementation stood at 11 January 2015, Belgium is in official violation of EU law with regard to this instrument.

1.1.2.2.2. Rights of suspects and accused persons

- Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

This Directive has currently not yet been transposed into domestic law. As the deadline for implementation stood at 27 October 2013, Belgium is in official violation of EU law with regard to this instrument.

- Directive 2012/13/EU of 22 May 2012 on the Right to Information in Criminal Proceedings

This Directive has currently not yet been transposed into domestic law. Nevertheless, considering that the deadline for implementation stands at 16 November 2015, Belgium may yet be in time.

B. EXECUTIVE/ADMINISTRATIVE IMPLEMENTATION OF EU INSTRUMENTS AFFECTING CIVIL RIGHTS

With regard to the transposition of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States, it has been pointed out in Belgian legal doctrine that the biggest challenge in its executive and administrative implementation lied in effectuating a mechanism that imposed an obligation of result, but also was replete with stingy details.³⁰ Nevertheless, the first reactions of the main actors in the Belgian criminal justice system expressed appreciation of this instrument as a modern tool for extradition, departing from automatic mechanisms of mutual recognition of judgments rendered in other Member

³⁰D. FLORE, 'L'accueil de la décision-cadre relative au mandat d'arrêt européen en Belgique', in M.E. CARTIER (ed.), *Le mandat d'arrêt européen* (Bruylant, 2005), p. 138.

States.³¹The transposition of the Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition for judgments imposing custodial sentences or measures involving deprivation of liberty also mainly took place through legislative measures. Beyond the provisions indicated above, no particular regulatory/executive or administrative measures were adopted that testify to either a broadening or eroding of the pertinent civil rights norms.

Additional reflections are warranted here with regard to Framework Decision 2008/947/JHA of 27 November 2008 on probation decisions and alternative sanctions. As indicated above, and in line with the general approach of the Belgian legislator when transposing EU instruments, the Law of 21 May 2013 contains all the provisions of the Framework Decision. Nevertheless, the legislator acted with greater restraint than it did when enacting the previous law of 1990, which made it more difficult to gain access to a file.³² Nevertheless, most provisions contained in the Framework Decision were already long since reflected in domestic law in a variety of other acts and administrative measures – amongst others the Law of 29 June 1964 concerning the conditional sentence, suspended sentence and probation, the Law of 17 April 2002 establishing the working penalty as autonomous punishment in minor criminal matters and police matters, the Ministerial Circular No. 1771, modified by the Ministerial Circulars no. 1787 of 24 November 2006 and No. 1794 of 7 February 2007 (both applied to provisional releases), the Law of 17 May 2006 concerning the external status of persons convicted to a prison sentence and the rights accorded to victim in the frame of the modalities of sentence (applied to conditional release), and the Law of 1 July 1964 for the protection of the society against abnormal persons, habitual criminals and perpetrators of certain sexual criminal offences.³³

In the same vein, Belgium had already developed a number of specific programmes for *inter alia* domestic violence, sexual offences and drugs related facts, that can be applied in the context of a probation measures and specific treatment regarding the

³¹Ibid.

³²L. LEMMENS and M. REGOUT, 'Reconnaissance mutuelle des peines de substitution et de celles assorties du sursis avec mise à l'épreuve', accessible at <www.legalworld.be>.

³³Consider also the national fact sheet of Belgium on the portal site 'Probation and measures and alternative sanctions in the EU', accessible at <<http://www.euprobationproject.eu/national.php>>.

different categories of offenses.³⁴Therefore, as regards the implementation of Framework Decision 2008/947/JHA, Belgium already had introduced measures long before co-existing with the new instrument, providing a successful combination of legislative, executive and administrative measures mirroring (rather than extending or curtailing) the rights guaranteed under EU law.

Taking now into consideration the executive/administrative implementation of Framework Decision 2006/783/JHA on the application of the principle of mutual recognition for confiscation orders, and Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence, mention must be made of the fact that, in terms of financial penalties, the aforementioned law of 26 November 2011 presented various innovations and clarifications compared to the previous legal framework. For starters, it proved not to be limited to criminal proceedings, but also extended to cover administrative law procedures, provided the appropriate set of criminal law guarantees is not circumvented. Additionally, Belgium indicated it would apply the new EU standards in the contexts of decisions taken under the Law of 13 May 1999 on administrative sanctions in public, decisions taken under the Act of 21 December 1998 on safety at football matches, and fines imposed with regard to road traffic offenses (only final decisions).

The Belgian implementing acts also provided that any court decisions definitively imposed and resulting in the deprivation of property must be considered in the context of those laws as equal a confiscation order. Unlike freezing orders which fall within the competence of the public prosecutor in the implementation phase, criminal courts are to decide on the execution of confiscation orders.³⁵In this regard, it is clear that due to the civil rights that are at stake, the measures taken are principally regulatory and executive measures. The conclusion one may draw is that, in light of the broad purview awarded to the EU instruments during the administrative and executive implementation, the relevant civil rights appear to be more strongly protected in Belgium.

³⁴ Report 'The European Organization of Prison and Correctional Services' compiled by the Expert Group on Framework Decision 2008/909/JHA, accessible at <www.eurpris.org>.

³⁵ See Belgian Senate 2011-2012, 'Projet de loi modifiant la loi du 5 août 2006 relative à l'application du principe de reconnaissance mutuelle des décisions judiciaires en matière pénale entre les États membres de l'Union européenne (I). Rapport fait au nom de la comisión de la justice par MM. Vanlouwe te Mahoux', accessible at <<http://www.senate.be/>>.

With regard to the executive and administrative implementation of the EU instruments pertaining to victims' rights, it is most agreeable to note that Belgium also seems to have ventured farther than necessary. It has hereby for instance adopted the Council of Europe approach in paying special attention to the dignity and the family life of crime victims.³⁶ Consequently, the obligation to extend due respect and ensure proper recognition of the rights of crime victims has been adequately met. At the same time, it deserves to be underlined that the majority of guarantees existed before the establishment of the EU Framework Decision. In that sense, no actual implementation of the instrument took (or had to take) place here.³⁷ Moreover, regardless of the adopted EU measures, the extant levels of victim protection already offered more than sufficient coverage, for residents and non-residents on the Belgian territory alike. For example, the administrative apparatus engaged with the support of crime victims is most elaborate, encompassing *inter alia* the local and federal police,³⁸ the Commission for financial aid for victims of deliberate acts of violence³⁹, general welfare centers (CAWs)⁴⁰, the *Fédération des Services Laïques d'Aide aux Justiciables*,⁴¹ child trust centres,⁴² the Federation of SOS children's services,⁴³ and the *Jugendhilfedienst* (JHD).⁴⁴

C. JUDICIAL INTERPRETATION AND APPLICATION OF EU INSTRUMENTS AFFECTING CIVIL RIGHTS

Below, a sample of judgments from Belgian courts is provided that can be said to represent salient recent pronouncements on the instruments analysed above.

As regards the Framework Decision 2002/584/JHA on the European arrest warrant, the most recent decision in this respect is that of the Court of Cassation (Second Chamber) in

³⁶ B. VRELUST, *op. cit.*, p. 11.

³⁷ *Ibid.*

³⁸ <www.ibz.fgov.be>.

³⁹ <www.just.fgov.be>.

⁴⁰ <www.archipel.be>.

⁴¹ <http://www.laicite.be/le_cal/2_2_11_federation_des_services_laiques_d_aide_aux_justiciables>.

⁴² <www.kindinnood.org>.

⁴³ <www.federationsosenfants.be>.

⁴⁴ <www.dglive.be/desktopdefault.aspx/tabid-300/537_read-3830>.

case number RG.P.15.0126.N, rendered on 3 February 2015.⁴⁵ The crucial paragraphs set out the following, in faithful adherence to the ruling of the ECJ in the *I.B.* case:⁴⁶

"[...] Under Article 6.4 ° of the law of 19 December 2003 on the European arrest warrant, enforcement may be refused if the European arrest warrant has been issued for execution of a sentence or a detention order when the person concerned is Belgian or resides in Belgium and the competent Belgian authorities undertake to execute the sentence or detention order in accordance with Belgian law. It follows from this legal provision that the cause of refusal provided for in Article 6.4 ° of the law of 19 December 2003 can be applied only for the enforcement of a European arrest warrant for the execution of a sentence or a security measure, but not for prosecution.

As is clear from Case C-306/09 of 21 October 2010 the Court of Justice of the European Union, the person who was convicted in absentia and who still has the opportunity to request a new proceeding comparable to that of a person who is the subject of a European arrest warrant for prosecution. It follows that a European arrest warrant issued pursuant to a judgment by default and still subject to appeal is comparable to a European arrest warrant for the purposes of prosecution, so that the stop applies because of refusal provided for in Article 6.4° of the law of 19 December 2003 on the European arrest warrant to refuse enforcement of a European arrest warrant for prosecution is not legally justified. [...]"

In similar vein was the judgment of the Court of Cassation (Second Chamber) in case number RG P.12.1816 of 11 December 2012,⁴⁷ which indicated that:

"[...] Article 2, 4, 3° of the law of 19 December 2003 on the European arrest warrant does not require that the European arrest warrant states the period of sentence pronounced in prescribing the issuing State. This provision does not prevent the investigating court to determine the limitation period on the basis of additional information provided subsequently by the authorities of that State and subject to the contradiction of the parties. Article 24 C. I. cr. applies only to cases in which the Belgian criminal courts are competent to try offenses committed outside Belgium. Articles 23, 47, 62a and 69 give equal competence to the public prosecutor, the investigating judge and the investigating authorities, the place of the offense, the place of residence of the accused and where it can be found. These grounds for not hierarchical territorial jurisdiction are also applicable in case of extradition of a person provided with an official residence in Belgium.

Article 8 of the Law of 19 December 2003 on the European arrest warrant concerns not only the European arrest warrant issued for prosecution, but such a warrant issued for the execution of a sentence imposed in absentia in respect of a person who was not informed of the date and place of the hearing preceding the

⁴⁵English translation of the summary accessible at <www.jura.be>.

⁴⁶ ECJ, Case C-306/09 *Criminal proceedings against I.B.*

⁴⁷English translation of the summary accessible at <www.jura.be>.

conviction, and against which that person still has a remedy. Under Articles 12, 18 and 39.2 of the Act of 15 May 2012 on the principle of mutual recognition to sanctions or deprivation of liberty imposed in a Member State of the European Union that the sentence imposed in another Member State of the European Union cannot be sustained in Belgium provided that the penalty is not prescribed under Belgian law. Article 4,4° of the Law of 19 December 2003 on the European arrest warrant only allows the investigating court to refuse enforcement of a European arrest warrant because of the prescription of punishment under Belgian law, provided that the acts fall within the jurisdiction of Belgian courts. Article 4,4° of the Law of 19 December 2003 on the European arrest warrant and the principle of mutual recognition of foreign criminal judgments do not permit that the investigating court finds that at the time of decision the sentence imposed in the issuing State is already prescribed under Belgian law, make the surrender of a Belgian or a Belgian resident sentenced to a sentence by default in the issuing State provided under Article 8 of the Law of 19 December 2003.

The investigating authorities actually appreciate, therefore supremely, if there has clearly a danger to the fundamental rights of the person subject of the extradition request, and if the available evidence rebuts the presumption of compliance with these advanced rights by the Member State of issue. (Art. 4, 5° of the law of 19 December 2003 on the European arrest warrant). A penalty prescribed under Belgian law can be performed in Belgium or in a more appropriate sentence under Belgian law. [...]"

It appears then that the Belgian supreme court in criminal matters does not shy away from interpreting national law in conformity with the Framework Decision, even absent guidance from the CJEU. The Court of Cassation (Second Chamber) also indicated in case number RG.P.08.1818.F, rendered on 25 February 2009, that:⁴⁸

"[...] Neither the law of 19 December 2003 on the European arrest warrant or any other legal provision make the admissibility of public action exerted dependent of the person discount for the exercise of prosecution, his dismissal in the administering state before it has been disposed of in the issuing state.

The European arrest warrant issued for the purpose of criminal prosecution indicates the scale of penalties prescribed by law for the offense. It does not indicate, in addition, the higher penalty if necessary by the perpetrator who committed it a repeat offender [...]".

As regards the application and interpretation of Framework Decision 2008/909/JHA, attention may be drawn to the judgment of the Court of Cassation

⁴⁸English translation of the summary accessible at <www.jura.be>.

(Second Chamber) in case number RG.P.14.0611.N of 29 April 2014, where it engaged in the following interpretation:⁴⁹

"[...]Article 18.4 of the Act of 15 May 2012 on the principle of mutual recognition to sanctions or deprivation of liberty imposed in a Member State of the European Union implies that the rules governing the court proceedings for the application of penalties are also applicable to the particular procedure laid down in Article 18.4 of that law, unless their application is not compatible with the provisions and objectives of this law. It follows from the scheme of the Act of 17 May 2006 on the external legal status of persons sentenced, as reflected in Articles 36, 44, 61, 63, 68, 78, 79 and 95.1, which court hearings for sentence enforcement are held in principle in camera. The result of this rule, not inconsistent with the provisions and objectives of the Act of 15th of May 2012 on the principle of mutual recognition to sanctions or deprivation of liberty imposed in a Member State of the European Union, that in cases referred to in Article 18.4 of the Act.

The court in the application of penalties called to rule on the dispute under Article 18. 4 of the Act of 15 May 2012 on the principle of mutual recognition to sanctions or custodial measures imposed in a European Union Member State, only statue on the need and the mode of adaptation of the sentence or measure imposed abroad for the continuation of his execution in Belgium. To the extent that the court in the application of penalties called upon to rule on the challenge set only statue on the need and the mode of adaptation of the sentence or measure imposed abroad for its continued execution Belgium, the court can certainly consider again the facts that established the foreign conviction or subject it to a foreign judgment control, but must review the factual circumstances set out in the foreign judgment to determine, in light, what offense they are under Belgian law, to then set the maximum punishment of the head of that offense. The fact that a foreign judgment was not accepted as an aggravating circumstance established under the legislation, does not prevent the court from the application of penalties to decide to the facts underlying the foreign conviction, such that they are listed in that judgment is an aggravating circumstance under Belgian law. (Art. 18, § 1 and 4 of the Act of 15 May 2012 on the principle of mutual recognition to sanctions or deprivation of liberty imposed in a Member State of the European Union) [...]."

Again, this construction of domestic law that secures the mutual recognition of judgments imposing custodial sentences and depriving persons of liberty squares would appear to remain in close correspondence with the prevailing EU rules. Comparably, as regards the application in Belgium of measures on probation decisions and alternative sanctions, the judgment of the Constitutional Court ('*Grondwettelijk Hof* / '*Cour constitutionnelle*') in case number 46/2011 of 30 March 2011 made clear that their generous construction in light of EU law would not fall foul of ECHR standards:⁵⁰

⁴⁹English translation of the summary accessible at <www.jura.be>.

⁵⁰English summary accessible at <www.jura.be>.

“[...] Art. 37quinquies § 4 of the Criminal Code does not violate s. 10 and 11 of the Constitution, whether or not combined with art. 6 ECHR. The first question concerns the compatibility of the provision in question with art. 10 and 11 of the Constitution in that, when a person does not carry the penalty of work on which he was convicted, the prosecutor, not a judge, who decides on the execution of the sentence substitution. The second question relates to the compatibility of that provision with Art. 10 and 11 of the Constitution, combined with art. 6 ECHR, in that no appeal is possible against the Crown's decision on the execution of the alternative punishment. Pursuant to art. 37ter.1, of the Criminal Code, the judge when imposing a penalty work as principal punishment, provides for a penalty of imprisonment or a fine applicable in case of non-enforcement of the penalty of work. In this respect, the situation differs from that of the probationary suspension. When the judge orders the suspension of delivery, it does not provide for punishment may be applied in case of revocation of the suspension. The penalty shall be declared only after the revocation of the suspension of pronouncement of the judgment by the trial court. The judge has fixed the penalty applicable substitution for non-execution of the penalty of work, the Crown has in this regard that a limited discretion. It must respect the scale of punishments set by the judge and may not impose any other penalties than that provided by the judge. In addition, under the provision in question, it is appropriate to take into account the work sentence has already been executed by the convict. This requirement implies that the part of the alternative sentence to be served must be inversely proportional to the working party which hardly has already been executed by the convict.

The power of the judge who must decide on the revocation of probation or suspension of probation is also more extensive than that of the public prosecutor who decides the execution of the alternative punishment when a person does not execute the penalty work to which she was sentenced. Except if the stay is canceled by operation of law, the judge must decide whether the probationary suspension or probation should be revoked or not and, if not, whether there will be linking new conditions. The judge has several options when it must rule on an application for revocation of a probationary suspension or probation. It is different for non-execution of a sentence of work. The Crown can decide when the performance or not of alternative sanction, it being understood that under the provision in question, it must take into account the work sentence has already been executed by the convict. Control of the provision in question in the light of art. 10 and 11 of the Constitution, combined with art. 6 ECHR, is not likely to lead to a different conclusion. Indeed, this treaty provision does not apply to the execution of the sentence.[...]”

As regards Framework Decision 2008/978 and its implementation in Belgian law, the Constitutional Court declared in case number 145/2011 of 22 September 2011:⁵¹

“[...] The legislature has not provided specific procedure that must follow the Standing Committee R where at the request of a judge, he must give an opinion on the legality of intelligence methods used, it must be presumed not to have intended to derogate with the procedure provided for in Chapter IV of the Law of

⁵¹English translation of the summary accessible at <www.jura.be>.

30th November 1998 governing intelligence and security services. Thus, on the basis of Article 43.5 of the Act of 30 November 1998, when any person demonstrating a legitimate interest staff and lodged a complaint before the Standing Committee R, that person, accompanied by her lawyer may consult the file at the Registry of the Standing Committee for five working days, the dates and times provided by the Committee. The same provision states that the file contains all the elements and relevant information on the matter, with the exception of those that undermine the protection of sources, protection of privacy of third parties, the classification rules set out by the Law of 11 December 1998 on classification and security clearances, certificates and safety notice, or to implement the tasks of intelligence and security services defined in Articles 7, 8 and 11. Since any interested person, so including the defendant, may lodge a complaint at any time will be treated according to this procedure, the legislator's choice not to have planned special procedure is not without reasonable justification.

Subsequent verifications carried out by the Standing Committee R is wider than the mere control of decisions relating to specific and exceptional intelligence methods. It is clear from Article 43/6 expressly that the Standing Committee R is competent to order, as part of the verification, the termination of the method concerned, order that the information obtained cannot be exploited and order the destruction information obtained. In addition, article 43.2, paragraph 1, of the Law of 30 November 1998 governing intelligence and security services has the R Standing Committee is responsible for monitoring the specific and exceptional intelligence methods; in this case, it is not a question only of "decisions" but also problems relating to their execution. Moreover, it is clear from various provisions of the Act of 30 November 1998 in order to exercise its supervisory role, the Standing Committee R must have all relevant documents, including documents relating to the execution methods specific and exceptional intelligence (Article 18.3, 43.5, 43.3, paragraph 2, 43.5, paragraph 3 and 43.5, 3 of the Law of 30th November 1998). If the Standing Committee I could not control the legality of decisions, it would be quite redundant and unnecessary that it may consult the complete file. Therefore, the term "decisions" used in Article 43.6 of the Law of 30th November 1998 is not limited, so it is appropriate to include it in its widest meaning.

He is alleged art. 18.3 eroded the Law of 30 November 1998 governing intelligence and security services to provide that specific methods of data collection may be extended or renewed without limit of time, which would constitute a serious interference right to respect for private life. Under specific intelligence methods should be distinguished specific methods intrinsically instant intelligence and the specific methods of information of a potentially longer. Regarding the inspection (Article 18/2, § 1, 2), taking knowledge of the sender identification data or recipient of a letter or a holder of a post office box (Article 18/2, § 1, 3) and the identification measures of the subscriber or habitual user of an electronic communications service or electronic means used (Article 18.2, § 1, 4 °), it is not necessary that the legislator provides for a "duration" maximum intelligence because these methods are, by their nature, of short duration and are of intrinsically immediacy. Furthermore, the assessment of the application for authorization by the head of service should always be present in relation to the implementation of the specific intelligence method, the risk of depriving the prior authorization of its legitimizing effect. Finally, we can stress the legal obligation, under Article 18/3, 3 of the Act of 30 November 1998, under which, by specific method, a list of measures that have been

executed is transmitted the Administrative Commission at the end of each month. These lists must include certain data (Article 18/3), including "the period during which the specific method of data collection can be implemented after the decision." Therefore, the review by the Administrative Commission has extended to this period. Regarding the observation (Article 18.2) and tracking measures for electronic communications means call data and locating the origin or destination of electronic communications (Article 18/2, § 1, 5 °), the leader of the service must set a maximum. The maximum period set by the leader of the service is an important safeguard against possible abuse: the leader of the service must, at the expiration of this period, in case of extension or renewal, a new decision with the understanding that, in accordance in article 18/3 § 4 of the Act of 30 November 1998, all applicable requirements must be met again. Furthermore, the assessment of the application for authorization by the head of service should always be present in relation to the implementation of the specific intelligence method, the risk of depriving the prior authorization of its legitimizing effect. Given the conditions prevailing in the implementation of specific methods and various checks organized by the law, the measure does not affect disproportionately the right to respect for privacy of those involved.

Given that it constitutes an interference by the authorities with the right to respect for private and family life and what it must therefore correspond to a pressing social need and be proportionate to the legitimate aim pursued, it be considered as art. 18/6, §2, 18/7, §2 and 18/8, §2 attacked the Law of 30 November 1998 governing intelligence and security services should apply only to exceptional circumstances where extreme urgency, moreover strictly defined by the legislator can show that it is not applied the ordinary procedure. If the intelligence officer may require on the spot the data referred to by the contested provisions, by an oral decision to be justified, it must, first, to require the verbal agreement of the manager of the service. This agreement should be confirmed as soon as possible by a written and reasoned decision of that leader. The legislator did not interfere disproportionately the right to respect for privacy of the persons concerned by allowing a method can be implemented by an intelligence officer when the efficiency of the current research or dependent when the situation has a severity such that we should react very quickly. This is particularly so, as it was observed, the decision of the officer must be confirmed promptly by the manager of the service. The right to respect for private life is also guaranteed in this case by the fact that, contrary to what the applicant, all the control procedures organized by law, to the Administrative Committee or the Standing Committee R, continue to apply, the latter may suspend or terminate the method if it is illegal.[...]"

The implementing measures could thus be upheld, and EU instruments did not grant more extensive rights here than the Belgian provisions offered hitherto. In similar vein, in relation to national rules lying within the purview of the EU instruments securing the rights of victims, it was contended in the judgment of the Court of Cassation in case number RGP12.0106.N, rendered on 24 January 2012 that:⁵²

⁵²English translation of the summary accessible at <www.jura.be>.

"[...] The help from a lawyer during the hearing by the investigating judge only envisages the monitoring of compliance with the right not to incriminate oneself and the freedom of choice to make a statement, to respond to questions asked or to be silent, the way the interviewee was treated during a hearing, a particularly manifest exercise of or prohibited imposition of pressure, stress and limits on communication, violating the rights of the defense in section 47bis of the Criminal Procedure Code and the regularity of the hearing[...]."

Concerning the right to information of suspects, we may point to e.g. the judgement rendered by the civil court of Bruges on 17 December 2013, indicating conformity of the Belgian criminal procedural rights with the requirements of EU law and the underlying exigencies flowing from ECtHR jurisprudence:⁵³

"[...] For infringements found to the right to counsel at the hearing, it should be checked case by case if this limitation has affected, in light of the entire process, the right of the accused to a fair trial. When declarations are not used as conclusive evidence by the judge, when clearly no abuse or coercion are used at the hearing and when, at the time of the hearing and during the investigation, the accused was not present in a vulnerable position or quean was remedied real and adequately to the vulnerable position of the accused, the fairness of the trial remains guaranteed [...]."

Lastly, by way of definitive underlining of the compliant practices in Belgian court practice, reference may be had to the recent judgment of the Court of Cassation in case number RG P.13.1332.N, delivered on 14 January 2014:⁵⁴

"[...] Neither the fairness of the trial, as guaranteed by Article 6 ECHR nor the rights of the defence do not require that the accused and his counsel may have a written translation of all parts of the criminal file, but however, the accused has the right to have the necessary for the effective exercise of its rights of defence items are translated. The judge appreciates s if exigencies is respected and can, if necessary, in order to guarantee the rights of the defence, order in light of all relevant circumstances of the case and under conditions other than those provided in Article 22 of law of 15 June 1935 on the use of languages in judicial matters, the translation of documents in another national language [...]."

3. EU LEGISLATION RELATED TO THE PROTECTION OF PERSONAL DATA

A. TRANSPOSITION OF THE ABOVE EU INSTRUMENTS PROTECTING OR POTENTIAL AFFECTING CIVIL RIGHTS

⁵³English translation of the summary accessible at <www.jura.be>.

⁵⁴English translation of the summary accessible at <www.jura.be>.

- Directive 95/46 on the protection of individuals with regard to processing of personal data and on the free movement of such data (Data Protection Directive) [1995] OJ L281/31.

The EU's general Data Protection Directive has been implemented in Belgian law by the Law on the protection of privacy in relation to the processing of personal data of 8 December 1992,⁵⁵ as last amended in 2014.⁵⁶ This Data Protection Law has been further implemented by the Royal Decree of 13 February 2001.⁵⁷

- Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector (ePrivacy Directive) [2002] OJ L201/37.

The e-Privacy Directive has been implemented in the Belgium by the following instruments:

- The Law of 13 June 2005 on electronic communications;⁵⁸
- The Law of 18 May 2009 pertaining to various provisions regarding electronic communications;⁵⁹
- The Law of 24 August 2005 aiming to transpose certain provisions of Directive distance financial services and the Directive on privacy and electronic communications transposes Article 13 of Directive 2002/58;⁶⁰

⁵⁵Wet voor de bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens / Loi relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel, *Belgisch Staatsblad / Moniteur Belge* 18 March 1993. The full text can be consulted from <www.ejustice.just.fgov.be>.

⁵⁶*Belgisch Staatsblad / Moniteur Belge* 28 March 2014.

⁵⁷ Koninklijk besluit ter uitvoering van de wet van 8 december 1992 tot bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens / Arrêté royal portant exécution de la loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel, *Moniteur Belge / Belgisch Staatsblad* 13 March 2001. The full text can be consulted from <www.ejustice.just.fgov.be>.

⁵⁸*Moniteur Belge / Belgisch Staatsblad* 20 June 2005. The full text can be consulted from <www.ejustice.just.fgov.be>.

⁵⁹ Loi du 18 mai 2009 portant des dispositions diverses en matière de communications électroniques / Wet van 18 mei 2009 houdende diverse bepalingen inzake elektronische communicatie, *Moniteur Belge / Belgisch Staatsblad* 25 July 2009. The full text can be consulted from <www.ejustice.just.fgov.be>.

⁶⁰ Loi du 24 août 2005 visant à transposer certaines dispositions de la directive services financiers à distance et de la directive vie privée et communications électroniques transpose l'article 13 de la directive 2002/58 / Wet tot omzetting van verschillende bepalingen van de richtlijn financiële diensten op afstanden van de richtlijn privacy

- The Law of 27 of March 2014 containing various provisions regarding electronic communications.⁶¹
- Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive (Data Retention Directive) [2006] OJ L105/54

The Data Retention Directive was implemented through the Electronic Communications Act ('*Wet van 13 juni 2005 betreffende de elektronische communicatie*' / *Loi relative aux communications électroniques*).⁶² Further implementation has been provided in the form of the '*Koninklijk besluit tot uitvoering van artikel 126 van de wet van 13 juni 2005 betreffende de elektronische communicatie*' / *Arrêté royal portant exécution de l'article 126 de la loi du 13 juin 2005 relative aux communications électroniques*'.⁶³

As known, the EU Directive was annulled by the European Court of Justice in 2014.⁶⁴

B. EXECUTIVE/ADMINISTRATIVE IMPLEMENTATION OF EU INSTRUMENTS AFFECTING CIVIL RIGHTS

Queries lodged with competent experts have confirmed that the implementation of the core of the abovementioned EU instruments on the protection of personal data in Belgian law is, broadly speaking, considered to have proceeded quickly and successfully. Hereby, Belgium has not adopted a genuinely sectoral approach for the regulation of the protection of privacy and personal data, but instead adopted specific rules for certain cases. In addition to the Data Protection Law and the Royal Decree of 2001 for the general Directive, a plethora of specific laws and rules was also put in place to contain

elektronische communicatie, *Moniteur Belge* / *BelgischStaatsblad* 31 August 2005. The full text can be consulted from <www.ejustice.just.fgov.be>.

⁶¹ Loi du 27 mars 2014 portant des dispositions diverses en matière de communications électroniques / Wet houdende diverse bepalingen inzake elektronischecommunicatie, *Moniteur Belge* / *Belgisch Staatsblad* 28 April 2014. The full text can be consulted from <www.ejustice.just.fgov.be>.

⁶² *Moniteur Belge* / *Belgisch Staatsblad* 20 June 2005. The full text can be consulted from <www.ejustice.just.fgov.be>.

⁶³ *Moniteur Belge* / *Belgisch Staatsblad* 8 October 2013.

⁶⁴ ECJ, Joined Cases C-293/12 & C-594/12 *Digital Rights Ireland and Seitlinger and Others*.

provisions on the protection of privacy and personal data.⁶⁵ The measures enacted to further give shape to e-Privacy Directive, flagged above, testify to that fact. Other examples of these types of complementary executive and administrative acts are the Camera Surveillance Law of 21 March 2007,⁶⁶ or the monitoring of employees' online communications regulated by the Collective Bargaining Agreement No. 81 concerning the monitoring of electronic communications of employees of 26th April 202.⁶⁷

C. JUDICIAL INTERPRETATION AND APPLICATION OF EU INSTRUMENTS AFFECTING CIVIL RIGHTS

With regard to the interpretation and application of the data protection rules in general, and in particular the measures adopted pursuant to the aforementioned EU instruments, it should first be noted that the competent regulatory authority in Belgium is the Privacy Commission.⁶⁸ This Commission supervises compliance with the Belgian Data Protection Law, issues guidance on its application, keeps a public register of notifications, and offers advice on various matters related to the protection of personal data. This Commission enforces and applies the national regulation, but upon receiving a complaint, the first immediate thing it will attempt is to reach an agreement between the parties. If not solution can be reached, the Commission can issue an opinion on the case at hand.⁶⁹ At the same time, an investigation can be initiated in order to verify whether processing of personal data proceeded in accordance with the Data Protection Law. As indicated in the latter's article 32(2), the Privacy Commission can also inform the public prosecutor of suspected violations, and submit to the Brussels Court of First Instance any disputes

⁶⁵T. D'HULST, 'Data Protection in Belgium: Overview', accessible at <<http://practicallaw.com/resource/2-502-2977>>; an integral overview of all measures can be obtained at <<http://practicallaw.com/resources/global-guides/dataprotection-guide>>.

⁶⁶ Wet tot regeling van de plaatsing en het gebruik van bewakingscamera's / Loi réglant l'installation et l'utilisation de caméras de surveillance, *Moniteur Belge / Belgisch Staatsblad* 31 May 2007. The full text can be consulted from <www.ejustice.just.fgov.be>.

⁶⁷ Collectieve arbeidsovereenkomst 81 tot bescherming van de persoonlijke levenssfeer van de werknemers ten opzichte van de controle op de elektronische onlinecommunicatiegegevens / Convention collective du travail 81 relative à la protection de la vie privée des travailleurs à l'égard du contrôle des données de Communications électroniques en réseau, accessible at <<http://www.werk.belgie.be/searchcao.aspx?id=4708>>.

⁶⁸ Commissie voor de bescherming van de persoonlijke levenssfeer / Commission de la protection de la vie privée, <www.privacycommission.be>.

⁶⁹ As settled in Article 31(3) of the Data Protection Law.

relating to the application of the Law. The sanctions and the remedies that can be taken by this Commission are listed in the articles 37-39 of the Data Protection Law.⁷⁰

The Belgian Courts are nevertheless also tasked to apply and interpret the abovementioned national laws implementing the EU legislation related to the protection of personal data, notwithstanding that they will often take their cue from precedents and guidelines established by the Privacy Commission, where available.

With regard to possible trends or patterns in their output, there are too many (differentiated) strands in the case law than can possibly be outlined here, meaning that any selection would fall victim to an excessive randomness. Without any pretence of authority or representativeness, we venture to spotlight two recent pronouncements instead. To begin with, we may point to the intriguing decision of the Brussels Court of Appeal of 3 September 2013, placing remarkably few fetters on the use of health data for customer acquisition:⁷¹

“[...] The diversion of customers is not unlawful in itself and derives from the freedom of trade and industry and competition. It is not unlawful in itself a former employee approach clients for his new employer and, to this end, use is made of the training, professional knowledge, skill and experience that were previously acquired. This practice, however, can acquire unlawful because of the objective pursued, namely the disruption and / or destabilization of the other, and / or because of the particular circumstances in which it occurs, such as the creation confusion, the error induction by giving misinformation, by discrediting, by the illicit use of company data and misuse of knowledge.

The use of health data of patients for customer acquisition, constitutes unlawful treatment and abuse of health data, and is therefore a breach of Article 8 of the Law of 8 December 1992 on the protection of privacy with regard to the processing of personal data (Article 7), and Article 95 of the LPMC. In principle, the judge terminations can only order the cessation of a particular act or a particular practice. An order to do something can only be imposed if it amounts to prohibiting the continuation of an act or practice or if it is necessary for this purpose. This is not the case of demand which tends to communication and destruction (copies or copies of) patient data. The nothingness to reducing the consequences of an offense does not fall under the jurisdiction of the cessation of judge. The diversion of customers is not in itself prohibited, so that a bancannot be imposed to approach patients from a competitor. The judge terminations is not competent to nullify the consequences of illicit diversion of customers. When determining the amount of the penalty, shall be taken into account that the penalty must contribute to respect for the cessation order. This amount must

⁷⁰T. D’HULST, op. cit.

⁷¹English translation of the summary accessible at <www.jura.be>.

be high enough to prevent the convict would agree that payment of the penalty results in a smaller disadvantage than advantage he could achieve by ignoring the provisions of LPMC. Moreover, the credibility of the penalty system cannot be impeded. The demand to customers of a competitor to sign a statement of notice with the competitor, is not an aggressive commercial practice [...]."

Secondly, in a recent, interesting and rather permissive ruling of the Court of Appeal of Antwerp ('*Hof van Beroep te Antwerpen*'), rendered on 17 March 2010, it was decided that:⁷²

"[...] The patient may not assert the right to a copy under Article 9 of the law of 22 August 2002 on patients' rights in respect of a practitioner and not in respect of an establishment of care as a nursing home CPAS. It is nowhere described what is meant by competent persons. The Royal Decree of 21 September 2004 laying down the standards for the special licensing as a nursing home and care, such as day care centre or as a centre for acquired brain injury, also speaks of a resident, not a patient. It does not give the right to reside view or copy the care record. It lays the task of coordinating physician and advise holding the medical record as well as the participation in the holding of the individual care record (as amended by section 6 of the RD of 7 June 2009).

Under the Royal Decree of 21 September 2004, the coordinator and advisor doctor of nursing home care and must keep the medical records. Only the doctor can decide about the right of consultation of individual care record. Article 10 § 2 of the Law of 8 December 1992 provides that, without prejudice to Article 9, § 2, of the Act of 22 August 2002, everyone has the right, either directly or with the help a professional healthcare practitioner, to take cognizance of personal data processed regarding his health. Therefore, the right to a copy of the medical care data in the file cannot be imposed.[...]"

⁷²English translation of the summary accessible at <www.jura.be>.

PART II

ENFORCEMENT OF SELECTED CIVIL RIGHTS

The three civil rights selected for further analysis in this report on Belgium are the following:

- The right to human dignity
- The right to due process and access to the judiciary
- The right to language (as primarily protected under article 30 of the Belgian Constitution)

1. SOURCE OF PROTECTION

- ✓ What are the sources of protection of each of this right? Do you see any problems in this regard? (E.g. the right is recognized only in a lower level norm, or multiple sources with different authority and meanings, etc.)
- The right to human dignity

For starters, it should be pointed out that the issue of the source of protection of this right calls for a preliminary clarification on the hierarchy of norms. As noted, in Belgium international law directly applicable, pursuant to the monist tradition. Below or at the same level as the international standard stands the Belgian Constitution. It is necessary, therefore, to distinguish how the human dignity right is articulated in the Belgian legal system, both in domestic law and in the direct applicable international law.⁷³

In the Belgian Constitution, the right to human dignity is primarily protected under Article 28. This provision reads:⁷⁴

Everyone has the right to lead a life in keeping with human dignity.

⁷³ K. LENAERTS, P. VAN YPERSELE & J. VAN YPERSELE, 'La protection des droits sociaux fondamentaux dans l'ordre juridique de la Belgique' in J. ILLIOPOULOS-STRANGAS (ed.), *La protection des droits sociaux fondamentaux dans les États membres de l'Union européenne* (Bruylant, 2000), pp. 179-180.

⁷⁴ English translation accessible at <www.legislationline.org/documents/id/9045>.

To this end, the laws, federate laws and rules referred to in Article 134 guarantee economic, social and cultural rights, taking into account corresponding obligations, and determine the conditions for exercising them.

These rights include among others:

- 1° the right to employment and to the free choice of an occupation within the context of a general employment policy, aimed among others at ensuring a level of employment that is as stable and high as possible, the right to fair terms of employment and to fair remuneration, as well as the right to information, consultation and collective negotiation;
- 2° the right to social security, to health care and to social, medical and legal aid;
- 3° the right to decent accommodation;
- 4° the right to the protection of a healthy environment;
- 5° the right to cultural and social fulfilment.

The right is thus intrinsically linked to a sub-set, and to be further worked out in rules adopted at federal and regional level.⁷⁵ Since 1970, the three official Communities in Belgium (Flemish, French and German-speaking) and the three regions (Flemish, Walloon and Brussels) have indeed enacted measures under their cultural, linguistic and educational competences that tie in with the right to dignity. It deserves note that the rules adopted by the councils of the Communities and Regions stand, ex Article 134 of the Belgian Constitution, at the same hierarchical level as ordinary (federal) Belgian laws; likewise, the rules adopted by the governments of the Communities and the Regions have the same legal value as those adopted by the federal government.⁷⁶ As these provide for more elaborate economic, social and cultural rights, they lie however squarely within the purview of other WPs, and will not be further detailed here. At the federal level, we may nevertheless additionally point to the following the laws on non-discrimination of 17 March 2003 and 10 May 2007.⁷⁷

As mentioned, in the monist tradition, international law is equally situated at the pinnacle of the hierarchy of norms, and all international conventions ratified by Belgium wholly form part of the domestic legal system. EU law, including the Charter of Fundamental Rights, enjoys that same status by virtue of the judgement of the 1964 ECJ in *Costa/ENEL*.⁷⁸ As known, the right to human dignity is also enshrined in Article 1 of

⁷⁵ The latter in line with Article 134 of the Belgian Constitution, referred to in Article 28.

⁷⁶ There is therefore no supervisory authority between the federal power and the powers of communities and regions, save for judicial review by the Constitutional Court.

⁷⁷ Wet ter bestrijding van discriminatie en tot oprichting van een Centrum voor de gelijkheid van kansen / Loi pour la lutte contre le racisme et créant un Centre pour l'égalité des chances, *Belgisch Staatsblad / Moniteur Belge* 17 March 2003; Wet ter bestrijding van bepaalde vormen van discriminatie / Loi tendant à lutter contre certaines formes de discrimination, *Belgisch Staatsblad / Moniteur Belge* 30 May 2007. The full texts can be consulted from <www.ejustice.just.fgov.be>.

⁷⁸ ECJ, Case 6/64 *Flaminio Costa v E.N.E.L.*

said Charter. What is more, ever since the 1971 judgment of the Court of Cassation in the *Fromagerie Franco-Suisse Le Ski* case,⁷⁹ all self-executing (directly binding) international law is considered to enjoy primacy over national law.⁸⁰The principal international conventions providing for protection of the right to human dignity, ratified by Belgium, are:

- The European Convention of Human Rights;⁸¹
 - The International Covenant on Civil and Political Rights;⁸²
 - The International Covenant on Economic, Social and Cultural Rights;⁸³
 - Several of the conventions concluded within the scope of the ILO.⁸⁴
-
- Right to due process and access to the judiciary

The right to due process and access to the judiciary is protected under the Belgian Constitution in Articles 13, 31, 144, 145, 146, 148, 149, 152, 154 and 155.⁸⁵

It is further implemented in two main domestic laws, and one directly related act:

- The Judicial Procedural Code of 10 October 1967;⁸⁶
- The Criminal Procedure Code of 17 November 1808;⁸⁷
- The Law of 23 November 1998 relating to legal aid.⁸⁸

⁷⁹Court of Cassation 27 May 1971, *Arr. Cass.* 1971, 959;[1972] CMLR 230.

⁸⁰Interestingly, in doing so, this Court took its cue from the CJEU's *Costa/ENEL* judgment: it extended the *Costa/ENEL* imperative to all self-executing international law, thus completely reversing its earlier position on the matter. Under the current case law of the Belgian courts, the threshold here is that the rule concerned should require, in light of its spirit, terms and contents, no further national regulation to specify it or render it more complete (“dat de regel op zichzelf beschouwd, wat de geest, inhoud en bewoordingen ervan betreft, geen verdere nationale reglementering behoeft met het oog op precisering of vervollediging”). For an illustration, see e.g. Council of State, judgment nr. 63.473 of 10 December 1996. Deviating from this general ‘objective’ approach, the Court of Cassation normally also adds a ‘subjective’ element, requiring that the parties to the treaty intended for the rule concerned to be self-executing.

⁸¹The European Convention on Human Rights contains no express reference to the right to dignity, but ‘dignity’ as we understand it in this context provides the philosophical underpinning for decisions on Article 2 (right to life), Article 3 (prohibition of inhuman and degrading treatment), and, in some cases, Article 8 (privacy and personal autonomy).

⁸²Preamble and Article 10.

⁸³Preamble and Article 13.

⁸⁴E.g. Convention No. 105 on the Abolition of Forced Labour (1957).

⁸⁵English translation accessible at <www.legislationline.org/documents/id/9045>.

⁸⁶Code judiciaire / Gerechdelijk Wetboek, *Moniteur Belge / Belgisch Staatsblad* 31 October 1967. The full text can be consulted from <www.ejustice.just.fgov.be>.

⁸⁷Code d’instruction criminelle / Wetboek van Strafvordering, published in the *Moniteur Belge / Belgisch Staatsblad* 27 November 1808. The full text can be consulted from <www.ejustice.just.fgov.be>.

As known, the right is equally enshrined in Article of the Charter of Fundamental Rights of the European Union that enjoys primacy and direct effect in the Belgian domestic legal order.

The principal international agreements concluded by Belgium that provide for protection of the right to due process and access to the judiciary are:

- The European Convention on Human Rights;⁸⁹
- The International Covenant on Civil and Political Rights.⁹⁰

- The right to language

By way of introduction, it may be underlined that the Kingdom of Belgium possesses an exceptionally elaborate complex of language laws, which is the outcome of a history of language-related legislation that commenced in the late nineteenth century and persists until today.⁹¹ To obtain a better grasp of this exceptional framework, it is practical to first briefly describe the administrative situation in this convoluted federal state.

One of the fundamental rights enshrined already in the Belgian Constitution of 1831 was the freedom to choose and use a language. This right implied that every citizen had the freedom to choose in which language he preferred to communicate; and the law could not impose any obligation to make use of a predetermined language. On the contrary, the law could impose on the public institutions and the courts the obligation to accept any of the available languages.⁹²

During the first years that followed the independence of the Kingdom of Belgium however, French was the language of public authorities. Since the mother tongue of the Flemish population was mostly Dutch, this resulted in particular strains. In response, the

⁸⁸ Loi du 23 du Novembre 1998 relative a l'aide juridique / Wet betreffende de juridische bijstand, *Moniteur Belge / Belgisch Staatsblad* 2 December 1998. This law entered into force on 1 January 2000 and was incorporated into the Belgian Judicial Code. The full text can be consulted from <www.ejustice.just.fgov.be>.

⁸⁹ Articles 6 and 13.

⁹⁰ Article 14.

⁹¹ See e.g. J. BLOMMAERT, 'The Long Language-Ideological Debate in Belgium', *Journal of Multicultural Discourses* 2011, nr. 3, p. 241.

⁹² *Ibid.*

Flemish embarked on a trajectory to solidify the right to communicate in their own language. It was nevertheless only in 1963 that the country was divided into four linguistic regions: the region of the French language, the region of the Dutch language, the region of the German language, and the bilingual (French/Dutch) region of Brussels. In result, Belgium has no *lingua franca*. French, Dutch and German are used in the public life of the respective territories, and the French, Flemish and German-speaking communities, within their territorial limits, regulate the three main aspects of the right to use a language: in administrative matters, in the education system, in labour relations between employers and employees, and in the acts and documents of businesses made compulsory by public law and regulations.⁹³

As Article 129 of the Belgian Constitution instructs, the Parliaments of the Flemish and the French community are to regulate by decree the use of language for administrative affairs, education, social relations between employers, employees and documentation concerning undertakings.⁹⁴ These decrees enjoy binding force of law in, respectively, the Dutch and the French language community (except where it concerns municipalities, bordering on the territory of a different community where the use of another language is prescribed or permitted; services operating across the borders between the different language communities; and common federal and international institutions).

The right to use one's language is currently protected under Belgian federal law and legislation in the following provisions:

- Articles 2,⁹⁵ 4,⁹⁶ 30,⁹⁷ 43,⁹⁸ 54,⁹⁹ 129,¹⁰⁰ 136,¹⁰¹ 138,¹⁰² and 139¹⁰³ of the Belgian Constitution;

⁹³ I. BAMBUST, A. KRUGER & T. KRUGER, 'Constitutional and Judicial Language Protection in Multilingual States: A Brief Overview of South Africa and Belgium', *Erasmus Law Review* 2012, nr. 5, pp. 216-217.

⁹⁴ The German community only holds the competence to regulate the use of language in education.

⁹⁵ In this article the separation between geographical regions is made, by settle that *Belgium is made up of three Communities: the French, the Flemish, and the German-speaking Community*.

⁹⁶ This is the Article that establishes the separation between linguistic areas as follow: "(1) Belgium has four linguistic regions: the French-speaking Region, the Dutch-speaking Region, the bilingual Region of Brussels-Capital, and the German-speaking Region. (2) Each commune of the Kingdom is part of one of these linguistic regions. (3) The limits of the four linguistic regions can only be changed or modified by a law adopted by majority vote in each linguistic group in each House, on the condition that the majority of the members of each group are gathered together and from the moment that the total of affirmative votes given by the two linguistic groups is equal to at least two thirds of the votes expressed." English translation accessible at <www.legislationline.org/documents/id/9045>.

⁹⁷ In this Article, the freedom of use a language is established in Belgium; the text reads as follows: "The use of languages spoken in Belgium is subject to free choice; it can only be determined by law, and only for acts of the

- The Law on languages for the administration of 18 July 1966;¹⁰⁴
- The Law on institutional reform of 8 August 1980;¹⁰⁵
- The Law of 16 of June 1989 laying down various institutional reforms;¹⁰⁶
- The Law of 15 June 1935 regarding the languages used in judicial proceedings;¹⁰⁷
- The Law of 30 July 1963 concerning the use of languages in education;¹⁰⁸
- The Decree of 30 June 1981, supplementing the Articles 12 and 33 of the Laws on languages for the administration, coordinated by the Royal Decree of 18 July 1966 concerning the use of languages in relations

public authorities and for judicial affairs.”English translation accessible at <www.legislationline.org/documents/id/9045>.

⁹⁸ In Article 43, the different linguistic groups that are represented in the federal Lower and Upper Chamber are identified. It is settled that(1) for cases determined by the Constitution, the elected members of each House are divided into a French linguistic group and a Dutch linguistic group, in the manner determined by law; and that (2) the senators referred to in Article 67(1) (2, 4, 7) are to make up the French linguistic group of the Senate. The senators referred to in Article 67(1) (1, 3, 6) are to make up the Dutch linguistic group of the Senate.

⁹⁹ Article 54 indicates the linguistic majority that is needed for the adoption of federal laws.

¹⁰⁰ This article fixes the regulatory powers of the Communities with regard to the use of language as follows: “1) The French and Dutch Community Councils rule by decree, in as much as each is concerned, excluding the federal legislator, on the use of language for: 1) administrative matters; 2) education in those establishments created, subsidised, and recognized by public authorities; 3) social relations between employers and their personnel, in addition to corporate acts and documents required by law and by regulations. (2) These decrees have force of law in French-language and in Dutch-language regions respectively except as concerns: - those communes or groups of communes contiguous to another linguistic Region and in which the law prescribes or allows use of another language than that of the Region in which they are located. For these communes, a modification of the rules governing the use of languages as described in (1) may take place only through a law adopted by majority vote as described in Article 4, last paragraph; - services the activities of which extend beyond the linguistic Region within which they are established; - federal and international institutions designated by law, the activities of which are common to more than one Community.” English translation accessible at <www.legislationline.org/documents/id/9045>.

¹⁰¹ This article describes the different linguistic groups that make up the Brussels-capital regional council.

¹⁰² Article 138 determines the powers of the Parliament of the French Community, the Parliament of the Walloon Region and of the French linguistic group of the Parliament of the Brussels-Capital Region, on the other hand, to decide on issues of language by common accord and by federate law.

¹⁰³ Article 139 establishes that: “Upon request by their respective governments, the German-speaking Community Council and the Walloon Regional Council may, by decree, decide of common accord that Walloon regional responsibilities may be exercised in whole or in part by the German-speaking Community Council and government in the German language region.”

¹⁰⁴ Lois sur l’emploi des langues en matière administrative / Wetten op het gebruik van de talen in bestuurszaken *Moniteur Belge / Belgisch Staatsblad* 2 August 1966. The full text can be consulted from <www.ejustice.just.fgov.be>.

¹⁰⁵ Bijzondere wet tot hervorming der instellingen/ Loi spéciale de réformes institutionnelles, *Moniteur Belge / Belgisch Staatsblad* 15 August 1980. The full text can be consulted from <www.ejustice.just.fgov.be>.

¹⁰⁶ Wet houdende diverse institutionele hervormingen / Loi du 16 juin 1989 portant diverses réformes institutionnelles, *Moniteur Belge / Belgisch Staatsblad* 17 June 1980. The full text can be consulted from <www.ejustice.just.fgov.be>.

¹⁰⁷ Wet van 15 juni 1935 op het gebruik der talen in gerechtszaken / Loi concernant l’emploi des langues en matière judiciaire, *Moniteur Belge / Belgisch Staatsblad* 22 June 1935. The full text can be consulted from <www.ejustice.just.fgov.be>.

¹⁰⁸ Wet houdende taalregeling in het onderwijs / Loi concernant le régime linguistique dans l’enseignement, *Moniteur Belge / Belgisch Staatsblad* 17 June 1980. The full text can be consulted from <www.ejustice.just.fgov.be>. The law was repealed for the German community by DCG 2004-04-19/36.

between the administrative services of the linguistic region Dutch and individuals;¹⁰⁹

- The Decree of 4 April 2003 on the restructuring of higher education in Flanders;¹¹⁰
- The Decree on the naming of public roads of 10 May 1999;¹¹¹
- The Decree of 19 April 2004 on the use of languages in teaching.¹¹²

2. SCOPE AND LIMITS OF THE RIGHT (including balancing with other rights)

- ✓ What is the scope and what are the limits of this right? Are there any deficiencies in this regard (e.g. non-compliance with EU or ECHR standards)? How are they balanced against other rights, values or interests?
 - The right to human dignity

Article 23 of the Belgian Constitution states that every person has the right to lead a life in accordance with human dignity. As noted, the provision links this enjoyment of the right to human dignity to a selection of economic, social and cultural rights as well. The right also guides legislative action by imposing on the legislature the obligation to pursue a policy aimed at the preservation of human dignity.¹¹³ It thus enshrines the right of everyone to lead a life in decency, also from an economic, social, environmental and cultural profile point of view, extending then to situations of unemployment, illness, old age, etcetera, yet also remaining accessible to those less disenfranchised.¹¹⁴

¹⁰⁹Decreet houdende aanvulling van de artikelen 12 en 33 van de bij Koninklijk Besluit van 18 juli 1966 gecoördineerde wetten op het gebruik van de talen in bestuurszaken wat betreft het gebruik van de talen in de betrekkingen tussen de bestuursdiensten van het Nederlands Taalgebied en de Particulieren, *Moniteur Belge / Belgisch Staatsblad* 30 June 1980. The full text can be consulted from <www.ejustice.just.fgov.be>.

¹¹⁰Decreet betreffende de herstructurering van het hoger onderwijs in Vlaanderen, *Moniteur Belge / Belgisch Staatsblad* 4 April 2003. The full text can be consulted from <www.ejustice.just.fgov.be>.

¹¹¹Decreet betreffende de benaming van de openbare wegen / Décret relatif à la dénomination des voies publiques, *Moniteur Belge / Belgisch Staatsblad* 15 January 2000. The full text can be consulted from <www.ejustice.just.fgov.be>.

¹¹²Decreet van 19 april 2004 betreffende de taaloverdracht en het gebruik van de talen in het onderwijs / Décret du 19 avril 2004 relatif à la transmission des connaissances linguistiques et à l'emploi des langues dans l'enseignement, *Moniteur Belge / Belgisch Staatsblad* 9 November 2004. The full text can be consulted from <www.ejustice.just.fgov.be>.

¹¹³A. VANDENBURIE, *L'article 23 de la Constitution. Coquille vide ou boîte aux trésors?* (La Charte, 2008), p. 144.

¹¹⁴*Ibid.*, p. 146.

As remarked in the literature, the human dignity of a citizen will obviously come through by the fact that he ensure his basic necessities and family needs.¹¹⁵ However, the Belgian Constitution in its Article 23 adds a fundamental component to this conception of human dignity. This component is the preservation of a healthy environment, and the personal self-development of each citizen in its own walk of life.¹¹⁶The exact contents of the concept of human dignity in Belgium nevertheless remain obscure, and given the lack of definition in the Belgian constitution, much has been left to be developed by legal doctrine and jurisprudence. On that footing, human dignity must be understood as a broad concept that goes beyond the limits of such actual economic, social and cultural rights. It accrues to all Belgian nationals, as well as (albeit in qualified form) to foreigners.¹¹⁷Strong links are visible with the principles of non-discrimination and equality, as Article 23 may be invoked in conjunction with the articles 10 and 11 of the Belgian Constitution that preserve those rights. The latter are, in turn, 'glued' to the ECHR and EU Charter standards, by virtue of the Constitutional Court's sudden acceptance in 1989 that when a plea calls for judicial review against the domestic standard, on the basis of articles 10 and 11 of the Constitution, it may also proceed to consider a possible violation of the identical ECHR/EU norm.¹¹⁸ In this way, rules of Belgian constitutional law are 'merged' with the analogous supranational standards, and no legal gaps, discrepancies or deficiencies are allowed to arise.¹¹⁹

¹¹⁵ F. KURZ, 'L'application du principe du respect de la dignité humaine: un défi pur les juridictions du travail', *JTT: Droit du travail, droit de la sécurité sociale, droit judiciaire social, droit pénal social* 2002, nr. 15, p. 275.

¹¹⁶ A. VANDENBURIE, op. cit., p. 157.

¹¹⁷ Article 191 of the Belgian Constitution provides that any foreigner on Belgian territory enjoys the protection granted to his person and his property, save for those exceptions established by law.

¹¹⁸ Court of Arbitration, judgment nr. 23/90 of 13 October 1989. Article 10 reads: "There are no class distinctions in the State. Belgians are equal before the law", and article 11: "Enjoyment of the rights and freedoms recognized for Belgians should be ensured without discrimination". The underlying rationale has been that national rules may not make random distinctions between persons holding Belgian nationals and foreigners; hence the need to scrutinize whether the rights conferred to members of the latter category under the ECHR and EU law have not been violated. Since 2003, a special law has extended the Court's competence to the articles 170, 172 and 191 of the Constitution, which relate respectively to the principle of legality, the principle of equality in tax matters, and the equality of Belgians and strangers where it concerns the protection of persons and goods.

¹¹⁹ In so doing, the Constitutional Court managed to circumvent its official lack of competence to directly test the legality of Belgian statutes against international and European law (article 142 only allows for such testing against the Belgian Constitution). See further on this e.g. T. VANDAMME, 'Prochain arrêt: La Belgique!', *European Constitution Law Review* 2008, p. 127-148, and P. POPELIER, 'Belgium: The Supremacy Dilemma', in P. POPELIER, C. VAN DE HEYNING & P. VAN NUFFEL (eds.), *Human Rights Protection in the European Legal Order: The Interaction Between the European and the National Courts* (Intersentia, 2011), pp. 149-151. There exists no such limitation on the competence of the Court of Cassation and the Council of State, who may freely test national rules against treaty standards.

The right to human dignity under Article 23 of the Belgian Constitution can be subjected to limits provided for by law, conform to the usual conditions applicable under the ECHR. In this way also, it echoes Article 22 of the UDHR, Article 10 of the ICCPR and Article 13 of the ICESCR.

As regards balancing, as noted human dignity rights is closely related to the social, economic and cultural rights cross-referred to in Article 23:

- 1° The right to work and free choice of a professional activity in the framework of a general employment policy, aimed among other to ensure a level as high as possible and stable employment, the right to conditions of work and to fair remuneration, as well as the right to information, consultation and collective negotiation;
- 2° the right to social security, protection of health and the social assistance, medical and legal aid;
- 3° the right to a decent accommodation;
- 4° the right to a protection of a healthy environment;
- 5° the right to self-development culturally and socially.

The principal balancing choices here fall to the legislator and executive, with room for marginal scrutiny by the competent instances in the domestic judiciary. In this matter no striking frictions or difficulties can be reported.¹²⁰

- Right to a due process and access to the judiciary.

The right to due process and access to the judiciary is considered in Belgium as a special prerogative, as no one can waive the right to bring a case to court in order to ensure or defend his rights.¹²¹ It is obviously qualified by the requirements of admissibility under public or private (procedural) law. As stated in Article 17 of the Belgian Judicial Code, an action is inadmissible if the applicant does not have an interest and expresses it, and these conditions of admissibility are common to all (civil) actions.¹²²

¹²⁰ Cf. in similar terms J. VELAERS, 'De samenloop van grondrechten in het Belgische rechtsbestel', in A. NIEUWENHUIS et al., *Samenloop van grondrechten in verschillende rechtsstelsels, multiculturaliteit in het strafrecht & schuldsanering en collectieve schuldenregeling*, (Boom Juridische uitgevers, 2008), p. 81.

¹²¹ G. DE LEVAL, *Éléments de procédure civile* (Larcier, 2005), p. 16. Here we may distinguish between waiving the action before starting a procedure or discontinuing one. The latter is not encompassed in the right as such.

¹²² G. DE LEVAL, *op. cit.*, p. 17.

The right to access to the judiciary is considered to be a broad right, as it contains different components. Belgian legal doctrine generally regards the right to due process to constitute a derivation of it, rather than an independent right of itself. Nevertheless, both are conjoined in reflecting the exigencies of the 'monumental' Article 6 ECHR.¹²³ The same holds for Article 47 of the EU Charter of Fundamental Rights, which grants the right to effective judicial protection in terms similar to that of the ECHR.¹²⁴ The judiciary, and the Court of Cassation for its part, generally subscribe to the precept that the right of the accused to a due and a fair trial before an independent and impartial tribunal established by the law "is integrated into a broader notions that the defendant cannot be put in an illegal injurious situation".¹²⁵

Perceptions of the ECHR have had, and still have, a clear impact on the national law. Its Articles 6 and 13 however did not completely upset or revolutionise Belgian law, as already before their entry into force, the legislature and the Courts were already actively tending to the relevant rights of individuals. All the same they triggered some notable legislative changes, as well as reversals of jurisprudence, particularly with regard to impartiality, decision of cases within reasonable time, the costs of translations in hearings, the equality of arms in proceedings, the admissibility of anonymous testimonies in proceedings, among others. Special mention must be made of the impact of the exigencies of Article 6 in criminal trials (*viz.* that anyone charged with a criminal offense to be assured that his case is heard fairly, with a sufficient measure of openness, within a reasonable time and by an independent and impartial tribunal established by law).¹²⁶ In criminal trials, whenever the accused contends a violation of said rights has occurred, the judge is to assess whether the alleged breach has made a fair trial impossible before rendering judgment.¹²⁷ The case law of the Court of Cassation testifies here to the existence or enforcement of close harmony between Belgian standards and those of the ECHR.¹²⁸

¹²³ J. DU JARDIN, 'Le contrôle de légalité exercé par la Cour de cassation sur la justice disciplinaire au sein des ordres professionnelles', *Journal des Tribunaux* 2000, p. 625-642.

¹²⁴ The official Explanations underscore that it has roughly 'absorbed' the standards of Articles 6 and 13 ECHR.

¹²⁵ F. KUTY, *Justice pénale et procès équitable, Notions générales, Garanties d'une bonne administration de la justice – Volume I* (Larcier, 2006), pp.2-3.

¹²⁶ M-A. BEERNAERT, N. COLETTE-BASECQZ, C. GUILLAIN, P. MANDOUX, M. PREUMONT and D. VANDERMEERSCH, *Introduction à la procédure pénale* (La Charte, 2014), p. 17.

¹²⁷ *Cass.*, 15 January 1991, *Arr. Cass. I*, p. 444.

¹²⁸ See e.g. *Cass.*, 18 May 1994, *Rev. Dr. Pén. Crim.* 1995, p. 78; *Cass.*, 15 December 2004, *J.T.* 2005, p. 4.

The right to due process and access to the judiciary is to be balanced with other civil rights, particularly when a violation of another civil right risk to occur. In addition, it has to be pointed out that it is obviously connected to the right to legal aid, expressly contained in Article 23 of the Belgian Constitution. Under Article 664 of the Judicial Code, mirroring again Article 6 ECHR and 47 EU Charter, legal aid is to be provided, in whole or in part, to those who not have the necessary means to meet the cost of litigation, including related extrajudicial proceedings.

- The right to a language

As remarked above, the current linguistic situation in Belgium is the product of a complex historical development.¹²⁹ When the country was founded in 1830 and drafted its first Constitution, it was composed for two major language groups, French and Dutch speakers. French was the language used in the legislature, executive and judiciary (including the civil service), education, among the 'upper class' professions and the bourgeoisie generally. French was also the language in which laws were published. This led to situation in which the Dutch speaking population suffered a serious protection deficit.¹³⁰ It was only the Constitution of 1931 that (then Article 23, the current Article 30) that ensured the right to language. Meanwhile, laws adopted in 1873 (allowing the use of Dutch in criminal cases in Flanders) and 1878 (allowing the use of Dutch in administrative affairs) already offered steps forward, the latter stipulating that notices and communications from the central government were to be drawn up either in Dutch or in Dutch and French to be valid for Flanders.¹³¹ Until 1883, education in secondary schools had been entirely in French. On 15 October of that year, the Law on the use of Dutch in public secondary education was approved.¹³² This was the act on language in Belgium that took into account the principle of territoriality, further elaborated upon below. 1898 saw the adoption of the first linguistic equality law. The passing of that act entailed that, henceforth, laws were voted, ratified, promulgated and published both in Dutch and French. Also from then on Royal and Ministerial Decrees were drawn up

¹²⁹ On this see further H. VUYE, 'Language and Territoriality, in Flanders in a Historical and International Context', Agentschap voor Binnenlands Bestuur (accessible at <<http://www.flanders.be/en/publications>>), p. 17-24.

¹³⁰ A poignant manifestation was e.g. the fact that suspects could be sentenced despite their being unable to defend themselves in court for not understanding a word during their trial.

¹³¹ This was not required from municipal and provincial authorities.

¹³² It did not apply to private education institutions.

and promulgated in this two national languages. The principle of territoriality was officially 'anchored' on 31 July 1921, when a reformed law on languages in administrative affairs was passed. Until then, a tension existed between the personality and the territoriality existed, ultimately settled in favour of the latter, leading to the demarcation of the three language areas.¹³³

The 1931 Constitution that enshrined the right to language was very progressive overall. The formulation employed has been retained up to the present day. Article 30 ordains that the use of languages current in Belgium is subject to free choice; its regulation can only proceed through law, and only for acts of the public authorities and matters regarding the judicial process.¹³⁴ It thus enshrines the right to use any language, with only limited exceptions.¹³⁵ The territoriality principle functions as the main tool to define its scope and boundaries. As indicated by VAN PARIJS, it serves to grant a privilege within the limits of territory to the identity associated with the language to which that territory has been ascribed.¹³⁶ Thus, the principle of territoriality guarantees the primacy of the main language in each monolingual region, as well as the equality between the languages in the Belgian bilingual region.

This right is intrinsically linked to the aforementioned due process / fair trial rights, as Article 5 ECHR classically holds that arrested persons shall be informed, in a language which they understand, of the reasons for their arrest and any charge brought against him, and that persons charged with a criminal offence shall be informed, in a language they understand and in detail, of the nature and cause of the accusations against them; assistance to an interpreter shall be granted if (s)he cannot understand or speak the

¹³³ The personality principle entails that every citizen has the freedom to address the authorities in any of the national languages, regardless of their region of residence; the territoriality principle is based on the fact that the language used in a particular region strictly follows on its borders, and the connected right cannot travel beyond.

¹³⁴ "L'emploi des langues usitées en Belgique est facultatif; il ne peut être réglé que par la loi, et seulement pour les actes de l'autorité publique et pour les affaires judiciaires / Het gebruik van de in België gesproken talen is vrij; het kan niet worden geregeld dan door de wet en alleen voor handelingen van het openbaar gezag en voor gerechtszaken."

¹³⁵ The exceptions may however be imposed by the federal authority and thus for the whole country. See I. BAMBUST, A. KRUGER & T. KRUGER, op. cit., p. 216.

¹³⁶ Ph. VAN PARIJS, 'The Linguistic Territoriality Principle: Right violation or Parity of Esteem?', in P. DE GRAUWE & Ph. VAN PARIJS (eds.), *The Linguistic Territoriality Principle: Right Violation or Parity of Esteem?* (Re-Bel-Book, 2011), p. 11.

language used in court.¹³⁷ It deserves attention in this context that the Law of 15 June 1935 regarding the languages used in judicial proceedings contains an unusual blend of the two aforementioned principles, *viz.* a severe territoriality principle regarding the language of procedures and written notifications, and a personality principle concerning the language spoken by the citizen in court.¹³⁸ It should nevertheless be clear that monolingualism is the rule in Belgian judicial proceedings, either of the civil or criminal type, and that this regime is applied in an absolute manner, even in circumstances in which person(s) concerned understand(s) the other language as well.¹³⁹

3. INTERPRETATION AND APPLICATION

- ✓ How is this right interpreted and applied by courts? Are there any deficiencies in this regard?
- The right to human dignity

In the outlining of the scope of the right of human dignity, it was already indicated that its concept and limits have been further developed in case law and legal practice. Numerous examples can be brought to the fore. On the whole, the role of the judge in applying this right would appear much more important here than in other rights.

The judiciary certainly does not shy away from awarding claims on that basis, though Article 1 EU Charter has so far not played any role here. An example of the strong reliance on the domestic equivalent offers the judgement of the District Court of the

¹³⁷With the exception of this specific application with regard to criminal matters, it should simultaneously be stressed that the Convention does not explicitly guarantee the right to use a particular language in communications with public authorities, or the right to receive information in a language of one's choice; cf. in this light also ECtHR, *Mathieu-Mohin and Clerfayt v Belgium*, judgment of 2 March 1987, Series A, No. 113.

¹³⁸In the civil, commercial and labour courts in the French-speaking provinces, the entire procedure takes place in French. The same holds for the Dutch-speaking provinces, where the entire procedure is conducted in Dutch. In the courts of the German language district, all procedures are conducted in German. In the courts of Brussels, proceedings are initiated in French when the defendant resides in the French-speaking part of the country, in Dutch when the defendant resides in the Dutch-speaking area, and in French or Dutch (at the plaintiff's choice) if the defendant resides in the Brussels-agglomeration or when he or she has no known residence in Belgium. At the same time, in the courts of Brussels it is possible to change the language of the proceedings, and the defendant may ask that the proceeding (initiated in French or in Dutch) continues in the other language (Dutch or French). On this see further I. BAMBUST, A. KRUGER & T. KRUGER, *op. cit.*, p. 221-222.

¹³⁹The language rules are not to be taken lightly, because if they are violated, the proceedings are deemed null and void *ex officio*.

Canton Mouscron-Warneton-Comine, in which the request for interruption of the water supply was refused on the ground that depriving a person of access of water is equivalent to degrading treatment.¹⁴⁰ In a wholly different context, reference may be had to the Labour Court of Hasselt, ruling that the exception contained in Article 851 of the Judicial Code was unenforceable as the imposition of a bond on an asylum seeker residing legally on Belgian territory contravened the right contained in Article 23(1) of the Constitution.¹⁴¹ Another example of Belgian courts' application can be found in the judgment of the Council of State (Administrative Law Division) that set out that a beneficiary of social assistance cannot be banned from choosing the doctor (s)he wants on pain of forfeiting the benefit, as that also was considered to be incompatible with the right to lead a life consistent with human dignity.¹⁴² Equally, the Labour Court of Mons has held it to be contrary to the right of human dignity to require of the spouse of a beneficiary of an unemployment benefit that (s)he must decline to profit from that revenue, since the right enshrined in Article 23(1) of the Constitution is an individual and personal right; it is thus guaranteed without limitations founded on marital or family status.¹⁴³

The right to human dignity is consequently something more than a vague constitutional goal, as it has become a guiding principle of action. This is evident from the application of other state bodies as well, whereby the legislature has been bound to duly take into account that the broad ambit of the right places considerable fetters on its scope of manoeuvring.¹⁴⁴

The smooth interplay with other (international and supranational) rights, which can give rise to a denial of claims nonetheless, shines through in multiple other judgments. Of these we may highlight the recent attempt to limit the legislator's discretion in allowing for children to be kept in detention centres. In case number 166/2013, decided on 19 November 2013, the Constitutional Court responded in the following way:¹⁴⁵

¹⁴⁰District Court of Mouscron-Comines-Warneton, 24 May 2004, published in *Revue générale de droit civil belge* 2008, p. 273. Similarly see Civil Court of Charleroi, 19 January 2000, *Revue générale de droit civil belge* 2000, p. 593.

¹⁴¹Labour Court of Hasselt, 28 November 1995, published in *Cahiers de droit de la santé* 1996, p. 536.

¹⁴²Council of State, judgment nr. 64.554 of 17 February 1997 (Mourad).

¹⁴³Labour Court of Mons, 27 April 1999, *Revue régionale de droit* 2000, nr. 197, p. 57.

¹⁴⁴A. VANDENBURIE, op. cit., p. 172.

¹⁴⁵English translation of the summary accessible at <www.jura.be>.

" [...] Art. 74.9 of the Act is compatible with the articles 10, 11, 23, paragraph 1, and 191 of the Constitution, combined with the general principle of human dignity, article 3 ECHR and the article 37a) CRC, given that keeping children in detention centers does not constitute inhuman and degrading treatment. These provisions do not absolutely prohibit the detention of minors. The maintenance of minor children for their expulsion is not more contrary to the right to lead a life worthy of human dignity. Art. 37 CRC also authorizes the detention of minors if done according to law and to the extent that such ownership is decided on the last resort and for as short a time as possible [...]"

Another recent illustration of the judicial management of interconnected rights forms the ruling of the Constitutional Court of 30 April 2015 in case number 48/2015, wherein:¹⁴⁶

" [...] [t]he Court dismisses the action for annulment of the art. 11 of the Law of 20 January 2014 on the reform of jurisdiction, procedure and organization of the State Council (introduction of compensation proceedings before the Council of State in Art. 30/1 LCCE) concerning the violation of Article 23 of the Constitution, combined with the Aarhus Convention and the EIA Directive. According to the case law of the European Court of Justice regarding the excessive nature or otherwise of certain costs that cannot be purely subjective, the competent court must take into account the economic situation of the person concerned, and that it may consider reasonable prospects of successful applicants, the importance of the issue for the applicant and for the protection of the environment, the complexity of the law and the procedure applicable, and any possible rashness in resorting to its various stages. First, it should be noted that the procedural indemnity represents a lump sum compensation for costs and legal fees of the party that won the case and not full compensation for all costs incurred by it. It reports to the legislature's discretion, to organize a system repeatability of costs and attorney's fees, to choose the formula that appears most timely, given the many interests and principles, sometimes contradictory, present.

Furthermore, A.R. of 28 March 2014 concerning the compensation procedure referred to in Article 30(1) of the consolidated laws on the Council of State determines the basic amount, and the maximum and minimum amount of the compensation procedure. The Administrative Law Division of the Council of State was also approachable when granting the compensation procedure to derogate from the basic amount set in the Royal Decree, as the fee does not exceed the maximum and minimum amounts and it also takes into account the financial capacity of the losing party, the complexity of the case and the patently unreasonable nature of the situation. In addition, the Administrative Law Division has the option to waive the minimum amount fixed by Royal Decree when a person receiving second-line legal aid finds himself in a clearly unreasonable situation. The system allows for limitation of the effects for the party that loses the case and does not possess substantial financial resources. The procedure for granting compensation in proceedings before the

¹⁴⁶English translation of the summary accessible at <www.jura.be>.

Administrative Law Division of the State Council thus meets the conditions set by the Court of Justice. The procedural indemnity scheme established by art. 11 of the Law of 20 January 2014, contested here, cannot therefore be considered an 'excessive cost' [...]".

- Right to a due process and access to the judiciary

There are as much, if not more, examples that could be advanced of recourse to and interpretation of the right to due process in the case law of Belgian Courts. From the rich field of criminal law, sampling case law of the four previous decades, we may e.g. point to:¹⁴⁷

1. The condemnation of situations in which the accused was expected to prove his innocence;
2. The safeguarding of the possibility for the accused to inspect and rebut the evidence adduced against him by the prosecution;
3. The prohibition of basing a conviction exclusively or decisively on anonymous statements;
4. Outlawed infringements of the principle of equality of arms between parties;
5. Relaxation of the authority of *res judicata* of rulings in criminal proceedings for judges in civil actions when that were to deprive a third party, not party in the criminal proceedings, the right to rebut the alleged evidence.

Of the many recent rulings we believe particularly striking the judgment of the Court of Cassation of 13 November 2012 in case number RG.P.12.1082.N, following on the ECtHR's *Salduz* ruling, where it indicated that:¹⁴⁸

"[...] The rights of defense and the right to a fair trial are violated when a suspect made statements during the hearing by the police in violation of the duty of information and without the possibility to be assisted by a lawyer, but that fact does not automatically mean that it is definitely impossible to investigate fairly the cause of an accused defendant. When the statements are not used as evidence by the judge determining that no abuse or coercion has clearly taken place, and that the defendant was not located in a vulnerable situation at the time of the hearing or during instruction, or has been remedied to the vulnerable situation of the accused to an effective and adequate manner, the fairness of the trial is ensured [...]".

¹⁴⁷Following on M-A. BEERNAERT, N. COLETTE-BASECQZ, C. GUILLAIN, P. MANDOUX, M. PREUMONT and D. VANDERMEERSCH, *Introduction à la procédure pénale* (La Chartre, 2009), pp. 18-19.

¹⁴⁸English translation of the summary accessible at <www.jura.be>.

In similar deferential terms, the judgment of the Court of Cassation in case number RG.C.14.0050.F of 27 November 2014, where it was indicated that:¹⁴⁹

“[...] Article 57 of the Judicial Code, under which the appeal period runs from the delivery date of the decision, unless the law has provided otherwise, does not require that derogations therefrom are expressly reserved, but simply that the exemption can be deduced from the legal provisions applicable to the proceedings in question. Article 1051, paragraph 1 of the Judicial Code, which provides that the period for appeal is one month from the delivery date of the judgment or its notification made in accordance with Article 792, paragraphs 2 and 3, certainly establishes an express derogation from Article 57, but the remainder of an application of this article does not restrict the reserve required by it to cases that it designed.

Article 488bis, c), paragraph 1, paragraph 9 of the Civil Code is limited in directing that the notification of the order designating a provisional administrator has accepted his mission will be communicated bypost, without depending on the regularity of some other form, and without requiring especially the particulars provided by Article 792, paragraph 3 of the Judicial Code.

To the extent that it does not appear from the documents which the Court may regard that the applicant has argued before the appeal court that the absence of these indications relating to remedies would have compromised the right of access to the judge protected in Article 6, paragraph 1 ECHR, the plea is inadmissible, as it would require the Supreme Court to an appreciation of facts exceeding its powers [...].”

Equally, the recent judgment of the Court of Cassation of 10 September 2013 in case number RG.P.12.0376.N. makes clear that indicates that the existence of deficits in obtaining effective judicial protection cannot be presumed, so that the right to due process and access to the judiciary will not so easily be deemed infringed:¹⁵⁰

“[...] Nor Article 6 of the European Convention on Human Rights and Fundamental Freedoms nor the rights of defense or the right to a fair trial preclude that information be considered for simply guiding instruction and the independent collection of evidence without concretely specifying from what origin that information was derived, provided that it did not appear to have been obtained irregularly.

The obligation on a party to make plausible the claim that information which has no probative value but is considered only to guide instruction and the independent gathering of evidence, was obtained irregularly and should not be allow to be considered as more than a mere assertion, does not make theoretical or illusory the applicant's rights of defense nor its right to a fair trial, including the right to equality of arms and the right to an adversarial trial (Art. 6 ECHR) [...].”

¹⁴⁹English translation of the summary accessible at <www.jura.be>.

¹⁵⁰English translation of the summary accessible at <www.jura.be>.

Even if the staked claims do not automatically prove successful, these pronouncements demonstrate how systemic harmony is pursued between the Belgian legislation and the most relevant supranational source, contained in the European Convention on Human Rights.

- The right to a language

The right to a language has received inestimable recognition in Belgian courts' practice. Rather than invoking external sources, most of the litigation occurring revolves around the proper interpretation to be given to the relevant domestic laws and, with special salience, the Law of 15 June 1935 relating the use of languages in judicial proceedings. Since it is once again impossible to do justice to the entire body of case law within the confines of this report, let us again offer some select pickings with a keen emphasis on more recent rulings.

For starters, we consider the Constitutional Court's observations in case number 81/95, delivered on 14 December 1995, recognizing that:¹⁵¹

"[...] the applicants who, although they belong to the French language section of the army, are not subject to the laws on the use of languages in administrative matters, and may thus use Dutch to lodge an application with the Court [...]".

A related flexibility was exhibited by the Constitutional Court in its judgment in case number 62/2000, rendered on 30 May 2000:¹⁵²

"[...] In 1963, Parliament amended the art. 46 and 53 of the Law of 15 June 1935 on the use of languages in judicial matters, given the fact that some unilingual court cantons included municipalities where, as required by art. 6, para. 4 of the Law of 28 June 1932 on the use of languages in administrative matters, as amended by the Act of November 8, 1962, notices and communications to the public must be established in both national languages. The preparatory work of the Law of 9 August 1963 reveal that the legislature has established a link between the existence of facilities in administrative matters in the municipalities on the

¹⁵¹English translation of the summary accessible at <www.jura.be>.

¹⁵²English translation of the summary accessible at <www.jura.be>.

linguistic border, and compulsory knowledge of the second national language of judges of peace and / or substitute judges of peace and chief clerks of court is a precept in these municipalities.

The measure which is embodied in ss. 46 and 53, par 5 of the Law of 15 June 1935 did not exhaustively regulate the use of languages in judicial matters, but allows that the laws on the use of languages in administrative matters, coordinated by the Royal Decree of 18 July 1966, are respected for the completion of administrative acts which fall within the remit of the cantonal jurisdictions. It follows from the foregoing that articles 10 and 11 of the Act of 25 March 1999 on the reform of cantonal judiciaries, which modify the art. 46 and 53 para. 5 of the Law of 15 June 1935, have no other scope than allowing for compliance with the requirements of art. 1, 4° of the Law of 28 June 1932 on the use of languages in administrative matters in the municipalities on the linguistic borders, when the justices of the peace perform administrative acts regarding such common inhabitants on the linguistic border. Since the impugned legislation's dispositions do not affect the use of languages in administrative matters of municipalities with facilities, they should not be adopted at a special majority, and the pleas which alleges a breach of art. 129, para. 2, first indent, second sentence, should be dismissed [...]."

No surprise does then offer the judgment of the Constitutional Court of 8 of May 2014 in case number 75/2014, settling that:¹⁵³

"[...] Article 4(1) al. 2 of the law on the use of languages in judicial matters does not violate Articles 10 and 11 of the Constitution, in conjunction with Article 6(1) ECHR. Formed during an arbitration procedure under Part Six of the Judicial Code ("Arbitration"), the legal proceedings to which section 1691(2) Judicial Code (as worded before its repeal by section 2 of the Act of 24 June 2013 amending the sixth part of the Judicial Code relating to arbitration) is not an incident within the meaning of article 37(2) of the Law on use of languages in judicial matters. This legal claim is a statement of claim within the meaning of Article 12 Judicial Code, which is formulated in a "writ of summons" in the sense of article 4(1) al. 2 of the law on the use of languages in judicial matters. There are reasonable grounds that a party to an arbitration claim before the Court of First Instance of Brussels admitting the challenge of the arbitrator is obliged to submit the application by establishing its Dutch citation when the referee is domiciled in the Dutch-speaking region. Any other view would mean that the language of the document instituting the proceedings is not determined by the domicile of the defendant, but by the choice of the parties to the arbitration proceedings. The fact that the challenged arbitrator has in practice an adequate knowledge of a language other than that of the linguistic region where he is domiciled, without legal obligation to use this language, changes nothing. Indeed, the legislature could reasonably consider that the language of the defendant in order to match the language of the linguistic region where he is domiciled. It is thus avoided that, if the plaintiff establishes the document instituting the proceedings in a language other than the language of the linguistic region where the defendant is domiciled, he belongs to the defendant to show that he does not have sufficient that other language to oppose the use thereof. The fact that the referee elects domicile within the meaning of Article 39 Judicial Code in the

¹⁵³English translation of the summary accessible at <www.jura.be>.

bilingual Brussels-Capital region is not relevant either, since the home referred to in Article 4(1), al. 2 of the Law on Employment of judicial matters is the home language within the meaning of Article 36 Judicial Code, that is to say, the "place where the person concerned is registered primarily in the civil records". The presumption that the language of the defendant is the language of the linguistic region where he is domiciled is not negated by the fact that the person concerned has taken up residence through an agent. Furthermore, the parties may not, by the election of domicile, affect the regulation of the use of languages in judicial matters, which is of public order [...]".

However, to not convey the impression that converse perspectives fail to prove successful, it may be observed how much greater bite and clout was awarded to the right to language in the Constitutional Court's judgment of 23 January 2014 in case number 11/2014:¹⁵⁴

"[...] The art. 4, para. 1, para. 2 of the Law of 15 June 1935 on the use of languages in judicial matters violates ss. 10, 11 and 30 Constitution, in that it does not allow a worker whose benefits are linked to a place of business in the territory of the bilingual Brussels-Capital region, the victim of an industrial accident, and to continue to introduce its action against the insurer law chosen by the employer in the language in which the insurer-law must apply to him under ss. 41, para. 1, 42 and 46, by the first of the Consolidated Laws of 18th of July 1966 on the use of languages in administrative matters. If art. 4, para. 1, para. 2 of the Law of 15th June 1935 must be interpreted as meaning that where the defendant is a corporation, the language of the originating feat is determined according to its registered office, even in disputes a work accident, while the victim of the accident at work or has used this language in dealings with the employer who chose the legal insurer or with the insurer-law, it creates at detriment of workers who have an accident at work who perform their services in the bilingual Brussels-Capital region, a difference of treatment which is not reasonably justified. Indeed, when the insurer-law is chosen by the employer and shall, if the employer is domiciled in the bilingual Brussels-Capital region, to use the French or Dutch language with the insured, as required by Articles 41(1) 42 and 46(1) of the Consolidated Laws of 18 July 1966, it is not justified that the lawsuit between a worker who suffers a work accident and an insurer who used French or Dutch in their social relations, in accordance with their legal obligations, including the contentious phase of these relations is to be conducted in another language, taking as a criterion the location of the head office of the insurer. The obligation to conduct the proceedings in a language other than knotted relations conforms neither to insured's rights of defense, which must be explained in a language that is not his, or the efficient functioning of justice because judges will handle the case in a language other than that of the parts that come before them, and may lead to unnecessary costs since it can require the use of translators and interpreters jurors, as provided in the articles 8 and 30 of the Law of 15th June 1935 [...]".

¹⁵⁴English translation of the summary accessible at <www.jura.be>.

4. CASE LAW PROTECTING CIVIL RIGHTS

- ✓ When the right in question is recognised through case law, how are they enforced? Is there a relevant doctrine of precedent? Can violation of judge-made principle be invoked in courts? Must judges bring up of their own motion civil rights violations? Etc.

The first part of this question has in part already been addressed in the response to the second question. As will be further elaborated below in the reply to the seventh question, the principle of legal certainty in the Belgian order is held to imply authority of *res judicata*. As a corollary, judge-made principles may indeed be invoked in courts. Revisions of case law (possibly entailing *revirements de jurisprudence*) can be conducted only for the purpose of correcting judicial errors, not to engage in fresh examinations of the (facts of the) case, and neither can the mechanism be employed as a 'disguised appeal'. Violations of civil rights are not to be brought up *ex officio* in either private, criminal or administrative law proceedings so that generally reference may be had to the adage of *onus probandi incumbit actori* – save for where said rights are encapsulated in public policy (*ordre public*) norms, or where such is demanded by EU law (which has, as known, restricted the behest to the rules of competition law¹⁵⁵).

5. JUDICIAL ENFORCEMENT INSTITUTIONS AND BODIES

- ✓ Which institutions are responsible for the enforcement of this rights in your country? Please expose here the structure of the judicial system of the country under study. Indicate, in particular, whether the country under study has a constitutional court or equivalent body. If not, how is compliance with international, European (including EU) and national (constitutional) civil rights guaranteed. Explain the role of other relevant bodies (e.g. ordinary courts, specialized courts, etc.)

¹⁵⁵ ECJ, Joined Cases C-222/05 to C-225/05 *J. van der Weerd and Others v. Minister van Landbouw, Natuur en Voedselkwaliteit*; Case C-8/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*.

- ✓ How are these institutions regulated at national level (constitutions or constitutional instruments, special (i.e. organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other)
- ✓ Is the independence of these institutions and organs guaranteed? If so, how? Have they been concerns related to the independence of the judiciary in the country of study, which could undermine the effective enforcement of the selected civil right? Please indicate the different modes and modalities of enforcement of civil right carried out by the different judicial institutions involved.
- ✓ What are currently the main judicial procedures available to sanction, remedy or compensate for violations of the selected civil right (e.g. judicial review, damages, emergency measures, etc.). Indicate for each of them important information related in particular to time limits, costs, legal aid availability, length of proceedings, type of actions (e.g. collective action, class action), admissibility criteria (including standing conditions, delays, etc.) as well as merits conditions (acceptable grounds, substantive conditions, degree of control, evidential aspects, burden of proof, etc.). What are the consequences of successful or unsuccessful legal actions under each of the procedures (annulment, compensation, sanctions, etc?)
- ✓ Is the judiciary effective and/or trusted to protect civil rights, or do people turn to alternative modes of action in order to protect these rights (i.e. demonstration, media involvement, social network activities, lobbying, etc.)

In Belgium, the judicial task is entrusted to and exercised by courts and tribunals. Presently, four types of courts and tribunals exist. In keeping with Constitution, only the ordinary courts and tribunals belong to the judiciary, the others with special

jurisdiction possessing a special (distinct) status.¹⁵⁶ A concise yet comprehensive overview of the Belgian judicial system:

- *Ordinary courts and tribunals.* The range of ordinary courts and tribunals is composed of the following: the Court of Cassation,¹⁵⁷ Courts of Appeal,¹⁵⁸ Courts of Assizes,¹⁵⁹ Courts of First Instance,¹⁶⁰ and inferior or local courts.¹⁶¹ The disputes that can be brought before these courts or tribunals are either civil or criminal. The ordinary courts are entitled to resolve disputes related to civil rights, except those where jurisdiction has been assigned by the legislature to a specific administrative court. It deserves mentioning that disputes brought before ordinary private law courts are known as civil disputes, while revolving around subjective rights not necessarily of a civil status within the public law sense.
- *Arrondissement Court.*¹⁶² This Court belongs *in se* to the ordinary courts, but deserves to be set apart, as it has a special mandate that also impacts on the delineation of civil rights claims. It principally resolves conflicts between labour courts, commercial courts and courts of first instance where it is unclear which court is competent for the respective case. It is also the institution where legal help can be obtained from a so-called House of Justice,¹⁶³ further elaborated upon at the end of the present section.

¹⁵⁶ See Article 40 and Articles 141-161.

¹⁵⁷ Cour de Cassation / Hof van Cassatie.

¹⁵⁸ Composed by the Court of Appeal (Cour d'appel / Hof van Beroep) and the Labour Court (Cour du Travail / Arbeidshof). The Court of Appeal is divided into several divisions: the Civil Division (Chambres civiles / Burgerlijke Kamers), the Criminal Division (Chambres Correctionnelles / Correctionele Kamers), the Juvenile Division and the Indictment Division (Chambre des mises en Accusation / Kamer van Inbeschuldigingstelling).

¹⁵⁹ Cour d'assises / Hof van assisen.

¹⁶⁰ Composed by the Court of First Instance (Tribunal de première instance / Rechtbank van Eerste Aanleg), the Labour Tribunal (Tribunal du Travail / Arbeidsrechtbank) and the Commercial Court (Tribunal de commerce / Rechtbank van Koophandel). Moreover, the Court of First Instance is divided into three divisions: the Civil Court (Tribunal civil / Burgerlijke Rechtbank), the Criminal Court (Tribunal correctionnel / Correctionele Rechtbank) and the Juvenile Court (Tribunal de la jeunesse / Jeugdrechtbank). Since 2007, there has been a division called the Court for the Enforcement of Sentences (Tribunal de l'application des peines / Straftuitvoeringsrechtbank) at the Court of First Instance of Antwerpen, Brussels, East Flanders, Liège and Hainaut. See further on their internal functioning <www.e-justice.europa.eu> and <www.justice.belgium.be>.

¹⁶¹ Composed by the Civil magistrate (Juge de paix / Vrederechter), the Police Court (Tribunal de police / Politie rechtbank).

¹⁶² *Arrondissementsrechtbank / Tribunal d'arrondissement.*

¹⁶³ *Justitiehuis / Maison de justice.* There is one 'House of Justice' in each judicial arrondissement, and there are two in the arrondissement Brussels-Capital (a Dutch- and French-speaking one).

- *Administrative Tribunals.* Administrative tribunals are constituted by the legislature. They are only competent to resolve disputes concerning political rights. Numerous administrative jurisdictions have been established all the same, equipped with well-defined powers.
- *Council of State.* This is a specialised court with a special status bestowed by and defined in the Co-ordinate Act of the Council of State of 12 January 1973.¹⁶⁴The Council of State is only competent to hear disputes between citizens and public authorities or between public authorities (disputes between citizens belonging to the jurisdiction of ordinary courts). However, not all disputes between public authorities and citizens are susceptible to be brought before the Council of State, as it will be the nature of the particular object of litigation (*objectum litis*) that decides the competent jurisdiction. The most important task of the Council of State is to annul and/or suspend illegal administrative jurisdictional acts. The Council thus only resolves 'objective' disputes, in the sense that it is to verify if public authorities have complied with the law, and is not principally tasked to secure and enforce individual rights.
- *Constitutional Court.* This is a specialised court that enjoys a special status as well, by virtue of the Special Act of 6 January 1989 on the Constitutional Court.¹⁶⁵ Placed on the same footing as the Council of State, the Constitutional Court is competent only to resolve disputes between citizens and public authorities or between public authorities. The Constitutional Court also has the power to annul and/or suspend laws, decrees and ordinances that are deemed to violate certain articles of the Constitution, or which otherwise impinge on the division of powers between the different level of governance, i.e. the federal, community and regional. The Constitutional Court therefore also is in the business of 'objective law', though indirectly subjective rights may turn out to be safeguarded as well.

¹⁶⁴ Lois sur le Conseil d'État, coordonnées le 12 Janvier 1973 / Wetten op de Raad van State, gecoördineerd op 12 Januari 1973, *Moniteur Belge / Belgisch Staatsblad* 21 March 1973. The full text can be consulted from <www.ejustice.just.fgov.be>.

¹⁶⁵ Loi special sur la Cour constitutionnelle / Bijzondere wet op het Grondwettelijk Hof, *Moniteur Belge / Belgisch Staatsblad* 7 January 1989. The full text can be consulted from <www.ejustice.just.fgov.be>.

Having mapped the various types and levels of jurisdiction, we can proceed to identify the different mechanisms for protection of specifically the right to human dignity, the right of due process and access to the judiciary, and the right to language. These mechanisms will be spotlighted along the lines of the following divide:¹⁶⁶

- Those offering protection against normative acts, either legislative or regulatory, and
- Those offering protection against actions committed by particular entities, either public authorities or private persons.

Before proceeding, we must underline that the three selected rights enjoy the same scope of judicial protection, i.e. they can support or make up the essence of a claim at every level of the judiciary. This is not to say that no divergences exist between the types of dispute and the extent of review, as will be pointed out where relevant.

A. *Protection mechanism against normative acts*

If the violation of the right originates from a *legislative action*, holders of civil rights can claim protection if these are recognised as accruing to them, and based in hierarchically equivalent or superior provisions. In the Belgian legal system, as mentioned before, international and European law contain such norms alongside the Constitution. Such norms therefore are capable of taking precedence over and affecting the validity of legislative acts.

As regards the type and extent of the judicial review, a subsequent distinction can be made; on the one hand, there is a *fuzzy control*, i.e., a kind that flags the (in)compatibility of a national rule or decree with international law and sets out an order of precedence between the jurisdictions; on the other hand, there is a *concentrate control*, focused in a single jurisdiction. Depending on the mechanism of review, two different results may ensue. In the first line, if an incompatibility between a national decree or law and a norm

¹⁶⁶ This division follows on K. LENAERTS, P. VAN YPERSELE & J. VAN YPERSELE, ‘La protection des droits sociaux fondamentaux dans l’ordre juridique de la Belgique’, in J. ILLIOPOULOS-STRANGAS, *La protection des droits sociaux fondamentaux dans les Etats membres de L’Union européenne*” (Bruylant, 2000), p. 204 ff.

of international/European law is identified, the judge will be limited to disapply the national norm. In the second case, the result is quite different, as the judge himself will declare the law or decree null and void.¹⁶⁷ With this typology we can now (re)allocate the different components of the judiciary.

- *Fuzzy control*.¹⁶⁸ The protection of civil and social rights is guaranteed primarily by the control exercised by the Council of State.¹⁶⁹ This institution issues a motivated advice with regard to the text and contents of the proposed law or decree. The advice extends to scrutinising the compatibility of the (envisaged) domestic law and international/European law. The advice possesses no binding force, but carries considerable weight in the sense that, if its conclusion were to be that there exists an incompatibility, the legislature will be forewarned that in all probability, at a later stage the law or decree will be annulled by a competent judge. It is at that stage that *concentrate control* rears its head.
- *Concentrate control or constitutional control*.¹⁷⁰ This type of control is limited to scrutinising the division of powers between the federate entities and the federal state. Depending on the provision put up for review, the Constitutional Court will engage in a classic or more original check of constitutionality.¹⁷¹ We need not dwell further on this bifurcation, referring the reader instead to the procedure in the Special Act of 6 of January 1989, Title V, Articles 67-78.

If the violation of the right is held to stem from *regulatory action*, the rights holders can proceed to either administrative courts or the civil law jurisdiction alleging the commission of a tort by a public authority. The Council of State can still play a role here, as alongside its consultative competence, it disposes of a judicial branch competent to

¹⁶⁷ K. LENAERTS, P. VAN YPERSELE & J. VAN YPERSELE, op. cit., p. 204.

¹⁶⁸ Or control *a priori*.

¹⁶⁹ See Article 160 of the Constitution and Articles 2 to 4 of the Coordinated Laws on the Council of State.

¹⁷⁰ Or control *a posteriori*.

¹⁷¹ K. LENAERTS, P. VAN YPERSELE & J. VAN YPERSELE, op. cit., pp. 208-209.

annul and/or suspend administrative acts,¹⁷² including decisions and regulations. Moreover, Article 159 of the Constitution allows for all judges to waive the application of regulations encroaching on civil rights.¹⁷³

B. Protection mechanism against actions committed by particular entities, either public authorities or private persons

When the violation of the relevant right(s) originates from an *action committed by public authorities*, it is the Administrative Law Division of the Council of State that ultimately enjoys competence to suspend or annul individual administrative decisions.¹⁷⁴ By virtue of articles 144 and 145 of the Belgian Constitution, disputes relating to civil and political rights are assigned to the ordinary courts. The jurisdictional competence of the Council of State is equally excluded when the contested measure consists of a refusal of an administrative authority to perform an obligation related to a subjective right, when the claimant is the holder of the right, and the Council of State is incapable of ruling on the legality of the contested act without necessarily pronouncing on its contents and purview. As indicated in the Article 11 of the Coordinated Laws on the Council of State that institution will only be competent to rule by way of judgment on claims relating to compensation for exceptional material or immaterial damage caused by an administrative authority in circumstances where no other jurisdiction is competent.¹⁷⁵ General competence is bestowed upon the courts and tribunals by the Belgian Judicial Code. At the same time, the latter assigns the resolution of conflicts on certain civil rights to different jurisdictions. In this respect, Articles 568 to 583 of the Belgian Judicial Code empower the labour courts to adjudicate disputes on social security (whereby the right to human dignity can occupy a prominent place). This is also this jurisdiction competent to resolve disputes between employers and employees.

If the violation of the rights stems from an *action committed by individuals*, the civil jurisdiction holds competence to entertain the dispute. There exist some exceptions to

¹⁷² A competence granted by Article 160 of the Belgian Constitution and Article 14 of the Coordinated Laws of the Council of State.

¹⁷³ It reads to that effect “*Les cours et tribunaux n’appliqueront les arrêtés et règlements généraux, provinciaux et locaux, qu’autant qu’ils seront conformes aux lois / De hoven en rechtbanken passen de algemene, provinciale en plaatselijke besluiten en verordeningen alleen toe in zoverre zij met de wetten overeenstemmen.*”

¹⁷⁴ Article 11bis of the Coordinate Laws on the Council of State.

¹⁷⁵ K. LENAERTS, P. VAN YPERSELE & J. VAN YPERSELE, op. cit., p. 212.

this rule, as disputes related to workers' rights and social security fall within the competence of the labour tribunals.

The duration of the procedures is, in general terms, reasonable, but depends on the jurisdiction where the claim of violation is lodged.¹⁷⁶ At present, especially the labour jurisdiction appears excessively strained, hampering the swift delivery of justice.¹⁷⁷ As usual, there are possibilities to seek for speedier resolutions in particular cases. To that effect, Article 584(1) of the Judicial Code states e.g. that the president of a court of first instance has the possibility to render a provisional ruling in all urgent cases, except those which are expressly excluded from its jurisdiction.¹⁷⁸ In the same article, paragraph 2, identical competences are granted to the presidents of commercial and labour courts¹⁷⁹. To avail oneself of these more speedy options, urgency is required, which is deemed to exist when the risk of prejudice of a certain severity, or even a serious disadvantage, makes an immediate decision desirable.¹⁸⁰ Within the civil jurisdiction, the procedure to request the imposition of interim measures is regulated in Articles 1035 to 1041 of the Belgian Judicial Code. The minimum time for a defendant to respond to the writ served on him is two days, and in especially urgent cases the president can even reduce that time, or order some measures *ex parte*.¹⁸¹

It goes without saying that judges in Belgium are all assumed, and generally recognised to be independent, regardless of the jurisdiction in which they sit. There are thus to be rules guaranteeing him decide, free from any pressure, direction or influence, in accordance with the law. The judge made responsible for resolving disputes, on civil or

¹⁷⁶Cf. European Fundamental Rights Agency, *Access to Justice in Europe: An Overview of Challenges and Opportunities*, available from <<http://fra.europa.eu/en/publication/2011/access-justice-europe-overview-challenges-and-opportunities>>, p. 8.

¹⁷⁷ Article 556.

¹⁷⁸ Article 584(1) of the Belgian Judicial Code reads: “[...] *Le président du tribunal de première instance statue au provisoire dans les cas dont il reconnaît l’urgence, en toutes matières, sauf celles que la loi soustrait au pouvoir judiciaire / De voorzitter van de rechtbank van eerste aanleg doet, in gevallen die hij spoedeisend acht, bij voorraad uitspraak in alle zaken, behalve die welke de wet aan de rechterlijke macht onttrekt.*”

¹⁷⁹ Article 584 paragraph 2 states that “[...] *leprésident du tribunal du travail et leprésident du tribunal de commerce peuvent statuer au provisoire dans les cas dont ils reconnaissent l’urgence, dans les matières qui sont respectivement de la compétence de ces tribunaux / De voorzitter van de arbeidsrechtbank en de voorzitter van de rechtbank van koophandel kunnen bij voorraad uitspraak doen in gevallen die zij spoedeisend achten, in aangelegenheden die tot de respectieve bevoegdheid van die rechtbanken behoren[...].*”

¹⁸⁰ J. ENGLEBERT, ‘Le référé judiciaire: principes et questions de procedure’, in X., *Le référé judiciaire* (Conférence du jeune barreau de Bruxelles, 2003), p. 12.

¹⁸¹ See Articles 1035-1036 of the Belgian Judicial Code. Article 584(3) reads: “*Le président est saisi par voie de référé ou, en cas d’absolue nécessité, par requête / De zaak wordt vóór de voorzitter aanhangig gemaakt in kort geding of, in geval van volstreekte noodzakelijkheid, bij verzoekschrift.*”

other rights, can thus not receive any order from anyone. This absence of subordination and relative insulation must be secured vis-à-vis the legislature, the executive, as well as other departments of the judiciary.¹⁸² In the Belgian legal system, the independence of the judicial power is indeed guaranteed by the Constitution as follows:

- Article 151 enshrines the independence of judges and the Public Prosecutor;
- Article 152 shields against premature dismissal or relocation, demanding that judges are appointed until the age of retiring stipulated by law;
- Article 154 determines that the standards of conduct for judges are to be based in law;
- Article 155 ordains that no judges may hold another remunerated position in the public service, save for those allowed for by law where no incompatibilities or conflicts of interest are deemed to exist.

Final issues to be addressed under this heading are the effectuation of the right of access to the judiciary with regard to the obtaining of legal aid, and the costs of pursuing litigation in Belgium.

- *Legal aid*

Legal aid or assistance schemes exist in all Member States, and Belgium is not an exception. Legal assistance or legal aid can be considered as the allowance enabling persons to obtain effective access to a court when (s)he does not command the resources needed to cover the costs of the procedure. The Belgian Judicial Code guarantees legal assistance in Articles 446*bis*, 508/1 to 508/23 and Articles 664 to 699. The Law of 23 November 1998 on legal aid serves to further implement these

¹⁸² G. DE LEVAL & F. GEORGES, *Droit judiciaire, Tome 1, Institutions judiciaires et éléments de compétence* (Larcier, 2014), p. 50.

guarantees, replacing the older system providing for free assistance or severely reduced rate.¹⁸³ There currently are made available three types of legal aid:

* Primary legal assistance, or legal aid at the 'frontline', which is free and available to anyone (natural and legal persons) for short consultations, practical advice or an initial legal opinions. This type is provided by lawyers or other professionals. To qualify for and obtain this kind of assistance, the applicant must report to the assistance commission set up in each court district, comprising representatives of the bar, public welfare centers (OCMWs/CPAS), and recognised legal assistance organisations.¹⁸⁴

* Secondary legal assistance or the 'second line' of legal aid consists of detailed legal counsel made available to natural persons only. It can be provided irrespective of whether one finds oneself in the context of formal proceedings. The assistance extends to court action, including comprehensive legal representation. It is organized by a legal assistance bureau that is set up within each local bar council.

* The tertiary type of legal aid consists of full or part exemptions from stamp duties, registration charges and other costs of proceedings. It is made available to litigants who can attest they do not have enough resources to cover the cost of judicial or extrajudicial proceedings. This kind of legal aid can mainly be claimed by persons holding the Belgian nationality, foreign nationals in accordance with international treaties, all nationals of Member States of the Council of Europe, and foreign nationals lawfully residing in Belgium.¹⁸⁵ The application concerned can be presented in the office of the court in which the action is to be brought. To that end, there exists a legal aid bureau in every court of first instance, labour court, commercial court, court of appeal and at the Court of Cassation.¹⁸⁶

¹⁸³ Loi du 23 du Novembre 1998 relative a l'aidejuridique / Wet betreffende de juridische bijstand, *Moniteur Belge /BelgischStaatsblad* the 2nd of December 1998. This law came into force on 1 January 2000 and was incorporated into the Belgian Judicial Code. The full text can be consulted from <www.ejustice.just.fgov.be>.

¹⁸⁴ On OCMWs/CPAs, see further below.

¹⁸⁵ See in this respect articles 667 and 668 of the Belgian Judicial Code.

¹⁸⁶ In this respect see article 670 of the Belgian Judicial Code.

Legal assistance can be obtained for all types of disputes, in the civil, criminal or administrative law jurisdiction. However, aid can only be obtained for litigating specific issues, and the acquiring of primary, secondary or tertiary legal assistance depends on meeting will always depend on meeting certain conditions, set down in the aforementioned contexts.

Lastly, the level of trust in the Belgian judiciary is (despite the highly profiled 1990s protests in the wake of the *Dutroux* scandal) still relatively high.¹⁸⁷ Some smaller incidental affairs on the one hand, and a necessary but very slowly progressing process of judicial reform on the other, have nevertheless raised concerns amongst magistrates themselves, and produced tensions that in recent years continue to loom beneath the surface.¹⁸⁸ With regard to the safeguarding and enforcement of constitutionally guaranteed civil rights however, this did not incite the population at large to turn away and seek alternative strategies of protection.

6. NON-JUDICIAL ENFORCEMENT INSTITUTIONS AND BODIES RELEVANT FOR THE ENFORCEMENT OF THE SELECTED CIVIL RIGHTS

- ✓ Are there non-judicial/administrative procedures available to enforce the selected right against public authorities or private actors involved in public policy activities (e.g. delivery of public services, quasi-regulatory bodies, etc.)?
- ✓ Are there non-judicial procedures available to uphold these rights against private actors (e.g. employers, landlords, etc.)?
- ✓ Which organs, institutions, or bodies contribute to promoting and enforcing the selected civil right? (e.g. equality body, ombudsperson, governmental supervisory authorities, etc.)

¹⁸⁷ See e.g. the European Social Survey 'Trust in Justice', available at <http://www.europeansocialsurvey.org/docs/findings/ESS5_toplevels_issue_1_trust_in_justice.pdf>.

¹⁸⁸ For a summary, linked to a mass demonstrations of judges and petition offered to the Ministry in March 2015, see e.g. A. Keereman, 'Alarmdag bij justitie: een publieke ingebrekestelling', available at <<http://www.legalworld.be/legalworld/Alarmdag-bij-justitie-een-publieke-ingebrekestelling-2015.html?LangType=2067>>.

- ✓ How are procedures before these bodies regulated at national level (constitutions or constitutional instruments, special (i.e. organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?
- ✓ What is their respective mandate? Where/are they discussions as to expanding, or reducing their mandate?
- ✓ What are their powers? (e.g. consultation, information-gathering, reporting, adjudication/decision-making, regulatory powers, etc.)? Were they/are they discussions as to expanding, reducing their powers?
- ✓ How independent are they from government, parliament, stakeholders, others? Please pay particular attention to powers of appointment, and termination of the mandate of actors, as well as the bodies' decision-making procedures?

In order to answer this series of questions, to begin with, a distinction could be drawn between, on the one hand, the forms of extrajudicial resolutions through which a binding agreement/solution for existing problems/disputes can be found, and on the other hand, those forms of extrajudicial resolution whereby a person or an institution will merely mediate and try to get all parties involved to agree to a consensus.¹⁸⁹ In Belgium, nevertheless, hybrid forms lead to a less-clear cut dichotomy, whereby the following remedies may be pursued by civil right holders:¹⁹⁰ parliamentary methods, administrative non-adversarial proceedings and preliminary hearings, the lodging of petitions, access to (civil rights) information, invoking assistance from the Ombudsman, and alternative mechanisms provided for special circumstances. What follows offers a succinct sketch of these respective non-judicial avenues.

- 1) *Parliamentary methods for obtaining protection of civil rights.* As in most countries, citizens are entitled to contact and raise issues with individual MPs.

¹⁸⁹European Fundamental Rights Agency, *Access to Justice in Europe: An Overview of Challenges and Opportunities*, available from <<http://fra.europa.eu/en/publication/2011/access-justice-europe-overview-challenges-and-opportunities>>, p. 9.

¹⁹⁰ Following the presentation of non-judicial modes of resolution of K. LENAERTS, P. VAN YPERSELE & J. VAN YPERSELE, *op. cit.*, pp. 212-215.

The past years have seen a rising prominence of parliamentary investigation committees, where citizens are enabled to turn to with concerns with regard to civil rights infringements. The Belgian (federal) House of Representatives holds the power to initiate various types of inquiries.¹⁹¹ Committees are composed of a limited number of parliamentarians that examines specific problems arising in society, point out shortcomings and propose solutions. These committees do not hold the power to indict or convict, a competence that exclusively rests with the public prosecutor and the judiciary; the latter may however (be called to) take up a subsequent role. Issues raised by these committees have regularly succeeded in 'prodding' the administration. They receive a growing resonance in the media, and are subject to the attention of the members of government.¹⁹²

- 2) *Administrative non-contentious proceedings and the right to a preliminary hearing.* When administrative bodies intend to adopt acts or take decisions (potentially) affecting the rights of a beneficiary of civil rights, there exist several regulations and provisions that remand that at the request of the holders of those rights, a non-contentious procedure must be initiated.¹⁹³ The beneficiaries of the civil rights in question then also possess a right to be heard during that procedure. Such preliminary hearings have not been settled in any general written provisions in Belgium; they have nevertheless been explicitly incorporated in sectoral legislation and/or delegated acts.¹⁹⁴ Apart from such requirements, case law has awarded a key place to the principle of *audi alteram partem* in administrative proceedings, leading to an extensive application in multiple instances. This does entail a measure of uncertainty in the conferral of the right to be heard. Yet, in case authorities decide to impose administrative measure that adversely affect citizens in respect of their civil rights, case law confirmed at highest instance generally imposes the obligation of a prior hearing to the extent

¹⁹¹ This power belongs to the Federal House of Representatives as of the 16th reform of the state (2012-2014).

¹⁹² K. LENAERTS, P. VAN YPERSELE & J. VAN YPERSELE, op. cit., pp. 212-213.

¹⁹³ As for example in the Royal Decree of 25 November 1991 regulating unemployment (Arrêté Royal du 25 novembre 1991 portant réglementation du chômage / Koninklijk besluit houdende de werkloosheidsreglementering). This Decree institutes an administrative appeal against notices issued to long-term unemployed persons that their entitlement to unemployment benefits will be suspended. The full text can be consulted from <www.ejustice.just.fgov.be>.

¹⁹⁴ As for example in articles 80-83 of the Royal Decree of 25 November 1991 regulating the unemployment / Arrêté Royal du 25 novembre 1991 portant réglementation du chômage / Koninklijk besluit houdende de werkloosheidsreglementering. The full text can be consulted from <www.ejustice.just.fgov.be>.

that it will be required to at least have grant citizens a genuine opportunity to express his/her views.¹⁹⁵ Citizens that have not been granted such opportunities will not be immediately deprived of (enjoyment of) their civil rights though, as they retain a possibility to introduce an appeal in front of the competent courts against the final act/decision adopted by the administrative body concerned.

- 3) *Right to petition.* Apart from the submission of individual queries to MPs or the approaching of parliamentary committees flagged above, there is a right of official petition enshrined in the Constitution as well as in the Regulation of the (federal) House of the Representatives.¹⁹⁶ The Belgian Constitution states in its Article 28 that everyone has the right to address a petition to the public authorities signed by one or more persons, and that the authorities are entitled to address petitions collectively.¹⁹⁷ Thus, any citizen wishing to register a (civil rights) complaint, initiate a proposal for Belgian (civil rights) legislation, or comment on a particular or general (civil rights) topic is to direct a petition the President of the House of Representatives. This right is not restricted to those holding Belgian nationality, but can be exercised by all residents on the territory. It does have to be expressly stated that the document is intended as a petition, and it is mandatory for a signature of the petitioner(s) to be present.¹⁹⁸ For petitions lodged at federal level, the theme developed must however link in with competences of the federal legislator. In keeping with the constitutional separation of powers, the House can also not consider a petition tied to administrative proceedings or concerning ongoing judicial disputes. Competencies such as finance, justice, defence, social security and nuclear energy are currently still exercised at federal level. On the other hand, competences on housing, property, education and culture are nowadays entrusted to the Communities or Regions. The President of the House may refer a petition either to the petition committee or the authority responsible for this issue concerned.

¹⁹⁵ J. BOUVIER, *Eléments fondamentaux de droit administratif* (ERAP, 2011), p. 54.

¹⁹⁶ See articles 142 to 144 of the Règlement de la Chambre des représentants / Reglement van de kamer van volksvertegenwoordigers, *Moniteur Belge / Belgisch Staatsblad* 2 October 2003.

¹⁹⁷ “Chacun à le droit d’adresser aux autorités publiques des pétitions signées par une ou plusieurs personnes. Les autorités constituées ont seules le droit d’adresser des pétitions en nom collectif. / Ieder heeft het recht verzoekschriften, door een of meer personen ondertekend, bij de openbare overheden in te dienen. Alleen de gestelde overheden hebben het recht verzoekschriften in gemeenschappelijke naam in te dienen.”

¹⁹⁸ As stated in article 142 of the Regulation of the House of Representatives.

When a petition is transmitted to the petition committee, the latter is to take a decision on short notice. After this decision is taken, the petition returns to the competent minister who may add to it. The petition is equally submitted to the Federal College of Ombudsmen entrusted to deal with complaints under the established laws. The petitioner receives a response to his own address and on his own name. Petitions lodged at federal level are published in a public (online) registry.¹⁹⁹

- 4) *Right to request (civil rights) information.* Article 32 of the Belgian Constitution proclaims that everyone has the right to access or require a copy of any administrative document, except in the cases and in the conditions stipulated by law. Arguably, this entitlement impacts wholly positively, albeit more indirectly, on civil rights protection too. For exercising the right, the Constitution does not require a specific justification or interest with regard to the desired documents. In addition, the Government has adopted a broad definition of the term 'accessible administrative documents'. This pertains to any information, in any form whatsoever, available from the authorities: written, audio, visual recordings, data contained in the automated processing information, reports, studies, even unofficial consultative committees, accounts, minutes, statistics, administrative directives, circulars, contracts, licenses, public bank records, notebooks examination, films or photographs.²⁰⁰ This broad access and public transparency allows in fact for a genuine measure of control over the administration by the citizen, to the benefit of his civil rights protection. Furthermore, the Law of 29 July 1991 underpins the formal motivation requirements applicable to all public acts intended to produce legal effects.²⁰¹ The law aims to inform citizens and enable them to initiate a dialogue with the administration; it applies not only to federal and community/regional authorities, but also to e.g. public welfare centers and companies providing services of general economic interest. In combination with Article 32 of the

¹⁹⁹ See <www.lachambre.be/accessible/laChambre_petition.htm>.

²⁰⁰ J. BOUVIER, op. cit., pp. 57-58.

²⁰¹ Loi du 29 Juillet 1991 relative à la motivation formelle des actes administratifs / Wet betreffende de uitdrukkelijke motivering van de bestuurshandelingen, *Moniteur Belge / Belgisch Staatsblad* 12 October 1991. The full text can be consulted from <www.ejustice.just.fgov.be>.

Constitution, it can be seen as creating the necessary conditions for a obtaining in more specific fashion protection of a civil right alleged to be infringed.²⁰²

5) *Invoking assistance from the Ombudsman.* Ombudsmen assist persons whose rights are alleged to have been infringed, where judicial remedies are exhausted or unavailable. An Ombudsman has been established in Belgium at the federal level pursuant to the Law of 22 March 1995.²⁰³ The Federal Ombudsman ('Federale Ombudsman' / 'Médiateur fédéral') has been assigned three tasks: functioning as intermediary between citizens and the government, investigating individual complaints, and engaging in general (own-initiative) inquiries. The office analyses conflicts and proposes solutions, in other words, is to attempt to reconcile opposing points of view. Every civil rights holder on the territory is entitled to submit a complaint to the Federal Ombudsman. When the Ombudsman examines an issue, the office engages in an external, independent, unbiased scrutiny where the good functioning of the administration is put in question. It reports principally to the (federal) House of Representatives, but its recommendations can also be addressed to the Minister and/or the office/organ/service/department concerned. It also compiles annual reports. The Ombudsman only intervenes critically if a decision is established to be unfair, citizens cannot be expected to understand or accept a decision, if there are contradictory regulations, nefarious gaps in the laws, or public bodies did not discharge their tasks in a lawful, conscientious, reasonable, fast or impartial way.²⁰⁴

Due to the multilayered composition of the Belgian state, it features other renditions of the office operating at other tiers, serving the different language groups: reference can be had to the 'Vlaamse Ombudsdienst', the 'Médiateur de la Wallonie et de la Fédération Wallonie-Bruxelles', and the 'Ombudsmann der Deutschsprachigen Gemeinschaft'. By and large, they function along the same lines

²⁰² K. LENAERTS, P. VAN YPERSELE & J. VAN YPERSELE, op. cit., p. 214.

²⁰³ Loi du 22 mars 1995 instaurant des médiateurs fédéraux / Wet van 22 maart 1995 tot instelling van de federale ombudsmannen, *Moniteur Belge / Belgisch Staatsblad* 7 April 1995. The full text can be consulted from <www.ejustice.just.fgov.be>. The original setup of one Dutch- and one French-speaking Ombudsman has meanwhile been overhauled, as further explained in the subsequent text above.

²⁰⁴ See further <www.belgium.be/fr/justice/victime/plaintes_et_declarations/ombudsman/>.

as their counterpart at the federal level. Their individual complaint-handling with regard to alleged infringements of civil rights, in combination with their issued annual reports, has been known to carry a sizeable weight with regard to minor or major adjustments of public policy, in the legislative, regulatory, administrative as well as the judicial sphere.

- 6) *Alternative mechanisms of enforcement for special circumstances.* A broad array of alternative avenues is available for disputes on civil rights, partly based on the concept of mediation. Thus, for public agencies active in the financial sector, we may point to the Ombudsman in financial services; as regards energy there are the energy mediation services; for pensions the pension mediation services; likewise for e.g. the postal sector, telecommunications and private placement. With regard to police and justice issues, citizens are to report to respectively the Community complaint service and the Federal Ombudsman. With regard to the railways, an Ombudsman has been designated for the SNCB Group; there similarly functions an Insurance Ombudsman. Each of these mediators or ombudsmen holds particular competences and exert a notable influence, yet their remedial powers remain limited, and no legally binding decisions can be issued. In case of horizontal clashes between civil rights (i.e. between private persons), alongside the ordinary judicial avenues, reference may be had to the well-known mechanisms of conciliation, mediation or binding decisions.²⁰⁵

7. ACCES TO JUSTICE

- ✓ *Are access to justice rights (fair trial, due process, right to an effective remedy...) respected when it comes to the enforcement of the selected right? Are there particular problems in that respect? Please develop.*

²⁰⁵ See respectively articles 731, 732 and 1134 of the Judicial Code. An interesting device is the transaction, whereby parties settle an arising dispute or prevent future litigation, as defined by article 2044 ff. of the Belgian Civil Code. The constitutive elements of this mechanism are: the existence or the possibility of a contentious situation in which the parties wish to end the waiver of a right or the acquiescence to a judgment; the dispute will end through reciprocal concessions of the parties, as the litigants will abandon a part of their claims. A transaction between parties is considered as *res judicata*. It thus replaces a civil trial and short-circuits the dispute. On these mechanisms see further V. D'HUART, 'Modes alternatifs de règlement des conflits', in D. MATRAY (ed.), *Arbitrage et modes alternatifs de règlement des conflits* (Edition Formation Permanente CUP, 2002), pp. 13-14.

✓ *Does the principle have a broad scope of application, or are there exceptions?*

In Belgium, the right to access to justice can be principally based on Article 13 of the Constitution, which holds that nobody can be withheld from the judge attributed to him by the law.²⁰⁶ Moreover, Article 6 ECHR and Article 47 EU Charter have been properly entrenched in the domestic legal order, by virtue of the monist constitutional approach; effective judicial protection has been confirmed in Belgian case law to be a general principle of law.²⁰⁷ The requirements that flow from it are thus part of the fabric in litigation with regard to the other selected rights, human dignity and the right to language. Case law has also confirmed the principle that restrictions may not impinge on the core of these rights. On the other hand, articles 17 and 18 of the Judicial Code require for the initiation of disputes that the claimant has an interest, yet immediate threats to their civil rights are ordinarily considered sufficient.

In case of violation of access to justice rights, either within the context of enforcement of the other selected rights or there beyond, it may be pointed out that victims can bring a claim for damages.²⁰⁸ In this regard, Belgian law also prohibits a denial of justice (though erroneous or deficient judgments cannot be deemed to qualify as such), an obligation that is deemed to flow naturally from the quasi-monopoly of the state's judicial system.²⁰⁹

The foregoing notwithstanding, there does exist a *disposition maxim* within the Belgian judicial system, by virtue of which parties are free to decide if, and on which subject, they bring cases to court.²¹⁰ Important for our purposes is that consequently, individuals can waive their right of access to the judiciary. At the same time, limitations on the maxim are placed in the Anti-Discrimination Act, Anti-Racism Act and the Gender

²⁰⁶ “Nul ne peut être distrait, contre son gré, du juge que la loi lui assigne” / “No-one may be removed against his will from the judge that the law assigns to him.”

²⁰⁷ See e.g. the hallmark judgments of the Brussels Court of First Instance of 23 November 1967 or of 18 December 1989, available from <www.cass.be>.

²⁰⁸ See article 26 of the Preceding Title of the Belgian Criminal Procedure Code, and article 226bis of the Belgian Civil Code.

²⁰⁹ H. BOULARBAH, *Droit Judiciaire Privé*, <http://www.procedurecivile.be/fileadmin/fichiers/test/Tome_1..pdf>, p. 16.

²¹⁰ This maxim can be found implicitly in the article 1138 of the Belgian Judicial Code, and has been confirmed multiple times by the Court of Cassation.

Equality Act, which explicitly provide that persons cannot waive the rights they are entitled to under the respective acts.

In similar vein, it deserves noting that the right to appeal is in Belgium not considered to be a fundamental right. At first blush, this can be considered as a particular problem for gaining access to justice when claimants see their rights curtailed or impeded here. The Constitutional Court has confirmed that there is no constitutionally protected right to an appeal, but added that if a possibility to appeal exists, the law has to guarantee the fairness of the proceedings.²¹¹ Belgium has also made a reservation with regard to the article 14(5) of the ICCPR, holding that there is no right of appeal for a person who was acquitted in first instance but was convicted in appeal. It also reserved for itself the right to organise the criminal justice system in such a way that persons may be brought to trial directly before a higher court, such as a court of appeal, an assize court or the Court of Cassation. Despite the lack of entrenchment as a domestic constitutional right however, the 'ordinary' article 616 of the Judicial Code does proclaim that an appeal against a judicial decision is always possible, except when the law says otherwise. Moreover, as noted, if need be it can be claimed as a corollary of the rights bestowed by Articles 6 and 13 ECHR and 47 of the EU Charter. After appeal, where available, cassation may be requested vis-à-vis final decisions on points of law.

A further element to be kept in mind is that, as elsewhere, access to justice may be subjected to admissibility requirements. In general, such restrictions may nevertheless not impinge on the core of the right. A basic condition in public law is that the appellant must demonstrate to have an interest, implying that the act or initial decision must at least partly be to this detriment. There are also particular limits to access to the justice in specific cases before the courts of first instance and the commercial courts, wherein no appeal is possible. Certain time limits have to be respected as well.²¹²

Lastly, as regards access to non- or extrajudicial procedures, we may note that an agreement struck outside the court system in a legal dispute can only be concluded

²¹¹ Various decisions on this topic can be consulted from <www.cass.be>.

²¹² For example, with regard to a Court of Appeal, the time limit within which an appeal must be requested is one month from the date of the rendering of the first instance decision.

when one has the competence to dispose freely over the object of the agreement.²¹³ In addition, no agreements can be concluded with regard to provisions that pertain to the public order (*ordre public*).²¹⁴

8. SUPPORT STRUCTURES

- ✓ What is the role of NGO or other civil society actors (e.g. legal entrepreneurs, etc.) in bringing awareness about modes of enforcement of the selected civil right and in supporting actions to uphold the selected right using judicial or non-judicial means? Please give as many details as possible and identify the most relevant actors
- ✓ Does the organization and structure of the legal professions support the selected civil right claims? In particular, are there developed legal aid systems or pro bono schemes, or any other relevant support system which purports to enable public interest litigation aimed at promoting/supporting the development and effective enjoyment of the selected civil rights?
- ✓ Does legal training contribute or undermine the effective protection of the selected civil rights? Please give evidence based on standard law-school and/or bar-exams curricula?
- ✓ What are the relationship between legal elites, political/governmental elites and civil society organizations? Do they contribute or undermine civil rights litigation and enforcement?
- ✓ What is the role played by academic scholars in promoting and supporting the effective enforcement of the selected civil rights?

There exists in Belgium a wide range of organisations that act as a support structures in order to guarantee the relevant civil rights of nationals, EU citizens, as well as third

²¹³ See article 2054 of the Belgian Judicial Code.

²¹⁴ See article 6 of the Belgian Judicial Code.

country nationals residing on the territory. To enhance the quality of the answer of our response here, a number of these organisations have been approached to give us insight in their internal workings, enforcement priorities and self-perception. The relevance of legal training for the selected civil rights, the interrelations between the legal, political/governmental elites and civil society organisations and the role played by academic scholars shall already be sketched in the holistic overview that follows below.²¹⁵

- A prominent place is occupied first of all by the Centre for Equal Opportunities and Opposition to Racism, which has been reformed in 2014 into the Interfederal Centre for Equal Opportunities and the Federal Centre of Migration ('Interfederaal Gelijkekansencentrum-Federaal Migratiecentrum / 'Centre Interfédéral pour l'égalité des chances-Centre fédéral migration'). It was created in 1993, and (re)accredited as a National Human Rights Institution (status B) for Belgium by the UN in 2010. Its statutory roles are based on two pillars. The first of these, discrimination & equal opportunities, covers its efforts to combat discrimination and the promotion of equal opportunities. The second, migration, seeks to ensure respect for the fundamental rights of foreigners, to inform the authorities about the nature and scale of migration flows and to stimulate the fight against human trafficking. Within these pillars, the Centre performs three tasks: 1) processing individual reports, mainly on issues relating to allegedly discriminatory situations and issues relating to the basic rights of foreigners; 2) informing, training and raising awareness about its fields of competence, through publications, campaigns, press releases, meetings, training sessions, and so on; 3) drafting opinions and recommendations, mostly for public authorities, at all levels of government. These recommendations relate to improving legislation as well as the implementation of wider action plans. In July 2011, the Federal State, the Communities and Regions decided to designate the Centre as the independent mechanism responsible for promoting and monitoring the implementation of the UN Convention on the Rights of Persons with Disabilities.

²¹⁵ Leads for acquiring more detailed information may e.g. be obtained through www.picum.org/en/resources/contacts-of-organisations/links-to-organisations-belgium.

The Centre has over time built partnerships with many grassroots organisations, both public and semi-public bodies or institutions (public social welfare centres, university research centres, regional integration centres, etc.), or associations active in different sectors (associations defending the rights of disabled people, associations representing homosexuals, etc.). Incidentally, it has instigated public interest litigation for the benefit of the selected civil rights (e.g. in the case that led to the prohibition of the 'Vlaams Blok', pursued together with the 'Liga voor de mensenrechten'; see further below). Prominent academics were involved in this cause, which also showcases nicely the nexus between the political/governmental scene and civil society organisations.

The Centre is also involved as a member, observer, or in an advisory capacity with international organisations sharing the same goals. At EU level, these include Equinet (the European Network of Equality Bodies), the EU Fundamental Rights Agency, the Network of National Contact Points on Integration (NCP-I) of the European Commission, the European Migration Network, and the informal EU Network of National Rapporteurs or Equivalent Mechanisms on Trafficking in Human Beings; at Council of Europe level, it has established links with the European Commission against Racism and Intolerance; at OSCE level, it participates in the activities of the Office for Democratic Institutions and Human Rights.

- Next, mention must be made of the OCMWs/CPAS – 'Openbaar Centrum voor Maatschappelijk Welzijn / Centre Public d'Action Sociale' or public welfare centres. The core objective of these centres, which are present in all parts of the country, lies in safeguarding civil rights and contributing to any research on the related topics.

OCMWs and CPAS are politically governed organisations, with their boards reflecting the composition of the municipal city council. The governing board is bound by the organic law, which limits the room for manoeuvring and overt political leanings. Different (succeeding) board members can nonetheless place an own emphasis, favour own priorities and viewpoints.

Practically, OCMWs and CPAS directly receive clients that contend to have exhausted their rights in e.g. the social, financial or occupational sphere. Belgian law stipulates that the associates should attempt to ensure that all clients have health insurance, which gives them access to affordable medical treatment. In keeping with main tenets of human dignity, the securing of a stable income, as well as decent housing, for clients is regarded a key priority. It offers individual guidance to those clients who are motivated, ready and capable of working towards employment. At the same time, it investigates the right clients may have to certain means of income, such as unemployment or disability benefits. OCMWs/CPAS refer them to the respective organisations responsible for such benefits; where needed it assists to ensure due process. When no other sources of income are available or sufficient, OCMWs/CPAS can provide a minimum income as well, provided clients comply with specific aid requirements. To further their linguistic skills, close collaboration is established with organizations such as 'Inburgering', 'Open School' and 'Huis van het Nederlands'.

Specifically so as to further the judicial enforcement of civil rights where necessary, OCMWs/CPAS offer legal counsel, and collaborate closely with offices for legal aid. When clients have e.g. had a history of undeclared employment, steps can be taken to refer to the Social Inspection Office and file charges against their employer, possibly proceeding to the labour courts. OCMWs/CPAS also collaborate intensively with the Labour Law Office ('Arbeidsauditoraat' / 'Auditorat du travail') to combat social fraud, and develop ways to better inform clients of the possibilities to enforce their rights.

- In 1992, a special commission for the Protection of Privacy was established, officially known as the 'Commissie voor de bescherming van de persoonlijke levenssfeer' / 'Commission de la protection de la vie privée', but better known as the Privacy Commission, which functions as Belgium's Data Protection Agency. This Commission is an independent body that aims to ensure the protection of privacy when personal data are processed – an issue that can incidently be linked with or touch upon the right to human dignity enshrined in the Constitution.

- The Commission's legal basis resides in the aforementioned General Privacy Act of 8 December 1992.²¹⁶ Since 2009, this federal body is supplemented by the Flemish Supervisory Commission for Electronic Administrative Data Flows, which enjoys similar powers, but only at Flemish level. Both agencies participate actively in the elaboration of relevant standards for information security and privacy protection, particularly in the development, refining and supervision of those standards, as well as their correct application. They also undertake concerted efforts with some regularity to underline the importance of the protection of privacy, e.g. to youngster, their parents and teachers.²¹⁷
- An Institute for the Equality for Women and Men was created in December 2002, which aims to guarantee and promote the equality of women and men and to fight against any form of discrimination and inequality based on gender in all aspects of life – therewith also acting to enforce compliance with the right to dignity selected in this report. The Institute pursues its goals through the development and implementation of an adequate legal framework, appropriate structures, strategies, instruments and actions; by undertaking, developing, supporting and co-ordinating studies, statistics and data compilations in the field of gender and equality of women and men, as well as to assess the impact in terms of gender, of policies, programmes and government measures. It regularly addresses recommendations to the public authorities as well as individuals and private institutions with a view to improving the relevant laws and regulations. Here then, we also witness a keen nexus between the activities of a civil society actor and the political/governmental establishment that is actively approach to adjust their policies and/or recalibrate the scope of protection of the selected rights. The Institute moreover busies itself to organise support to associations working in the field, help any persons requesting advice on the scope of his/her rights and obligations, and if it sees fit, take legal action in the case of disputes resulting from the application of criminal and other laws, specifically aimed at guaranteeing the equality of women and men.

²¹⁶ *Belgisch Staatsblad / Moniteur Belge* 18 March 1993; as amended in 1998 and 2003 (latest version published in *Belgisch Staatsblad / Moniteur Belge* 26 June 2003).

²¹⁷ Producing the website <<http://www.ikbeslis.be>>.

- As elsewhere, Belgium features local subsidiaries of the non-governmental organisations Amnesty International and Human Rights Watch, concerned with the upholding of civil rights; these activities extend to promotional and lobbying work with all sectors of government, as well as targeted campaigns aimed to enhance the protection of designated groups (migrants, refugees, LGBTI, etc.)
- A similar role, but with a visibly more academic pedigree, is played by the 'Liga voor de mensenrechten' / 'Ligue des droits de l'homme' (League for Human Rights), which aims to combat injustice and discrimination in all forms. In particular, its stated objective is to influence Flemish and Belgian public policy in a constructive manner, create a greater human rights awareness, and disseminate information amongst the public in Flanders and Belgium. Its focal points currently lie in four domains: detention, privacy, non-discrimination, and 'freedom versus security', themes in which it can count on and has been known to profit from considerable support from university professors and researchers. As the litigation which led to the prohibition of the 'Vlaams Blok' in 2004 illustrates, it does not shirk from initiating court action against perceived gross violations of civil rights. This again offers a fine illustration of how organizations, scholars and those active in governmental/political circles can join forces to engage in successful civil rights litigation and enforcement.
- Belgium remains committed to establish a National Human Rights Institution (NHRI) in accordance with the 'Paris Principles'.²¹⁸ The yet to be realised ambition is to establish an overarching Human Rights Institute that is to consist of the 'Interfederal Centre for Equal Opportunities and Opposition to Racism and Discrimination', the 'Federal Centre for the Analysis of Migration Flows, the Protection of the Basic Rights of Foreigners and the Fight Against Human Trafficking', and the 'Institute for the Equality of Women and Men'.

²¹⁸ Defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris in October 1991, as adopted by the UN Human Rights Commission in resolution 1992/54 of 3 March 1992, and the UN General Assembly in resolution A/RES/48/134 of 20 December 1993.

- With a specific eye on persons with non-Belgian nationality and third country nationals, we can moreover point to the following set of non-governmental organisations:
 - o ADDE, an association of which the main objective is promote foreigners' rights through the respect of principles of equality and non-discrimination;²¹⁹
 - o *Aide aux personnes déplacées* is an NGO that provides welcoming services for migrants to help them to understand the Belgian asylum process and various difficulties that they come across in everyday life, offering languages courses, as well as supporting them in availing themselves of their basis human (including civil) rights;²²⁰
 - o MEDIMMIGRANT is an organisation that aims to guarantee access to health care for EU citizens and third country nationals. One part of the working of the organisation is centred on casework (individual counselling of undocumented migrants); another part of the work is structural action related to access to health care, and where necessary (assisting in) obtaining residence permits for medical reasons. In this respect, it communicates with various action groups, mutual aid associations and other social institutes. It maintains direct contacts with regional governments and public authorities through working meetings. Collaborations with other NGOs and likeminded interest groups has led to joint letters of complaint, which on occasion resulted into the adjustment of the practices of some bodies and offices;²²¹
 - o ORCA (Organisatie voor clandestiene arbeidsmigranten – Organisation for undocumented migrant workers) is in an organization that seeks to defend the rights of undocumented workers in Belgium. It aims to stimulate cooperation amongst trade unions, labour inspections, employers and other NGOs to strengthen support for undocumented workers. It also offers direct services to undocumented workers seeking

²¹⁹ See <www.adde.be>.

²²⁰ See <www.aideauxpersonnesdeplacees.be>.

²²¹ See <www.medimmigrant.be>.

advice on work-related problems through counselling and information campaigns;²²²

- Steunpunt Mensen zonder Papieren attempts to expose the societal weak points and justice deficit that exists for persons without a legal right to stay in Belgium. The Steunpunt tries to exert a positive influence on law and policy in close cooperation with regional and national partners. The Support Centre, together with other organisations and with notable support from academics, was closely involved in a number of important concrete actions for undocumented migrants, for example the regularisation campaign of *sans-papiers* that took place in January 2000. The Steunpunt is also represented in the Flemish Community's Working Group on the Reception Policy and in a number of other consultative structures, thus being enabled to liaise directly with civil servants, politicians and policy officials.

As can be concluded, in Belgium there exists a rich array of actors that purport to raise awareness and facilitate the enforcement of the selected civil rights. They energetically support judicial and extrajudicial actions to develop and enhance the system, and actively liaise with other societal forces, including (legal) academics. The various threads and interconnections may overall buttress the claim that the country is in possession of a strong 'civil rights culture'.

The legal training received by (budding) lawyers is thought to contribute to an effective protection of the selected civil rights as well. This is *inter alia* showcased by the fact that many members of the board and staff of the highlighted centres and institutes, including the Ombudsmen and other public authorities that play a role in the civil rights protection *milieu*, are law school graduates. The contributions and activities of scholars were obliquely noted as well, further enhancing a good understanding of the application and limits of the rights selected.

9. FURTHER PRACTICAL BARRIERS TO THE EFFECTIVE ENJOYMENT OF THE SELECTED CIVIL RIGHTS

²²² See <www.orcasite.be>.

- ✓ Can you identify further barriers to an effective enjoyment of the selected civil rights in practice?

Please, include here (or repeat) particularly problematic barriers towards the enforcement of the selected civil rights (such as overbearing costs, judicial corruption, unavailability of legal aid in practice, lack of information about the rights, lack of expertise on the part of attorneys or other legal actors, intimidation towards people who want to enforce their rights, etc.)

- ✓ Can you identify linguistic barriers, and/or barriers related to difference between legal and judicial culture and practices which could undermine the effective enforcement of the selected civil rights, in particular for mobile EU citizens/Third Country Nationals?

Please, make sure to point out right-, gender-, or minority-specific differences with regard to an effective enjoyment of the selected civil rights.

The overall picture, as already sketched, testifies to a modern and vibrant 'civil rights culture' in Belgium where no serious deficits can be deemed to exist. None of the likely phenomena that impede effective enforcement of the selected rights make themselves felt: the awareness of the advantages conferred is strong and ubiquitous; the average costs for obtaining judicial or extrajudicial resolutions lie at an acceptable level, the members of the judiciary and the bar are generally well-qualified and discharge themselves of their tasks competently, diligently and impartially. The picture is thus a rosy one, without qualification. The residual barriers for optimal enjoyment of the selected rights can therefore only occupy a few short paragraphs.

A first point relates to acquiring access to quality legal aid, which cannot be guaranteed, as those with little means will need to rely on *pro bono* lawyers. That is not to say that the service offered is necessarily below par, yet there are simply limits on the amount of time and resources that those assigned to help out the less-privileged will be willing to

divest; none of the dozen top-flight law firms are, for lack of financial incentives, involved in said activities.

Specifically with regard to the right to language, the privileges offered to the three main language groups should not convey the impression that citizens with a different mother tongue can count on similar support. Thus, there are considerable minorities that are legally not considered as such, and offered the same protection as Belgian native speakers of French, Dutch or German.²²³ A closely related barrier with regard to this right is that there are no longer federal political parties, so that most Belgian citizens can nowadays only cast their vote within their own language group: people in Flanders can only vote for Flemish political parties, and Francophone voters only for the Francophone parties. This impacts indirectly on the extent and direction of other civil rights those parties, once elected, give further shape to. In the Brussels agglomeration citizens can vote for any party of their choice, which is the only deviation from the monolingual-ethnic political structures. Moreover, the latter anomaly has for the past decades repeatedly led to political conflicts.²²⁴

A final point here is that the rigid internal language division enacted in the 1960s persist in the administrative sphere as well, resulting in a similarly linguistically-imbalanced public life. This adds to the harrowing complexity, for ordinary Belgians and foreign residents alike, of the country's bureaucratic system. In earnest though, this convoluted situation does not materially place fetters on the exercise of their civil rights *sensu stricto* or *sensu lato*.

10. JURISDICTIONAL IN PRACTICE

✓ Personal

- Is there any de jure or de facto difference in the effective enjoyment of the selected civil rights in your country depending on the status of the person? (differences between natural and legal persons; citizens of that state; EU

²²³For example, the burgeoning Italian community. See T. BAMBUST, A. KRUGER & T. KRUGER, *op. cit.*, p. 217.

²²⁴J. BLOMMAERT, *op. cit.*, p. 242.

citizens; third country nationals; refugee; long term resident; family members; tourists; etc.)

The three selected rights *de jure* extend to all natural persons holding the Belgian nationality, but also extend to all non-nationals legally residing on Belgian territory: Article 191 of the Constitution proclaims that every foreigner residing on Belgian territory enjoys the protection granted to persons and goods, save for exceptions provided for by law.²²⁵ Article 11 of the Civil Code adds that foreign nationals that have obtained permission to establish themselves in Belgium and have been included in the public registry also enjoy all civil rights that have been granted to Belgian nationals so long as they reside in Belgium.²²⁶ By the same token, Article 7 of the Belgian Civil Code entitles Belgians as well as EU citizens and third country nationals legally resident on Belgian territory to a full protection of their rights.²²⁷ Though exceptions may be made for those that have yet to obtain permission to reside in Belgium permanently, the distinction between Belgians and foreigners (EU citizens as well as third country nationals, including family members, long term residents and tourists) is thus principally absent *ab initio*.²²⁸ Exceptions can nonetheless be laid down by law for (specific categories of) EU citizens and other non-nationals (tourists, family members of EU citizens and third country nationals, refugees, asylum seekers and long term residents). Particular exceptions that have been laid down are e.g. the limitation in article 10 of the Constitution with regard to appointment to civil and military functions, unless specified otherwise (and by special decrees, EU citizens have been rendered

²²⁵ “Iedere vreemdeling die zich op het grondgebied van België bevindt, geniet de bescherming verleend aan personen en aan goederen, behoudens de bij de wet gestelde uitzonderingen” / “Tout étranger qui se trouve sur le territoire de la Belgique jouit de la protection accordée aux personnes et aux biens, sauf les exceptions établies par la loi.”

²²⁶ “Een vreemdeling heeft in België het genot van alle aan de Belgen verleende burgerlijke rechten behoudens de uitzonderingen door de wet gesteld. Een vreemdeling die gemachtigd is zich in het Rijk te vestigen en die in het bevolkingsregister is ingeschreven, heeft het genot van alle aan de Belgen verleende burgerlijke rechten zolang hij in België verblijf houdt.” / “L'étranger jouit en Belgique de tous les droits civils reconnus aux Belges, sauf les exceptions établies par la loi. L'étranger autorisé à s'établir dans le Royaume et inscrit au registre de la population jouit de tous les droits civils reconnus aux Belges aussi longtemps qu'il continue de résider en Belgique.”

²²⁷ “De uitoefening van de burgerlijke rechten is onafhankelijk van de hoedanigheid van staatsburger, die alleen overeenkomstig de Grondwet wordt verkregen en behouden.” / “L'exercice des droits civils est indépendant de la qualité de citoyen, laquelle ne s'acquiert et ne se conserve que conformément à la loi constitutionnelle.”

²²⁸ In addition, already in the mid-2000s, the Constitutional Court (at the time still the ‘Arbitragehof’ / ‘Cour d’arbitrage’) allowed for unlawfully residing parents to exercise rights accruing to their lawfully resident children – see Court of Arbitration, judgment nr. 32/2006 of 1 March 2006.

eligible for those civil and military functions not related to the public service *sensu stricto*²²⁹). Article 97 adds that foreigners cannot be appointed government minister.

Pursuant to the particular EU rules regulating their position, civil rights (e.g. of residence and equal treatment, albeit not without the qualifications those particular rules themselves allow for) have been granted to citizens of other Member States (tourists or otherwise), as well as third country nationals (family members of EU citizens, refugees and asylum seekers, long term residents).²³⁰ The earlier mentioned international treaties to which Belgium is party extend the scope of protection of civil rights to foreigners residing on the territory. This holds e.g. for the protection against torture and other cruel, inhuman or degrading treatment or punishment, on the basis of the UN Convention, or the right of article 8 ECHR to private life, including family life and inviolability of the home.²³¹

Research and inquiries reveal no known *de facto* impediments for the enforcement, nor any actual differences in the effective enjoyment of the selected civil rights that are demonstrably, or can be surmised to be, (exclusively) related to the status of the person concerned.

✓ Territorial

- Are there any *de jure* or *de facto* differences in the effective enjoyment of the selected civil rights in different parts, provinces or territories in your member states?

De jure, the selected rights, i.e. the right to human dignity, the right to access to justice and due process, and the right to language, are protected across the entire territory of the state of Belgium. Nevertheless, the right to language simultaneously constitutes an exception to that rule. As indicated above, in 1963 Belgium was divided in four linguistic regions: the region of the French language, the region of the Dutch language, the region

²²⁹Mainly the army, police, judiciary, internal revenue service and *corps diplomatique*. Compare the earlier condemnations in ECJ, Case 149/79 *Commission v Belgium*, Case C-173/94 *Commission v Belgium*, and Case C-47/08 *Commission v Belgium*; see further e.g. B. WEEKERS, 'De toegang van niet-Belgen tot de Belgische publieke sector', *Tijdschrift voor Gemeenterecht* 2005, nr. 1, pp. 5-16.

²³⁰In accordance with, above all, Directive 2004/38/EC, Directive 2003/109/EC and Directive 2004/83/EC.

²³¹With regard to the rights accorded to victims of criminal offences, regardless of their nationality, see e.g. <http://www.belgium.be/nl/justitie/slachtoffer/klachten_en_aangiften/basisrechten/fundamentele_rechten/>.

of the German language and the bilingual region of Brussels-Capital. Yet, as noted, the country also features three Communities, the French, the Flemish and the German Community. These latter have been deliberately construed to preserve and protect the cultural identity of the Flemish, French and German citizens. Each of these Regions and Communities sport their own government and parliament.²³² Hence, the country is blessed with six governments ruling the barely 10 million Belgians: the Federal government, the Walloon government, the Flemish government, the Francophone Community Government, the German Community Government and the Brussels Government.²³³ Since French, Dutch and German are used in the public life of their specific territories, it can be said that the principle of territoriality is strictly applied in Belgium. Straddling these frameworks are the facilities communities,²³⁴ where the right to use one of the native languages accrues to each linguistic minority.

Turning to the *de facto* picture, whilst the administrative life for ordinary Belgian and foreign citizens resident in the country proves inevitably complex, there is presently nothing that suggests the complexity has entailed that the enforcement of the selected rights is curtailed in any meaningful way along the different territorial components of this EU Member State.

✓ Material

- Are rights enforced differently in different *policy areas* (e.g. security exceptions, foreign policy exclusion, etc.)? Please, make an assessment on the basis of practice, too (e.g. more deference accorded in the balancing to the executive when it comes to these policy areas, though the legal framework – what you described in the response to the D7.1. questionnaire — is itself not different from other areas).

As was already indicated in the first report on Belgium (*Questionnaire task WP 7.1*), there is no provision for different standards of protection to apply in different policy areas (language, access to justice and human dignity rights are hence to be awarded an equivalent level and scope regardless of whether one deals with e.g. social security,

²³² Except from the Flemish Region and Community, which share the Parliament and the Government.

²³³ J. BLOMMAERT, *op. cit.*, p. 242.

²³⁴ *Faciliteitengemeenten / Communes à facilities*, designated as such in Article 129 of the Belgian Constitution.

criminal or environmental issues). This also obviates the *de facto* possibility for divergences to crop up in any distinct public domain vis-à-vis others.

✓ Temporal

- What is the temporal scope of protection in the enforcement of the selected civil rights? Are there any notorious or systematic deficiencies in how deadlines are determined or related to the length of proceedings in practice? Please, answer this question from the viewpoint of the practical application of the rules on deadlines for both initiating proceedings, reviews, etc., and for the court's duty, if there is any (next to Art 6 ECHR), to complete proceedings.

None of the rights protected under the Belgian Constitution have been limited in time since there were enacted in the first Belgian Constitution in 1831. No fetters have been placed either on their counterparts derived from international and supranational sources from the moment of their enactment, by virtue of the country's generous monist setup. As was already amply evidenced in the first report on Belgium (*Questionnaire task WP 7.1*), the rights that were added in subsequent modifications, or through special acts, decrees, statues or international treaties, have each acquired force of law from the moment of their official enactment. The rights selected can hence be exercised for an indefinite duration. Within the confines of actions launched to enforce selected rights, the temporal prescription for exercise depend on the instance approached. Nonetheless, the standard statutes of limitations apply in the respective administrative, criminal or civil law proceedings initiated, with no anomalous (notorious or systematic) deficiencies having arisen in the determination or application of deadlines. As the case law from the ECtHR testifies, in contrast to some other Council of Europe members, Belgium also belongs to the batch of countries that have not been convicted for deliveries of justice with egregious delay, in contravention of Article 6 ECHR.

11. SYSTEMATIC OR NOTORIOUS LACK OR DEFICIENT ENFORCEMENT OF THE SELECTED CIVIL RIGHTS IN THE COUNTRY UNDER STUDY?

- ✓ Please, discuss here in detail any 'revealing' cases of weaknesses in the effective exercise of selected civil rights in your country. Try to identify the reasons (e.g. political influence, financial hurdles, lack of expertise, etc.). Feel free to either repeat here, or refer back to points elaborated upon in previous replies.

The (insubstantial) main weaknesses in the enforcement of the selected civil rights have already been pointed out above; reference may thus be had to the responses delivered to previous questions.

12. GOOD PRACTICE

- ✓ Please highlight legal frameworks, policies, instruments or practical tools which facilitate the effective exercise of the selected civil rights in the country under study.

The relevant frameworks, policies, instruments and tools have also already been pointed out directly or indirectly above; reference may thus be had to the responses delivered to previous questions (particularly 7, 8 and 9).

ANNEXES

✓ NATIONAL LAWS

Laws

- The Constitution of Belgium of 17 February 1994 (coordinated text; orig. 1831)
- Code d'instruction criminelle / Wetboek van Strafvordering, *Moniteur Belge / Belgisch Staatsblad* 27 November 1808
- Code Penal du 8 Juin 1867 / Wetboek van Strafrecht van 8 juni 1867, *Moniteur Belge / Belgisch Staatsblad* 9 June 1867
- Loi contenant le Tritre Preliminaire du Code Procedure Penale / Wet houdende de Voorafgaande Titel Van het Wetboek van Strafvordering, *Moniteur Belge / Belgisch Staatsblad* 25 April 1878
- Wet van 15 juni 1935 op het gebruik der talen in gerechtszaken / Loi concernant l'emploi des langues en matière judiciaire, *Moniteur Belge / Belgisch Staatsblad* 22 June 1935.
- Code judiciaire / Gerechtelijk Wetboek, *Moniteur Belge / Belgisch Staatsblad* 31 October 1967
- Lois sur l'emploi des langues en matière administrative / Wetten op het gebruik van de talen in bestuurszaken *Moniteur Belge / Belgisch Staatsblad* 2 August 1966
- Wet houdende diverse institutionele hervormingen / Loi du 16 juin 1989 portant diverses réformes institutionnelles, *Moniteur Belge / Belgisch Staatsblad* 17 June 1980
- Wet houdende taalregeling in het onderwijs / Loi concernant le régime linguistique dans l'enseignement, *Moniteur Belge / Belgisch Staatsblad* 17 June 1980
- Bijzondere wet tot hervorming der instellingen/ Loi spéciale de réformes institutionnelles, *Moniteur Belge / Belgisch Staatsblad* 15 August 1980
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Mechanisms for enforcing civil rights

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bEUCitizen - WP7: Civil rights of citizens

30/04/2015

1. The (legislative) transposition, (executive/administrative) implementation and (judicial) application of EU legislative instruments which provide protection for specific civil rights

In this part, which adopts a *top-down* approach, the idea is to study the impact of different sets of EU legislative measures on the civil rights of EU citizens and third country nationals. EU legislation has sometimes been adopted to specifically confer protection to civil rights on EU citizens (Victims Rights Directive, e-Privacy Directive, etc), whilst other EU legislative measures have, on the contrary, the potential to undermine them (the most notorious probably being the European Arrest Warrant and the – now defunct - Data Retention Directive)

1.1. *EU legislation affording protection or potentially undermining civil rights in judicial proceedings*

1.1.1 Protection of rights in civil proceedings (mutual recognition instruments)

The EU has adopted a number of instruments enabling the mutual recognition of judgments in civil rights matters. Whilst these should respect EU fundamental rights norms and often include safeguard provisions, they may also undermine the civil rights of EU citizens, their families and affected third country nationals.

- Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Regulation') – in particular articles 1, 2, 3, 4, 5, 6, 7, 31, 32-56 ; 57-58, 61.
- Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ('Brussels IIa Regulation'). All provisions.
- Regulation No 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters. All provisions.

Question 1 – Transposition of the above EU instruments protecting or potential affecting civil rights

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Aforementioned legislative measures did not envisage any explicit transposition into the national law. Following the long established jurisprudence of the Court of Justice of the European Union (“CJEU”)¹, regulations are generally endowed with principles of primacy, direct effect and direct applicability, except for specific situation when they explicitly seek supporting transposition in relation to particular provisions.

Respective Czech authorities usually apply principles of primacy and direct effect in relation to Brussels I, Brussels IIa and 606/2013 regulation without any problems of systemic character.²

Apart from the Brussels I regulation and bilateral treaties committed to by the Czech Republic before its accession into the European Union, the jurisdiction, recognition and enforcement of judgments in civil and commercial matters is governed by the Act No. 91/2012 Coll., On international private law³. Section 2 of the Act No. 91/2012 Coll. provides that the Act shall be applied within the limits of the provisions of promulgated international treaties by which the Czech Republic is bound and directly applicable provisions of the European Union law, among others regulations Brussels I and Brussels IIa.⁴ National courts and administrative authorities generally accept direct applicability and primacy of the regulations before national law and Act No. 91/2012 Coll⁵.

However, some provisions of both regulations seek supporting application of other national measures – usually procedural norms of Rules of Civil Procedure (No. 99/1963 Coll.). There is no known defective or contradictory aspect. Several provisions of Civil Procedural Code were amended in order to reach conformity with EU Brussels regulations or their interpretation was adjusted by courts following the requirements laid down by the CJEU.⁶

Question 2 – Executive/administrative implementation of EU instruments affecting civil rights

Brussels regulations and Regulation 606/2012 are very seldom implemented by national executive or administrative bodies. In 2006, Czech administrative authorities faced an interesting case, when Skoma-Lux, importer of wine and wine-merchant, was accused of committing a customs offence by failing to comply with provisions of Regulation No. 2454/93, which was published in the Czech language only in electronic form, but not in the Official Journal of the European Union. In his answer of 11 December 2007, CJEU concluded

¹ See e.g. judgment of 9th March 1978, Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, 9 March 1978, Reports of Cases 1978 00629 , ECLI:EU:C:1978:49. For more on the principle of direct effect and primacy of EU law and their application before the Czech courts see Bobek, Bříza and Komárek, *Vnitrostátní aplikace práva Evropské unie* (CH Beck 2011), pp. 1-45.

² See e.g. decision of the Supreme Court, 26 May 2011, No. 33 Cdo 2485/2008, ECLI:CZ:NS:2011:33.CDO.2485.2008.1, concerning application of sources of international, European and domestic law in a consumer dispute lead against a consumer (defendant) without known residence in the Czech republic.

³ Zákon č. 91/2012 Sb., o mezinárodním právu soukromém, in force from 1 January 2014, replacing former Act No. 97/1963 Coll.

⁴ See Act No. 91/2012 Coll, unofficial translation available at: <http://www.brizatrubic.cz/files/scany-clanku/Translation-Czech-PIL.pdf>.

⁵ See for example decision of District court for Prague 3, 29 June 2011, No. 11C 292/2010.

⁶ See Havelka and Kondelová and Pavel and Šipulová, „Aplikace práva EU v rozhodovací praxi českých civilních soudů v letech 2009-2011. Evropský justiční prostor: vybrané problémy v rozhodovací praxi českých civilních soudů (třetí část)“, 10 *Právní rozhledy* (2014), pp. 1210-6410. One of the most evident cases being the shift in the interpretation of „domicile of a party“ in §89 Rules of Civil Procedure, following the interpretation of the Article 59 of Brussels I regulation.

that legislation which has not been properly published in the Official Journal of the European Union cannot be enforceable against an individual, notwithstanding its electronic publication on EUR-Lex.⁷ Any other interpretation is contrary to the Article 58 of the Act concerning the conditions of accession to the European Union (...). With Czech courts following interpretation given by the CJEU in case 161/06⁸, Czech administrative and executive authorities cannot bring any action against individual non complying with the regulation in case of the missing translation.

Question 3 – Judicial interpretation and application of EU instruments affecting civil rights

Brussels regulations are among the most frequently applied instruments of EU law (which is partly understandable as they need to be applied in every case with cross-border - European or international - element).⁹ Czech courts are following interpretation of individual provisions given by the CJEU aiming for conformity in their application. So far, the Supreme Court referred to the CJEU three preliminary questions seeking further interpretation of respective provisions of Brussels I and Brussels IIa regulations.

Brussels I

As already mentioned, Brussels I regulation is most often applicable instrument of EU law before the Czech courts. The courts are well acquainted with Brussels I regulation, respecting its direct effect and primacy over national legal provisions and some bilateral international treaties.

General provisions and autonomous interpretation

Some interpretative problems were experienced in the interpretation of Brussels I general provisions. Several courts tended for example to misinterpret its territorial jurisdiction and non-applying the Regulation in case where only one of the parties (the defendant) was domiciled in the member state of the European Union.¹⁰ However nowadays, these cases are very seldom with courts usually understanding the territorial jurisdiction and respecting its connection to the place of residence instead of the nationality or citizenship of the party.¹¹

Another problem relating to the jurisdiction (*ratione temporis*) lied in the interpretation of the Article 66 which states that the regulation “*shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.*” Czech courts faced problems interpreting the term “after the entry into force thereof” in relation to recognition and enforcement proceedings,¹² as the wording of Article 66 is not clear whether the entry into force relates to the state of the origin, state of the enforcement or both. This confusion led to the submission of a request for preliminary ruling by the Supreme Court in decision on the obligation to enforce a judgment issued in another member state (Landesgericht für Zivilrechtssachen Graz of 15 April 2003, Austria) before the

⁷ Case 161/06, *Skoma-Lux sro v Celní ředitelství Olomouc*, 1 December 2007, I-10841, ECLI:EU:C:2007:773.

⁸ See e.g. judgment of the District Court for Prague 1 of 4 February 2010, No. 15C 182/2009.

⁹ See Havelka and Kondelová and Pavel and Šipulová, “Aplikace práva EU v rozhodovací praxi českých civilních soudů v letech 2009-2011. Základní zásady aplikace unijního práva v praxi českých soudů (první část)”, 6 *Právní rozhledy* (2014). In civil and criminal matters, judgments applying one of the Brussels regulations represent over 70 % of all judgments applying any instrument of the EU law.

¹⁰ See for example Regional court in Prague, 1 February 2011, No. 21 Co 44/2011.

¹¹ See case C-412/98 *Group Josi*, 13 July 2000, I-05925, ECLI:EU:C:2000:399 and its application by national courts, e.g. District court in Frýdek-Místek, 21 April 2011, No. 140C 126/2009.

¹² See for example Regional Court Brno, 22 March 2010, No. 20Co 379/2009.

accession of the Czech Republic (as a state where the enforcement was sought) to the European Union. In May 2007, Wolf Naturprodukte GmbH lodged an application with Czech courts, seeking a declaration of enforceability of the Austrian judgment of 2003. Taking the view that the wording of Article 66 does not enable a clear determination of the temporal scope of Regulation No. 44/2001, the Supreme Court decided to stay the proceedings and refer the question regarding its interpretation to the Court of Justice for a preliminary ruling. The CJEU, in judgment of 21 June 2012, held that the simplified mechanism of recognition and enforcement set out in Article 33 para. 1, to the effect that a judgment given in a Member State is to be recognised in the other Member States without any special procedure being required, which leads in principle to the lack of review of the jurisdiction of courts of the Member State of origin, rests on mutual trust between the Member States.¹³ Rules on the recognition are very liberal because of the guarantees given to the defendant in the original proceedings. Therefore, while the core aim of the Regulation is to protect the claimant by enabling him swift and effective enforcement of a judgment, the simplified rules of such recognition and enforcement are justified only to the extent that the judgment which is to be recognised or enforced was delivered in accordance with the rules of jurisdiction in that regulation protecting the interests of the defendant. Taking into account this findings, CJEU concluded that Brussels I regulation is applicable for the purpose of the recognition and enforcement only if the Regulation was in force at the time of delivery of a judgment in both member states (i.e. state of origin and state of enforcement).

Another problematic aspect regarding the Brussels I application relates to the autonomous interpretation of selected provisions (e.g. “civil and commercial matters” in Article 1 para. 1¹⁴, or “consumer” for purposes of articles 15 and 16).

Article 59 para. 1 enables the national courts to interpret the term “residence” on the basis of their own national rules. One exception from this rule is given in Article 5 para. 2 which regulates domicile or habitual residence of the creditor. However, some courts still overlook this provision and its autonomous character interpreting domicile in conformity with national rules.¹⁵ On the other hand, interpretation of internal rules determining the residence of the party to the proceedings slowly shifted, probably also under the influence of EU legislation, towards the interpretation that residence cannot be tied solely to the place of the permanent residence of the party, but to the place of his or hers actual stay¹⁶.

Rules of jurisdiction

Rules determining the jurisdiction laid down in Articles 2 – 23 and related CJEU’s case law are rather well known in the jurisprudence of the Czech courts. However, few minor interpretation problems were identified in relation to three core issues: first, the identification of a place where a harmful event occurred (Art. 5 para. 3), second, the determination of consumer and consumer contract for purposes of inter-state disputes (Art. 15 and 16) and

¹³ Case C-514/10 *Wolf Naturprodukte v SEWAR spol. s.r.o.*, 21 June 2012, ECLI:EU:C:2012:367.

¹⁴ See decisions of City Court Prague, 9 September 2011, No. 39 Co 332/2011, Supreme Court, 27 September 2013, No. 33 Cdo 3793/2011, ECLI:CZ:NS:2012:33.CDO.3793.2011.1, or contrarily, wrong application of the principle of autonomous interpretation in decision of District court Frýdek-Místek, 24 September 2011, No. 119EC 184/2010, District court Rokycany, 21 February 2011, No. 10 C 271/2010. However, clear criteria of Brussels I application were finally unified by the Supreme Court in decision of 5 November 2012, No. 28 Nd 153/2012, ECLI:CZ:NS:2012:28.ND.153.2012.1, deriving the rules from the CJEU case law. For more see Drápal and Bureš (eds.), “Občanský soudní řád I, II. Komentář”, 1st Edition (C.H.Beck 2009), p. 2876.

¹⁵ See. i.e. District court Plzeň-město, 23 June 2011, No. 78EXE 1044/2011, Supreme Court, No. 31 Cdo 2325/2008, 14 July 2010, ECLI:CZ:NS:2010:31.CDO.2325.2008.1.

¹⁶ Supra note n. 6.

finally, the obligations derived from the unknown residence of the defendant (Art. 4, 17 and 24). It is worth mentioning that in order to broaden the protection of rights assigned to claimant by the Regulation, Czech courts repeatedly concluded that the claimant has no obligation to identify in his petition upon which of the rules of Brussels I should the jurisdiction of respective court be based.¹⁷

Article 5 introduces alternative connecting factors for the determination of jurisdiction. Czech courts are inclined to broaden the possibilities of the claimant to bring his claim before the court best suited (in other words before a court with closest relation to the dispute) to decide in the case. Interpretation of the Article 5 (in terms of “place of performance” in para. 1) given by the CJEU is generally deemed satisfactory as regards the protection of legal certainty and rights of the claimant.¹⁸ On the other hands, several Czech courts had problems in relation the application of Article 5 para. 3 (“*in matters relating to tort, delict or quasi-delict, in the courts fro the place where the harmful event occurred or may occur*”). The Article was originally drafted with aim to regulate disputes following from the traffic accidents.¹⁹ However, gradually, its scope of application was broadened on on different disputes such as unjust enrichment.²⁰

Consumer protection and interpretation of “consumer contract” opened several controversial questions before Czech courts.²¹ Even though the case law of the CJEU on the consumer protection is quite extensive, Articles 15 – 17 of the Brussels I regulation still pose new challenges regarding their interpretation. City Court Prague for example referred to CJEU request for preliminary ruling on question, whether the term “matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession”, encompasses obligations arising from bills of exchange.²²

The most controversial aspect of individuals’ rights protection however arose in connection to the interpretation of Article 4 and CJEU’s judgment in case *Lindner v Hypoteční banka*, C-327/10, 17 November 2011, I-11543, ECLI:EU:C:2011:745. Article 4 provides:

1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.
2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same ways as the nationals of that State.

¹⁷ See e.g. District court Prague 9, 22 January 2010, No. 18 C 290/2009.

¹⁸ See among others Supreme Court, 28 November 2011, No. 23 Cdo 3689/2011, ECLI:CZ:NS:2011:23.CDO.3689.2011.1.

¹⁹ See Jenard, *Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, 27 September 1968, OJEC No C 59/1, p. 26. Available at http://aei.pitt.edu/1465/1/commercial_report_jenard_C59_79.pdf.

²⁰ District court Benešov, 18 November 2008, No. 5 C 38/2008, District Court Frýdek-Místek, 30 March 2010, No. 12 C 200/2009, District court Mladá Boleslav, 31 October 2011, No. 12 C 166/2010.

²¹ Occasionally, courts of first instance applied narrower definition of consumer contract than the one following from the CJEU’s case law. See e.g. Regional court Plzeň, 15 December 2010, No. 56 Co 106/2011. However, practice is nowadays in quite close proximity to the interpretation of the CJEU.

²² See decision of the City court Prague, 21 March 2011, No. 54 Sm 289/2008 and the judgment of the CJEU in C-419/11, *Česká spořitelna v Gerald Feichter*, 14 March 2013, ECLI:EU:C:2013:165.

Section 29 para. 3 of the Czech Rules of Civil Procedure provided that, where no other measures apply, the presiding judge of the chamber may appoint a guardian ad litem for a party of unknown domicile, on whom it has not been possible to serve proceedings at a known address abroad (etc). The role of the guardian is to protect the interests of the absent party to the proceedings in the same way as it would be protected by a contractual representative. The court appointing the guardian ad litem is responsible to ensure, that the guardian defends the rights and legitimate interests of that party.²³ Articles 15 – 17 of the Regulation provide for a special protection of the consumer as a weaker party to the proceedings. Therefore, Article 16 para. 2 states that “*Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.*” In other words, these provisions allow only consumers domiciled in the Czech republic to be sued before the Czech courts (with exception of an prorogation between the parties according to the Article 17).²⁴ Nevertheless, Czech courts faced hundreds of disputes led by companies pursuing commercial or other professional activities against consumers of unknown residence who failed to fulfil their contractual obligations. In September 2008, Hypoteční banka sued Mr Lindner, a German national, to pay the mortgage loan granted to him pursuant to a contract. Hypoteční banka brought the dispute before the court with general jurisdiction over the place of the residence of the defendant, in which he had been domiciled at the time when the contract was concluded. The payment order issued by the District Court Cheb was not able to be served on the defendant personally, as required by the provisions of the Czech Rules of Civil Procedure. The defendant (consumer) changed his place of residence without informing his contractual partner. It was unknown whether he was still domiciled in the Czech Republic. District Court, unable to solve the dispute with his own interpretation of Brussels I, stayed the proceedings and referred to the CJEU question whether the Regulation precludes the use of provisions of national law which enable proceedings to be brought against persons of unknown address. In his answer, the CJEU drew a road map for the national courts to follow in order to abide the requirements of the Regulation while being able to continue with proceedings against persons of unknown residence. According to the CJEU:

- 1) The courts must firstly determine whether the defendant is domiciled in the Member State of that court by applying its own case law;
- 2) Where, as is the case in the main proceedings, that court concludes that the defendant in the main proceedings is not domiciled in the Member State of that court, it must then examine whether he is domiciled in another Member State. To this end it applies, in accordance with Article 59(2) of Regulation No 44/2001, the national law of that other Member State;
- 3) Where the national court, on the one hand, is still unable to identify the place of domicile of the consumer and, on the other hand, also has no firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union, a situation in which Article 4 of Regulation No 44/2001 may be applicable, it is necessary to examine whether Article 16(2) of that regulation may be interpreted as meaning that, in a case such as that envisaged, the rule on jurisdiction of the courts of the Member

²³ Constitutional Court judgment No. II. ÚS 629/04, 31 March 2005, ECLI:CZ:US:2005:2.US.629.04.

²⁴ Confirmed for example by judgments of City Court Prague, 15 August 2011, No. 39 Co 281/2011, 27 July 2011, No. 39 Co 235/2011, Regional court Plzeň, 23 August 2010, No. 25 Co 142/2010, Supreme court, decision No. 33 Cdo 2485/2008, 26 May 2011, ECLI:CZ:NS:2011:33.CDO.2485.2008.1.

State in which the consumer is domiciled, laid down in the latter provision, also covers the consumer's last known domicile.²⁵

The CJEU addressed the controversy regarding the right on the fair trial and rights of the defence on the part of the consumer as a weaker party to the proceedings, which are clearly damaged with the possibility to continue the proceedings without his presence. However, the CJEU held that the rights of the defence as laid down by Article 47 of the Charter of Fundamental Rights of the EU must be interpreted with respect to the right of the applicant to bring proceedings before a court in order to determine the merits of its claim. CJEU referred also to its previous finding in *Gambazzi*²⁶, that fundamental rights, such as the respect for the rights of the defence, do not constitute unfettered prerogatives and may be subject to restrictions, if the restriction corresponds to the objectives of public interest²⁷.

The answer of the CJEU brought rather critical responses in Czech academic and professional sphere, however not because of the holes in the consumer defence rights protection, but on the contrary, because the courts considered the "roadmap" conditions for the continuation of the proceedings to be too strict on them and the other party, and too lenient towards the consumer. Nevertheless, the judgment is respected with courts applying more careful determination whether the residence of the consumer is able to be found. The judgment was reflected in many internal communications issued by the Ministry of Justice towards judges of all Czech courts deciding the disputes on jurisdiction in cases with cross-border element.

Brussels IIa

Brussels IIa is the second most often applicable instrument of EU law within the civil, commercial and criminal matters before the Czech courts.²⁸ It is a core instrument of the European judicial area dealing with jurisdiction matters in family law.

While there are no systemic deficiencies arising from the application of the Brussels IIa regulation, Czech courts did address few interesting problems. Minor problems relate to a separate regulation of maintenance obligations which are regulated in a different instrument (Regulation No 4/2009). Nevertheless, in several cases courts applied the Regulation Brussels IIa on the determination of maintenance in proceedings which related both to the question of parental responsibility and maintenance obligation.²⁹ However, none of these cases of misinterpreted material jurisdiction of the Brussels IIa regulation led to a wrongly assigned jurisdiction to a court, as both regulations identify habitual residence of a child (or entitled) as a possible connecting factor. Yet, Regulation 4/2009 allows an alternative application of domicile of the defendant as a connecting factor determining the jurisdiction, therefore, there is a potential for split between the jurisdiction to decide on the maintenance and on the parental responsibility and the courts should respect the differences between regulations.³⁰

²⁵ *Lindner v Hypoteční banka*, C-327/10, 17 November 2011, I-11543, ECLI:EU:C:2011:745, para. 40-42.

²⁶ Case C-394/07, *Marco Gambazzi v DaimlerChrysler Canada Inc. and CIBC Mellon Trust Company*, 2 April 2009, I-02563, ECLI:EU:C:2009:219.

²⁷ *Lindner*, para. 48-50.

²⁸ Brussels IIa cca 18 %. Brussels I 52 %. Supra note n. 6.

²⁹ District court Frýdek-Místek, 7 September 2010, No. OP 443/2008; District Court Jeseníky, 9 September 2009, No. 8 P 64/2001, City court Prague, 4 September 2009, No. 18 Co 36/2010, District court Mladá Boleslav, 7 July 2011, No. 21 P 288/2007, District court Sokolov, 9 May 2011, No. 14 Nc 101/2009, District court Opava, 6 May 2011, No. 14 Nc 442/2009.

³⁰ Magnus and Mankowski, *Brussels II bis Regulation. European Commentaries on Private International Law*. (Sellier European Law Publishers 2012),p. 78.

For quite some time, Czech courts struggled with an interpretation of a term “habitually resident” in Article 8, interpreting the question of the residence of a child in conformity with national procedural rules.³¹ However, this problem was solved by the decision of the Supreme court of 30 November 2011, No. 30 Cdo 2244/2011, ECLI:CZ:NS:2011:30.CDO.2244.2011.1, which drew attention on the established case law of the CJEU³² and the necessity to interpret the term “habitually resident” as an autonomous norm of the EU law, which, therefore, cannot refer to norms of national law and their usual interpretation. The Supreme Court concluded that “*the term habitual residence of Article 8 para. 1 of the Regulation No. 2201/2003 has to be interpreted in a sense that this residence corresponds to a place which shows some level of integration of the child in the social and family environment. In this respect, high attention should be given to the length, regularity and reasons of the child’s residence in the member state, on the citizenship and nationality of a child, place and conditions of his school attendance, language skills and family and social ties in respective member state. It is upon the national court to determine a place of habitual residence taking into account particular facts of each individual case.*”³³ CJEU’s interpretation of habitual residency of a child draws closer attention to the concept of the best interest of the child. Conformity between the national courts practice and the CJEU interpretation strengthened the protection of individual rights of children in parental responsibility disputes.

However, for most cases it might be concluded that courts do not have any major problems with Brussels IIa regulation application, generally refer to the CJEU case law³⁴. Few existing problems were connected mostly to underdeveloped case law of the CJEU further interpreting ambiguous provisions of the Regulation: e.g. application in matters of the same-sex marriages³⁵, or some procedural aspects relating to the prorogation of jurisdiction³⁶.

Regulation 606/2013

As of time, there are no know data on 606/2013 Regulation application by judicial authorities.

1.1.2 Protection of rights in criminal proceedings (due process, right to a fair trial, etc.)

The EU has adopted numerous legislative instruments enhancing judicial cooperation and imposing mutual recognition in criminal matters. These have led to concerns regarding the protection of individuals in criminal proceedings across the member states of the EU, which led to the adoption of approximation/minimum harmonization of aspects of national criminal law and procedures. To what extent do these measures affect the civil rights of EU citizens, and their ability to exercise them?

Background instrument on judicial cooperation:

³¹ See e.g. decision of the District Court Mladá Boleslav of 23 June 2011, No. 14C 204/2011.

³² Case C-523/07 A, 2 April 2009, ECLI:EU:C:2009:225; Case C-497/10 *Barbara Mercredi v Richard Chaff*, 22 December 2010, I-14309, ECLI:EU:C:2010:829.

³³ For similar argumentation, see also Regional court in Brno, 4 February 2011, No. 20 Co 1334/2010-70.

³⁴ See e.g. decision of Regional court in Prague, 31 October 2011, No. 30 Co 482/2011, applying the CJEU’s judgment in C-168/08 *Hadadi*, 16 July 2009, I-06871, ECLI:EU:C:2009:474.

³⁵ See judgment of District court in Rokycany, 20 September 2011, No 6 C 59/2011. Existing academic debate suggests that the application of the Regulation should not be possible in same-sex marriages matters, however, as of time, there is no relevant case law of the CJEU. For more see Magnus and Mankowski, *Brussels II bis Regulation. European Commentaries on Private International Law.* (Sellier European law Publishers 2012), p. 63.

³⁶ See e.g. decision of the Supreme Court referring question for preliminary ruling to CJEU in case L, on the interpretation of Article 12.

- Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.

1.1.2.1 Mutual recognition instruments in criminal *matters*

Question 1 – Transposition of the above EU instruments protecting or potential affecting civil rights³⁷

- Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between member state: all provisions potentially relevant.

Framework decision 2002/584/JHA was fully transposed into the Czech legal order on 12 November 2002 (with transposition period expiring on 31 December 2003) in following national instruments:

Act No. 104/2013 Coll., on international judicial cooperation in criminal matters (<i>Zákon č. 104/2013 Sb., o mezinárodní justiční spolupráci ve věcech trestních</i>);
Act No. 105/2013 Coll., amending several acts in relation to the adoption of new Act on the international judicial cooperation in criminal matters (<i>Zákon č. 105/2013 Sb., o změně některých zákonů v souvislosti s přijetím zákona o mezinárodní justiční spolupráci ve věcech trestních</i>);
Act No. 141/1961 Coll., Criminal Procedure Code (<i>Zákon o trestním řízení soudním</i>);
Act. No. 265/2001 Coll., amending the Act No 141/1961 Coll, Criminal Procedure Code (<i>Zákon č. 265/2001 Sb., kterým se mění zákon č. 141/1961 Sb., o trestním řízení soudním (trestní řád), ve znění pozdějších předpisů, zákon č. 140/1961 Sb., trestní zákon, ve znění pozdějších předpisů, a některé další zákony</i>);
Act No. 292/1993 Coll., amending Act No. 141/1961 Coll., on Criminal Procedure Code and Act No. 21/1992 Coll. on banks, and Act No. 335/1991 Coll. on courts and judges (<i>Zákon č. 292/1993 Sb., kterým se mění a doplňuje zákon č. 141/1961 Sb., o trestním řízení soudním (trestní řád), zákon č. 21/1992 Sb., o bankách, a zákon č. 335/1991 Sb. o soudech a soudcích</i>);
Act No. 49/2009 Coll., Criminal Code (<i>Zákon č. 40/2009 Sb., trestní zákoník</i>);
Act No. 420/2011 Coll., amending laws in relation to adoption of a Law on the criminal liability of legal persons (<i>Zákon č. 420/2011 Sb., o změně některých zákonů v souvislosti s přijetím zákona o trestní odpovědnosti právnických osob a řízení proti nim</i>);
Act No. 459/2011 Coll., amending the Act 141/1961 Coll, Criminal Procedure Code (<i>Zákon č. 459/2011 Sb., kterým se mění zákon č. 141/1961 Sb., o trestním řízení soudním (trestní řád), ve znění pozdějších předpisů, a některé další zákony</i>).

Czech Republic made no statement pursuant to Article 32 of the Framework Decision.

³⁷ All presented information is based on the data provided by the Office of the Government, Information systém for the legal approximation, ww.isap.vlada.cz.

- Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition for judgments imposing custodial sentences or measures involving deprivation of liberty, in particular Arts 1, 2, 3, 6, 7, 8, 9, 10,11, 14, 18, 19, 29.

Framework Decision 2008/909/JHA was fully transposed on 22 December 2008 (within the transposition period expiring on 5 December 2011), by following legal instruments:

Act No. 104/2013 Coll., on international cooperation in criminal matters (Zákon č. 104/2013 Sb., o mezinárodní justiční spolupráci ve věcech trestních).

- Framework Decision 2008/947/JHA of 27 November 2008 on probation decisions and alternative sanctions, in particular Arts 1, 2, 3, 4, 10, 11, 19.

Framework Decision 2008/947 is fully transposed into the Czech legal order by following Acts:

Act No. 104/2013 Coll., on international judicial cooperation in criminal matters (Zákon č. 104/2013 Sb., o mezinárodní justiční spolupráci ve věcech trestních);
Act No. 141/21961 Coll., Criminal Procedure Code (Zákon o trestním řízení soudním);
Act No. 166/1998 Coll., amending the Act 141/1961 Coll. (Zákon č. 166/1998 Sb., kterým se mění zákon č. 141/1961 Sb., o trestním řízení soudním (trestní řád), ve znění pozdějších předpisů);
Act No. 178/1990 Coll., amending Criminal Procedure Code (Zákon č. 178/1990 Sb., kterým se mění a doplňuje trestní řád);
Act No. 181/2011 Coll. amending the Act No. 141/1961 Coll. (Zákon č. 181/2011 Sb., kterým se mění zákon č. 141/1961 Sb., o trestním řízení soudním (trestní řád), ve znění pozdějších předpisů, a některé další zákony);
Act. No. 265/2001 Coll., amending the Act No 141/1961 Coll, Criminal Procedure Code (Zákon č. 265/2001 Sb., kterým se mění zákon č. 141/1961 Sb., o trestním řízení soudním (trestní řád), ve znění pozdějších předpisů, zákon č. 140/1961 Sb., trestní zákon, ve znění pozdějších předpisů, a některé další zákony);
Act No. 330/2011 Coll., amending the Act No. 40/2009 Coll, Criminal Code and Act No. 141/1961 Coll. (Zákon č. 330/2011 Sb., kterým se mění zákon č. 40/2009 Sb., trestní zákoník, ve znění pozdějších předpisů, a zákon č. 141/1961 Sb., o trestním řízení soudním (trestní řád), ve znění pozdějších předpisů);
Act No. 390/2012 Coll, amending the Act No. 40/2009 Coll. Criminal Code (Zákon č. 390/2012 Sb., kterým se mění zákon č. 40/2009 Sb., trestní zákoník, ve znění pozdějších předpisů, a některé další zákony);
Act No. 40/2009 Coll, Criminal Code (Zákon č. 40/2009 Sb., trestní zákoník);
Act No. 41/2009 Coll. amending several acts in relation to the adoption of new Criminal Code (Zákon č. 41/2009 Sb., o změně některých zákonů v souvislosti s přijetím trestního

zákoníku);

Act No. 48/1973 Coll, amending Criminal Procedure Code (*Zákon č. 48/1973 Sb., kterým se mění a doplňuje trestní řád*).

- Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in criminal proceedings, in particular Arts 1-19.

Framework Decision 2008/978/JHA was not adopted into the Czech legal. Implementation is irrelevant as the Framework decision was replaced by the Directive of the European Parliament and Council 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters. As of time, the directive is transposed into the Czech legal order only partly (transposition period will expire on 22 May 2017)

- Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence, in particular Arts 1-2-3, 7,8, 10, 11.

Framework Decision 2003/577/JHA is fully transposed into the Czech legal order by following Act:

Act No. 104/2013 Coll., on international judicial cooperation in criminal matters (*Zákon č. 104/2013 Sb., o mezinárodní justiční spolupráci ve věcech trestních*). The only exception relation to Article 11 para. 4 and 5 which were not transposed, because transposing Act refers to the provisions of Criminal Procedure Code already fulfilling the requirements laid down by the provision.

- Framework Decision 2006/783/JHA on the application of the principle of mutual recognition for confiscation orders, in particular Arts 1,2,6,7,8,9, 11, 14, 18.

Framework Decision 2006/783 is fully transposed into the Czech legal order by following Act:

Act No. 104/2013 Coll., on international judicial cooperation in criminal matters (*Zákon č. 104/2013 Sb., o mezinárodní justiční spolupráci ve věcech trestních*).

Question 2 – Executive/administrative implementation of EU instruments affecting civil rights

The set of framework decisions is further implemented by the executive authorities through non-obligatory instructions issued by the Ministry of Justice which are supposed to coordinate the procedures before the national courts deciding in criminal matters with cross-border element. The key methodological guideline for courts applying the Act on international judicial cooperation in criminal matters (Act No. 104/2013 Coll.), the Criminal Procedure Code (Act No. 141/1961 Coll.), and binding international treaties and EU law, is the Instruction of the Ministry of Justice on the procedure before the courts in criminal matters

with cross-border element, which replaced Instruction of the Ministry of Justice, No. 66/2004-MO-J/155 (25/2007 Coll.).³⁸ The instruction addresses procedural details and appropriate procedure of contact between Czech courts and foreign authorities in international criminal judicial cooperation.

The Central authority authorising the transfer of individuals through the Czech territory is the Ministry of Justice (§ 142 Act No. 104/2013 Coll., On international judicial cooperation in criminal matters). Up until 31 December 2014, all transfers were authorised by the Supreme Court.

Question 3 – Judicial interpretation and application of EU instruments affecting civil rights

Generally speaking, Czech courts deciding in criminal matters apply EU law rather rarely.³⁹ However, one of the instruments of mutual recognition in criminal matters was heavily discussed and contested several times before the top Czech courts. Framework Decision 2002/584/JHA on the European arrest warrant rose question of its compatibility with individual rights guaranteed by the Czech Constitution. On 26 November 2004, group of deputies of the Chamber of Deputies and senators of the Senate of the Czech Parliament petitioned the Constitutional Court with proposal on the annulment of § 21 para. 2 of Act No. 140/1961 and § § 403 par. 2, § 411 par. 6 lit. e), § 411 par. 7 and § 412 par. 2 of Act No. 141/1961 Coll., on the Criminal Procedure Code, transposing relevant provisions of the European Arrest Warrant. The petitioners claimed that mentioned amendments of the Criminal Code and Criminal Procedure Code were unconstitutional. Originally, transposition and adoption of the amendments were to include also amendment of Article 14 of the Charter of Fundamental Rights and Basic Freedoms which would have read:

Citizens can be surrendered to Member States of the European Union for the purpose of criminal prosecution or of serving a custodial sentence, if such results from those of the Czech Republic's obligations as a European Union Member State which cannot be restricted or excluded.

However, this amendment was refused by the Chamber of Deputies. The “old” version of the Article 14 reads as follows:

“Article 14

- (1) The freedom of movement and of residence is guaranteed.*
- (2) Everyone who is legitimately staying within the territory of the Czech and Slovak Federal Republic has the right freely to leave it.*
- (3) These freedoms may be limited by law if such is unavoidable for the security of the state, the maintenance of public order, the protection of the rights and freedoms of others or, in demarcated areas, for the purpose of protecting nature.*
- (4) Every citizen is free to enter the territory of the Czech and Slovak Federal Republic. No citizen may be forced to leave her homeland.*

³⁸ Instrukce Ministerstva spravedlnosti o postupu soudů ve styku s cizinou ve věcech trestních, 9 April 2014, No. 37/2013-MOT-J/65.

³⁹ This is especially true for lower courts. See e.g. Report of the District Court Český Krumlov, No. 20 Spr 182/2015, 17 April 2014.

(5) *An alien may be expelled only in cases specified by the law.*”

In its judgment of 3 March 2006, No. Pl. ÚS 66/04⁴⁰ (European Arrest Warrant), the Constitutional Court rejected the proposed annulment and found it to be compatible with interpretation of the EU law instruments. Constitutional Court held, that *“If the Constitution, of which the Charter of Fundamental Rights and Basic Freedoms forms a part, can be interpreted in several manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected which supports the carrying out of that obligation, and not an interpretation which precludes its. These conclusions apply as well to the interpretation of Art. 14 par. 4 of the Charter.”* Furthermore, the Court emphasised that *“the petitioners’ assertion, that the adoption into domestic law of the European arrest warrant would disrupt the permanent relationship between citizen and state, is not tenable. A citizen surrendered to an EU Member State for criminal prosecution remains, even for the duration of this proceeding, under the Czech state’s protection.”* While the Article 14, para. 1 and 2, precludes the exclusion of a Czech citizen from the community of citizens of the Czech Republic, the text of Article 14 para. 4 cannot in itself be interpreted as precluding the surrender of a citizen, for a limited time, to another EU member state, if, following the conclusion of criminal proceedings, he has the right to return to his homeland. According to the Constitutional Court, Article 14 of the Charter has to be interpreted and understood in the light of the investigation and suppression of criminality which takes place in the European area and which cannot be successfully accomplished within national framework but requires extensive international cooperation. This “euro conforming” interpretation has to prevail over teleological interpretation in determining the objective meaning of Article 14 para. 4. of the Charter, because it reflects the contemporary reality of the EU. Constitutional Court furthermore drew attention to the fact that all EU member states are signatories of the European Convention for the Protection of Human Rights, and their relations in judicial area are governed by the principle of mutual trust.

Later on, Constitutional Court confirmed this finding in few other judgments (I. ÚS 1813/14, ECLI:CZ:US:2014:1.US.1813.14.1, decision of 4 November 2014; I. ÚS 1055/14, decision of 6 October 2014, ECLI:CZ:US:2014:1.US.1055.14.1; Judgment No. I. ÚS 111/12. 3 December 2013, ECLI:CZ:US:2013:1.US.111.12.3; Decision No. II. ÚS 858/13, 30 July 2013, ECLI:CZ:US:2013:2.US.858.13.1, decision II. ÚS 4237/12, 16 April 2013, ECLI:CZ:US:2013:2.US.4237.12.1).

The Supreme Court addressed the Framework Decision on the European Arrest Warrant as well. It is worth mentioning, that most decisions applying the European Arrest Warrants are procedural decisions on the transfer of individuals – related to the authority of the Supreme Court to decide on the transfers up until 31 December 2013. Since 1 January 2014, Supreme Court decides only in situations where the transfer through the territory of the Czech Republic is not carried on by air.⁴¹ Supreme Court never addressed any inconsistencies between the European Arrest Warrant and provisions of national law protecting the civil rights of individuals.

⁴⁰ Pl. ÚS 66/04, 3 March 2006, ECLI:CZ:US:2006:Pl.US.66.04. English translation available at <http://www.usoud.cz/en/decisions/>.

⁴¹ See e.g. Decision of 9 February 2015, No. 11 Tcu 18/2015, ECLI:CZ:NS:2015:11.TCU.18.2015.1.

1.1.2.2 'Approximation' measures

1.1.2.2.1 Victims' rights

Question 1 – Transposition of the above EU instruments protecting or potential affecting civil rights⁴²

- (Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings).

Framework decision 2001/220/JHA is not transposed and deemed as irrelevant due to its replacement by the Directive 2012/29/EU. Previously, relevant national regulation was provided by Act No. 141/1961 Coll., Criminal Procedure Code, Act No. 257/2000 Col, probation and mediation service (in relation to Article 1 letter e) and Article 10), Act No. 137/2001 Coll., on special protection of witnesses (*Zákon č. 137/2001 Sb., o zvláštní ochraně svědka a dalších osob v souvislosti s trestním řízením*), Act No. 209/1997 Coll., on monetary assistance for the victims of criminal activity (*Zákon č. 209/1997 Sb., o poskytnutí peněžité pomoci obětem trestné činnosti*; in relation to Article 4 para. 1), interestingly enough, part of the implementation was provided for in international obligations of the Czech Republic deriving from the European Convention on mutual assistance in criminal matters (Article 11 para. 2).

- Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

Directive 2012/29/EU is fully transposed into the Czech legal order by 52 different Acts. Furthermore, Ministry of the Interior and the Police Presidium of the Czech Republic, acting within the National strategy on the prevention of violence against children in the CR 2009-2010, started special program establishing interrogation rooms for traumatised victims and witnesses of criminal activities, with particular attention put on the protection of women and children (relevant for the Art. 23 para. 2, a)).

- Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims

Directive 2004/80 is fully transposed into the Czech legal order by provisions of following Act:

Act No. 45/2012 Coll, on the victims of crimes (*Zákon č. 45/2013 Sb., o obětech trestných činů a o změně některých zákonů (zákon o obětech trestných činů)*). Relevant information on the possibility of victims to get compensation are published on the web page of the Ministry of Justice.

- Directive 2011/99/EU on 13 December 2011 on the European Protection Order

Directive 2011/99/EU is fully transposed into the Czech legal order, even though the transposition was done 4 months after the expiration of the transposition period (transposition

⁴² All presented information is based on the data provided by the Office of the Government, Information system for the legal approximation, ww.isap.vlada.cz.

period ended on 11 January 2015, the Directive was fully transposed on 1 April 2015). Previously, the Directive was considered to be incompatible with provision of the Act No. 104/2013 Coll., On the international judicial cooperation in criminal matters, which lacked provisions guarantying the protection of victims moving to another member states from the Czech Republic or from other member state to the Czech Republic. (No other conflict with constitutional and legal order of the Czech Republic was identified, on the contrary, the Directive is compatible with *ne bis in idem* principles and other principles of Charter of fundamental rights of the Czech Republic, as well as with international treaties ratified by the Czech Republic (especially Convention of the Council of Europe on the compensation of victims of violent crimes and several related Recommendations – e.g. Recommendation No. (2006)8, Recommendation No. R (87)21, Recommendation No. R(85)11). The government therefore drafted new amendment of the Act providing procedural provisions for the protection order, which successfully passed the legislative process on 1 April 2015.

One of the questions raised in the transposition process was compatibility with principle *ne bis in idem* in situation, when the person with protection order breaks this order in a state of execution while simultaneously committing a crime. However, the legislator considered the wording of the preamble (“*In the context of cooperation among the authorities involved in ensuring the protection of the protected person, the competent authority of the executing State should communicate to the competent authority of the issuing State any breach of the measures adopted in the executing State with a view to executing the European protection order. This communication should enable the competent authority of the issuing State to promptly decide on any appropriate response with respect to the protection measure imposed in its State on the person causing danger. Such a response may comprise, where appropriate, the imposition of a custodial measure in substitution of the non-custodial measure that was originally adopted, for example, as an alternative to preventive detention or as a consequence of the conditional suspension of a penalty. It is understood that such a decision, since it does not impose ex novo a penalty in relation to a new criminal offence, does not interfere with the possibility that the executing State may, where applicable, impose penalties in the event of a breach of the measures adopted in order to execute the European protection order.*”) as a satisfactory explanation both within the principle of *ne bis in idem* as regulated by the national Charter and European Convention on Human Rights and its Protocol No 7, article 4.⁴³

Question 2 – Executive/administrative implementation of EU instruments affecting civil rights

There are no accessible data on the implementation of either of the directives by executive or administrative authorities affecting civil rights.

Question 3 – Judicial interpretation and application of EU instruments affecting civil rights

As of time, none of the directives was contested or interpreted by any of the top Czech courts – Constitutional, Supreme or Supreme Administrative court. The only exception relates to the Directive 2004/80/EC on the compensation of crime victims: in its judgment No. 30 Cdo 1084/2010 of 31 January 2012⁴⁴, the Supreme Court of the Czech Republic decided on the compensation of immaterial damage caused in a traffic accident resulting in death and severe

⁴³ See governmental draft of an Act amending the Act No. 104/2013 Coll., on the international judicial cooperation in criminal matters and its explanatory report. Available at: <http://www.psp.cz/sqw/text/tiskt.sqw?O=7&CT=261&CT1=0>.

⁴⁴ Supreme Court, No. 30 Cdo 1084/2010 of 31 January 2012 ECLI:CZ:NS:2012:30.CDO.1084.2010.1.

injury of a French couple. The Supreme Court analysed the system of compensation of victims in European Union and principles of the Directive 2004/80/EC, but, taking into the consideration the time of the accident (June 2000) concluded that the system of European harmonisation introduced by the Directive cannot be applied in the respective case.

There are no data available on the application on the part of the lower courts.

1.1.2.2.2 Rights of suspects and accused persons

Question 1 – Transposition of the above EU instruments protecting or potential affecting civil rights⁴⁵

- Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings

Directive 2010/64/EU is fully transposed into the Czech legal order by following legal acts:

Act No. 104/2013 Coll., on international judicial cooperation in criminal matters (<i>Zákon č. 104/2013 Sb., o mezinárodní justiční spolupráci ve věcech trestních</i>);
Act No. 105/2013 Coll., amending certain acts in relation to adoption of the Act on international judicial cooperation in criminal matters (<i>Zákon č. 105/2013 Sb., o změně některých zákonů v souvislosti s přijetím zákona o mezinárodní justiční spolupráci ve věcech trestních</i>);
Act No. 141/21961 Coll., Criminal Procedure Code (<i>Zákon o trestním řízení soudním</i>);
Act No. 178/1990 Coll., amending Criminal Procedure Code (<i>Zákon č. 178/1990 Sb., kterým se mění a doplňuje trestní řád</i>);
Act No. 193/2012 Coll., amending the Act No. 141/1961 Coll.
Act No. 227/2009 Coll., amending certain acts in relation to the adoption of the Act on the registries.
Act. No. 265/2001 Coll., amending the Act No 141/1961 Coll, Criminal Procedure Code (<i>Zákon č. 265/2001 Sb., kterým se mění zákon č. 141/1961 Sb., o trestním řízení soudním (trestní řád), ve znění pozdějších předpisů, zákon č. 140/1961 Sb., trestní zákon, ve znění pozdějších předpisů, a některé další zákony</i>);
Act No. 283/2004 Coll, amending the Act No. 141/1961 Coll.;
Act No. 292/1993 Coll., amending the Act No. 141/1961 Coll.;
Act No. 36/1967 Coll., on experts and court interpreters (<i>Zákon č. 36/1967 Sb., o znalcích a tlumočnických</i>) and respective regulation of the Ministry of Justice;
Act. No. 384/2008 Coll. amending the Act No. 155/1998 Coll., on sign language (<i>Zákon č. 384/2008 Sb., kterým se mění zákon č. 155/1998 Sb., o znakové řeči a o změně dalších</i>

⁴⁵ All presented information is based on the data provided by the Office of the Government, Information systém for the legal approximation, ww.isap.vlada.cz.

<i>zákonů a další související zákony);</i>
Act No. 444/2011 Coll., amending the Act No. 36/1967 Coll.,
Act No. 45/2014 Coll., on the victims of violent crimes (<i>Zákon č. 45/2013 Sb., o obětech trestných činů a o změně některých zákonů (zákon o obětech trestných činů)</i>);
Act No. 459/2011 Coll., amending the Act No. 141/1961;
Act No. 558/1991 Coll., amending the Criminal Procedure Code and Act on the protection of state secret (<i>Zákon č. 558/1991 Sb., kterým se mění a doplňuje trestní řád a zákon o ochraně státního tajemství</i>).

- Directive 2012/13/EU of 22 May 2012 on the Right to Information in Criminal Proceedings

Directive 2012/13/EU is fully transposed into the Czech legal order by provisions of 30 Acts. Only one point was raised in the transposition process regarding the Article 7 para. 1 (right of access to the materials of the case at any stage of the criminal proceedings where a person was arrested and detained). Provision of national *Criminal Procedure Code* (§ 65) allows a partial refusal of an access to a file, however, this provision must be interpreted in the light of the European Convention of Human Rights and Fundamental Freedoms, which provides, though the case law of the European Court of Human Rights, that possibility to refuse the access to the file is strictly limited in situation of detention in preliminary proceedings. Articles 3, 4 and 5 of the Convention guarantee the accused contradictory proceedings and balance of arms.⁴⁶

During the drafting process, the directive proposals were rather strongly opposed by the Council of Bars and Law Societies of Europe (CCBE).⁴⁷ CCBE drew attention to incompatibility of several provisions with European Convention on Human Rights, such as exemption from the confidentiality clause, possibility to waive the right of access to a lawyer, or the interpretation of the right of access to a lawyer itself, encompassing not only the right to communication and consultation of the lawyer but also the right to meet him or her in person. Finalised proposal dropped the controversial issues and individual provisions of the directives are yet to be contested before the national (Czech) courts. As of time, it seems there is no discrepancy between the directives and national legal provisions.

Question 2 – Executive/administrative implementation of EU instruments affecting civil rights

There are no accessible data on the implementation of either of the directives by executive or administrative authorities affecting civil rights.

Question 3 – Judicial interpretation and application of EU instruments affecting civil rights

⁴⁶ See e.g. *Migon v Poland*, 25 June 2002, Application No. 24244/94, *Lietzow v Germany*, 13 February 2001, Application no. 24479/94; *Garcia Alva v Germany*, 13 February 2001, 23541/94. For more on the national law interpretation see Šámal (eds). *Trestní řád*, 7th Edition (C.H.Beck 2013), p. 709.

⁴⁷ Council of Bars and Law Societies of Europe (2012): “CCBE Comments on the Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings”, available at: http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_21_01_11_CCBE_com1_1295877077.pdf.

As already mentioned, during the drafting process, the directive proposals were rather strongly opposed by the Council of Bars and Law Societies of Europe (CCBE).⁴⁸ CCBE drew attention to incompatibility of several provisions with European Convention on Human Rights, such as exemption from the confidentiality clause, possibility to waive the right of access to a lawyer, or the interpretation of the right of access to a lawyer itself, encompassing not only the right to communication and consultation of the lawyer but also the right to meet him or her in person. Finalised proposal dropped the controversial issues and individual provisions of the directives are yet to be contested before the national courts.

The directives were addressed by one of the top Czech courts only in one instance: by its judgment of 18 March 2015, No. IV. ÚS 2443/14, ECLI:CZ:US:2015:4.US.2443.14.1, the Constitutional Court dealt with a complaint logged by a claimant who had been facing expulsion from the Czech Republic. The claimant, having previously waived her right to protest against a criminal order, asked the Constitutional Court to stay the proceedings and refer a request for preliminary ruling to the CJEU with question on the interpretation of Directive 2010/64/EU, and compatibility of the Article 3 with such a provision of national law, which provides for a possibility to waive his or hers right of written translation of important documents (judgment or lawsuit) in situation where he or she has no access to a legal representative. However, the Constitutional Court concluded that conditions under which an individual can waive his or her right to contest the criminal order were clarified in previous case law of the Constitutional Court.⁴⁹ The constitutional rights of the claimant were breached in regards to the interpretation of these provisions and obligations following from the European Convention on Human Rights, therefore, the Constitutional Court concluded that there is no reason to refer to the CJEU for a clarification of the provisions of aforementioned directives.

As of time, it seems there is no discrepancy between the directives and national legal provisions.

1.2. EU legislation related to the protection of personal data

Question 1 – Transposition of the above EU instruments protecting or potential affecting civil rights⁵⁰

- Directive 95/46 on the protection of individuals with regard to processing of personal data and on the free movement of such data (Data Protection Directive) [1995] OJ L281/31.

The Directive 95/46 is fully implemented into the Czech legal order by following acts:

Act No. 101/2000 Coll., on the protection of personal data (<i>Zákon o ochraně osobních údajů a o změně některých zákonů</i>);
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Act No. 126/2003 Coll., amending the Act No. 269/1994 Coll., on the Criminal records
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⁴⁸ Council of Bars and Law Societies of Europe (2012): CCBE Comments on the Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings, available at: http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_21_01_11_CCBE_com1_1295877077.pdf.

⁴⁹ See e. g. judgment of the Constitutional Court, No. IV. ÚS 1320/07 of 5 November 2007, ECLI:CZ:US:2007:4.US.1320.07.1, or No. I. ÚS 291/96 of 23 September 1997, ECLI:CZ:US:1997:1.US.291.96..

⁵⁰ All presented information is based on the data provided by the Office of the Government, Information systém for the legal approximation, ww.isap.vlada.cz.

<i>(Zákon, kterým se mění zákon č. 269/1994 Sb., o Rejstříku trestů);</i>
Act No. 133/2000 Coll., on the evidence of citizens and birth numbers (<i>Zákon o evidenci obyvatel a rodných číslech a o změně některých zákonů (zákon o evidenci obyvatel)</i>);
Act No. 177/2001 Coll., amending the Act No. 101/2000 Coll.
Act No. 269/1993 on the Criminal records (<i>Zákon o Rejstříku trestů</i>);
Act No. 302/2000 Coll., amending the Act No. 46/2000 Coll., on the rights and obligations following the publication of periodical press (<i>Zákon č. 302/2000 Sb., kterým se mění Tiskový zákon</i>);
Act No. 320/2002 Coll., (<i>Zákon č. 320/2002 Sb., o změně a zrušení některých zákonů v souvislosti s ukončením činnosti okresních úřadů</i>);
Act No. 439/2004 Coll., amending the Act No. 101/2000;
Act No. 46/2000 Coll., on the rights and obligations following the publication of periodical press (<i>Tiskový zákon</i>);
Act No. 517/2002 Coll.;
Act No. 53/2004 Coll. amending certain laws related to the evidence of citizens (<i>Zákon, kterým se mění některé zákony související s oblastí evidence obyvatel</i>);
Act No. 552/1991 Coll, on the state control (<i>Zákon České národní rady č. 552/1991 Sb., o státní kontrole</i>);

Furthermore, some provisions of the Directive are reflected also in the Legislative rules of the Government providing (Art. 5 para. 1, Art. 13 para. 1, Art. 16 para. 1) that the submitter of the proposal is obliged to send the proposal to the Office for personal data protection.

- Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector (ePrivacy Directive) [2002] OJ L201/37.

Directive 2002/58 is fully transposed into the Czech legal order by following acts:

Act No. 101/2000 Coll., on the protection of personal data (<i>Zákon o ochraně osobních údajů a o změně některých zákonů</i>);
Act No. 127/2005 Coll., on the electronic communication (<i>Zákon o elektronických komunikacích</i>);
Act No. 177/2001 Coll., amending the Act No. 101/2000 Coll.
Act No. 214/2006 Coll. amending the Act No. 455/1991 Coll., trade law (<i>Zákon č. 214/2006 Sb., kterým se mění zákon č. 455/1991 Sb., o živnostenském podnikání (živnostenský zákon), ve znění pozdějších předpisů, a některé další zákony</i>);

Act No. 361/2005 Coll., amending the Act No. 143/2001 on the protection of the economic competition (*Zákon č. 361/2005 Sb., kterým se mění zákon č. 143/2001 Sb., o ochraně hospodářské soutěže a o změně některých zákonů (zákon o ochraně hospodářské soutěže), ve znění pozdějších předpisů, a některé další zákony*);

Act No. 439/2004 Coll., on the amendment of the Act 101/2000 Col.,;

Act No. 480/2004 Coll., on the services of some information companies (*Zákon o některých službách informační společnosti a o změně některých zákonů (zákon o některých službách informační společnosti)*).

No major difficulties were identified during the transposition process. Conformity of Directive 2002/58 provisions with the Czech legal order were confirmed by the judgment of the Supreme Administrative Court of 7 August 2014, No. 4 As 108/2014.

- Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive (Data Retention Directive) [2006] OJ L105/54. [annulled]

Question 2 – Executive/administrative implementation of EU instruments affecting civil rights

Indirectly, all EU legislation related to the protection of personal data is implemented (through the implementation of national transposition provisions) by the Office for the protection of personal data. Office was established by Act No. 101/2000 Coll., on the protection of personal data. The jurisdiction of the Office covers:

- Protection of personal data (i.e. control of information systems of public service authorities, administration of the registry of notices on activities, property, income, gifts and donations, etc., supplying the information according to the Act No. 106/1999 Coll., on the free access to information).
- Supervision of obligations related to processing of personal data in electronic communications (Act No. 127/2005 Coll., on electronic communication). Office may investigate petitions on the breach of personal data protection.
- Supervision of obligations regarding the business communication.
- Decisions on offenses related to the processing of personal data in specific areas (travel documents, register of citizens, conflict of interests).
- Creation of electronic identifiers for public registries.

Question 3 – Judicial interpretation and application of EU instruments affecting civil rights

National law regarding the data retention changed profoundly in 2012 as a result of two decisions of the Constitutional court. In its judgment No. Pl. ÚS 24/10, 22 March 2011, ECLI:CZ:US:2011:Pl.US.24.10.1, the Constitutional Court addressed a petition for the annulment of § 97 para. 3 and 4 of the Act No. 127/2005 Coll., on Electronic

communications. Petitioners contested the provisions of Act on Electronic communications as “*interfering with the protection of private life. The complainants assumed that the content of the contested provisions is an imposition upon natural and legal persons providing the public telecommunications network or publicly accessible service of electronic communications of a duty to retain the traffic and location data on entire telephone and facsimile communications, entire communications via e-mail and SMS, data on accession of websites and data regarding use of certain internet services specified by the contested decree for the period of 6 to 12 months.*”⁵¹ According to petitioners, continuous retention of above mentioned data represented a latent threat of future interference of governmental bodies. Constitutional Court, upon its review of the contested Act, annulled the respective provisions. It concluded that “*the right to privacy also guarantees the right of an individual to decide, at their own discretion, whether and to what extent, how and under what circumstances the facts and information concerning their personal privacy should be made accessible to other entities. This aspect of the right to privacy takes the form of the right to informational self-determination, expressly guaranteed in Article 10, para. 3 of the Charter... Although the prescribed obligation to retain traffic and location data does not apply to the content of individual messages [see Article 1, para. 2 of the Directive 2006/24/EC of the European Parliament and Council of 15 March on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (hereafter only as the Data Retention Directive) and the contested provisions of Section 97, para. 3, sentence 4) of Law No. 127/2005 Coll. on Electronic Communications and Amendment of Some related Acts (Act on Electronic Communications) in their latest wording] the data on the users, addresses, precise time, dates, places, and forms of telecommunications connection, provided that monitoring takes place over an extended period of time and when combined together, allows compiling detailed information on social or political membership, as well as personal interests, inclinations or weaknesses of individual persons. On condition that the criminal law allows for exercising the public interest to prosecute criminal activity by means of robust tools the use of which results in serious limitations of the personal integrity and fundamental rights and freedoms of an individual, then when applied, constitutional law limits have to be respected.*

Restrictions imposed on personal integrity and individual privacy (i.e. breaching the respect towards them) may only be applied as an absolute exception, provided it is deemed necessary in a democratic society, unless it is possible to meet the purpose pursued by the public interest in any other way and if it is acceptable from the perspective of the legal existence and respecting effective and specific guarantees against arbitrariness.”⁵²

Constitutional Court further emphasised that provisions of Criminal Procedure Code (Section 88 para. 1), as well as the Data Retention Directive, anticipate that the use of retained data is limited only for the purposes of criminal prosecution of serious crimes, where such an objective cannot be reached by any other means.

The second decision dealing with the data protection, Pl. ÚS 24/11 of 20 March 2011, ECLI:CZ:US:2011:Pl.US.24.11.1, annulled Section 88a of the Criminal Procedure Code which provided for the access of the authorities active in criminal proceedings to the telecommunication traffic data. This access was limited by only one condition – identification of the data solely for the purposes of clarification of the circumstances relevant for the

⁵¹ Judgment Pl. ÚS 2/10, 22 March 2011, ECLI:CZ:US:2010:Pl.US.2.10.1, quoted from the English translation available at www.usoud.cz/e/decisions.

⁵² Ibid.

criminal proceedings. Constitutional Court held that such a vague and general definition of the condition of access cannot be deemed constitutional in regards to the right to informational self-determination pursuant to Article 10 para. 3, Article 13 of the Charter and Article 8 of the European Convention. Constitutional Court (among other principles) observed that as stipulated by the Data Retention Directive, “*the aim of retaining certain data by the providers of the relevant services under this Directive is to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law.*”⁵³ It drew attention to the disproportional use of the request for retained traffic data in comparison to detected offences:

...the total number of criminal offences recorded in the territory of the Czech Republic in the given year amounted to 343,799, out of which 127,906 offences were detected. At the same time, the number of requests to provide the traffic and location data made by the competent public authorities reached 131,560 [cf. the Report from the Commission to the Council and the European Parliament, submitted on 18 April 2011 and entitled “Evaluation Report on the Data Retention Directive (Directive 2006/24/EC)”, available on eur-lex.europa.eu, CELEX: 52011DC0225; the European Commission requested the relevant data from the Czech side]. According to a similar report prepared by the Ministry of the Interior for 2009, the number of criminal offences in that year amounted to 332,829, out of which 127,604 offences were detected. However, according to the aforementioned report of the European Commission, the number of requests for retained traffic data amounted to 280,271, i.e. more than double compared to the number for the previous year. The data imply that the tool in the form of requesting and using retained data (including data on the telephone calls that were not transmitted, which are completely ignored by the contested provision) is used by the bodies active in criminal proceedings in an extensive manner, also for the purposes of investigating common, i.e. less serious crime.⁵⁴

Following this judicial development, The Parliament passed new amending Act No. 273/2012 Coll., allowing the data retention under more strict conditions. Many of the questions addressed by the Court of Justice of the EU in *Digital Rights Ireland*⁵⁵ were therefore already dealt with in the Czech context. However, many problems also persist: new legislation did not change the authorisation of the Police to use the data in the search for missing persons without court permission, or the use of data in supervision of capital market (authorisation of the Czech National Bank).⁵⁶

Regarding the Directive 95/46, indirect references are to be found both in the case law of the Supreme and the Supreme Administrative Court. In decision of 14 July 2012, No. Konf 10/2012, the Special Panel⁵⁷ concluded, that Article 1 of the Directive obliges the Member States to protect the fundamental rights and freedoms of natural persons, especially their privacy and the processing of their personal data. The Special Panel concluded that the national Act No. 101/2000 Sb., § 1, has exactly the same material scope.

⁵³ Judgment of the Czech Constitutional Court, 20 December 2011, Pl. ÚS 24/11, ECLI:CZ:US:2011:Pl.US.24.11.1. Quoted from the English translation available at: www.usoud.cz/en/decisions.

⁵⁴ Ibid.

⁵⁵ Case C-293/12, *Digital Rights Ireland*, 8 April 2014, ECLI:EU:C:2014:238.

⁵⁶ Vobořil, “Jaké budou dopady zrušení směrnice o data retention?” Epravo.cz (2013). Available at <http://www.epravo.cz/top/clanky/jake-budou-dopady-zruseni-smernice-o-data-retention-94415.html>.

⁵⁷ Special Panel established by the Act 131/2002 Coll. consists of three judges of the Supreme and three judges of the Supreme Administrative Court and decides on the competence disputes.

An interesting case regarding the application of the Directive relates to the petition against the Czech Archive of State Security which gave permission to access the archived personal documents to the Czech television. The dispute before the Special Panel concerned the competing competence of Office for protection of personal data and courts deciding the compensation for the breach of personal rights. Special Panel, referring to the Article 22 of the Directive 95/46, concluded that rights related to the processing of personal data must fall under the judicial protection, therefore, it is the court who is entitled to decide on the similar matter.⁵⁸

Overall, it might be concluded that courts do take into account interpretation following from the Directive when applying the domestic transposition. The term „personal data“ is constantly interpreted with reference to the Directive 95/46/EC and the Convention of the Council of Europe No. 108.⁵⁹

⁵⁸ Special Panel, 8 March 2012, No. Konf 94/2011 - 8

⁵⁹ See e.g. judgment of the Supreme Administrative Court, No. 7 A 58/2002 – 40, 22 October 2003.

2. Enforcement of selected civil rights

Identify at least three civil rights, irrespective of their source of protection, which are particularly salient and problematic from the point of view of the ability of EU citizens and other persons in the EU to effectively exercise them in the country under study. In the selection, bear in mind difficulties which may be specific to ‘mobile’ EU citizens and Third Country Nationals, and those which affect all EU citizens or Third Country Nationals irrespective of whether they have exercised their EU citizenship right to free movement or not. For each ‘problematic right’ identified, answer the following sets of questions.

2.1. *Right 1: Right of mobile EU citizens to vote and to stand as a candidate in municipal elections in their host Member States*

Question 1: Source of protection

The right of mobile EU citizens to vote and to stand as candidates in municipal elections in their Member State of residence, under the same conditions as nationals of that State, is stipulated in Article 20 para. 1 let. b) TFEU (ex Article 17 TEC).⁶⁰ It is inherently connected to the citizenship of the Union and the basic right of EU citizens to move and reside freely within the territory of the Member States.⁶¹ The secondary legislation specifying the electoral rights in municipal elections is the Council Directive 94/80/EC⁶².

On the face of it, electoral rights can be conceived as primarily political rights and thus falling outside the scope of civil rights dealt with in this study. However, the right to vote and to stand as candidates in municipal election of EU citizens, as guaranteed in the TFEU, is closely interconnected with the civil rights of mobile EU citizens which are at the heart of this study, namely **the right to free movement and the right to equal treatment** (non-discrimination).⁶³ This understanding is also supported by the preamble of Directive 94/80/EC according to which “the right to vote and to stand as a candidate in municipal elections in the Member State of residence ... is an instance of the application of the principle of equality and non-discrimination between nationals and non-nationals and a corollary of the right to move and reside freely ...”

In the Czech domestic law, the right of mobile EU citizens to vote and to stand as candidates in municipal elections **has not been not fully implemented.**

⁶⁰ The electoral rights in municipal elections are further elaborated in Article 22 TFEU (ex Article 19 TEC): “Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.”

⁶¹ Article 20 para. 1 TFEU and Article 21 TFEU (ex Article 18 TEC).

⁶² Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals.

⁶³ The right of freedom of movement of EU citizens within the territory of the Member States is provided for in Article 20 para. 1 let. b) TFEU. The right of EU citizens to equal treatment is stipulated in Article 18 TFEU (ex article 12 TEC) which prohibits any discrimination on grounds of nationality in relation to EU citizens.

Under section 4 and section 5 of the Act No. 491/2001 Coll., on Elections to the Representative Bodies of Municipalities and Amending Certain Acts, as amended (hereinafter “Act No. 491/2001 Coll.”), Czech citizens and citizens of other EU Member States have the right to vote (section 4 para. 1) and to stand as candidates (section 5 para. 1) in municipal elections in the municipality (or other corresponding basic local government unit according to the list enumerated in the Annex to the Directive 94/80/EC⁶⁴) of their **permanent residence** on the day of election.

However, the term “permanent residence” has a different meaning in the Czech law for the Czech citizens and foreigners. Whereas for the Czech citizens the permanent residence fulfils only a registration function,⁶⁵ for citizens of other EU Member States (as well as other foreigners) permanent residence means a permanent residence permit under section 87g of the Act No. 326/1999 Coll., on the Residence of Foreign Nationals in the Territory of the Czech Republic and Amending Certain Acts, as amended (hereinafter “Act No. 326/1999 Coll.”). The permanent residence permit is the highest residence status of foreigners and can be usually obtained only after a minimum of 5 years of continuous residence in the Czech Republic.⁶⁶

The condition of a permanent residence in the respective municipality on the day of election is thus **discriminatory** in nature and **disqualifies** the mobile EU citizens with a temporary residence in the Czech Republic **from the exercise of their active election rights**. The condition of “residence” in the Member State pursuant to Article 20 para. 1 let. b) TFEU should be considered as fulfilled also in the case of EU citizens registered for a stay exceeding 3 months under Article 8 of the Directive 2004/38/EC⁶⁷, which corresponds to the temporary residence permit under the Czech domestic law.⁶⁸

Furthermore, **the exercise of passive electoral rights** is further **hampered by the prohibition** of foreigners, including the citizens of other EU Member States, **to form and join political parties and political movements**.⁶⁹ Although it is possible to stand as an independent candidate (i.e. not being a member of political party) as well, the candidate list of such a candidate (or a group of such candidates) has to be supplemented by a petition with a prescribed number of signed voters supporting the candidacy of the independent candidate (or

⁶⁴ For the Czech Republic, the names of basic local government units enumerated in the Annex to the Directive 94/80/EC are: obec, městský obvod nebo městská část územně členěného statutárního města, městská část hlavního města Prahy.

⁶⁵ Under section 10 para. 1 of the Act No. 133/2000 Coll., on the Population Register and on Birth Certificate Numbers and Amending Certain Acts, as amended, the place of permanent residence is the address of the Czech citizens in the Czech Republic that is registered in the population register.

⁶⁶ See section 87g para. 1 of the Act No. 326/1999 Coll.

⁶⁷ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, which is implemented as a temporary residence permit under section 87a para. 1 of the Act No. 326/1999 Coll.

⁶⁸ This follows also of the regulation of election rights to the European Parliament under sections 5 and 6 of the Act No. 62/2003 Coll., on Elections to the European Parliament and Amending Certain Acts, as amended, which confer the right to vote and to stand as candidates in the elections to citizens of other EU Member States who have had a **permanent or temporary residence** in the Czech Republic for at least 45 days prior to the day of election.

⁶⁹ Section 2 para. 2 and section 6 para. 2 of the Act No. 424/1991, on Association in Political Parties and Political Movements, as amended by later regulations, restricts the exercise of these rights only to the Czech citizens.

group of candidates.⁷⁰ As a result, the practical chances of candidates who are not associated in a political party or movement to exercise their passive electoral right and stand as candidates in municipal elections is only virtual, especially in larger municipalities (cities).⁷¹

Question 2: Scope and limits of the right (including balancing with other rights)

Permissible limits to the passive electoral right of EU citizens in host Member States are provided for in Article 5 paras. 3 and 4 of the 94/80/EC Directive, which allow Member States to restrict certain offices in the local administration to its own nationals.⁷² However, none of these restrictions has been applied in the Czech Republic. Further restrictions are permitted in the Article 12 of the 94/80/EC Directive but neither of these provisions concern the Czech Republic.⁷³

There are no limits of the electoral rights of foreigner (including mobile EU citizens) in the constitutional order of the Czech Republic. The only provision dealing with municipal elections in the Czech Constitution⁷⁴ is Article 102 according to which members of representative bodies which administer the municipalities are elected by secret ballot on the basis of a universal, equal, and direct right to vote.

Although the of the Charter of Fundamental Rights and Freedoms (hereinafter ‘the Czech Charter’)⁷⁵ explicitly guarantees the right to vote in municipal elections to the Czech citizens

⁷⁰ See section 21 para. 4 of the Act No. 491/2001 Coll. The required number of petitioners is defined in the Annex to the Act No. 491/2001 Coll. For individual independent candidates it is set according to the municipality’s size (defined by a number of its inhabitants), varying from 0,5 % to 5 % of the total number of inhabitants. For groups of independent candidates the required number is set on 7 % of the total number of inhabitants, irrespective of the size of the municipality.

⁷¹ For more on the discriminatory impact of this statutory regulation on the electoral rights of citizens of other Member States of the EU see e.g. Antoš, “Politická participace cizinců v České republice”, 2 *Politologický časopis/Czech Journal of Political Science* (2012), pp. 113-127, at pp. 123-124.

⁷² Article 5 para. 3 of the 94/80/EC Directive: “Member States may provide that only their own nationals may hold the office of elected head, deputy or member of the governing college of the executive of a basic local government unit if elected to hold office for the duration of his mandate.

The Member States may also lay down that the temporary or interim performance of the functions of a head, deputy or member of the governing college of the executive of a basic local government unit may be restricted to own nationals.

Having regard to the Treaty and to general legal principles, Member States may take appropriate, necessary and proportional measures to ensure that the offices referred to in the first subparagraph can only be held and the interim functions referred to in the second subparagraph can be performed only by their own nationals.”

Article 5 para. 4: “Member States may also stipulate that citizens of the Union elected as members of a representative council shall take part in neither the designation of delegates who can vote in a parliamentary assembly nor the election of the members of that assembly.”

⁷³ These restrictions have a practical impact only in Luxemburg and Belgium. See Report from the Commission to The European Parliament and The Council on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals. COM(2012) 99 final, 9. 3. 2012. <http://aei.pitt.edu/45874/1/com2012_0099.pdf> (last visited 23 April 2015).

⁷⁴ The Constitution of the Czech Republic of 16 December 1992, Constitutional Act No. 1/1993 Coll. as amended. The English translation is available at <http://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Ustava_EN_ve_zneni_zak_c._98-2013.pdf> (last visited 28 April 2015).

⁷⁵ Constitutional Act No. 23/1991 Coll., promulgated in the Czech Republic as No. 2/1993 Coll. The English translation is available at <http://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/prilohy/Listina_English_version.pdf> (last visited 28 April 2015). According to Article 3 of the Czech Constitution, the Charter forms a part of the constitutional order of the Czech Republic.

only⁷⁶ and the same holds true also for the right to form political parties and political movements and to associate therein,⁷⁷ there is no provision forbidding to award these rights also to other categories of inhabitants, including the citizens of other EU Member States.

Question 3: Interpretation and application

There have been two decisions of regional courts (administrative divisions) on the right of mobile EU citizens holding a temporary residence permit to vote in the municipal elections, both issued shortly before the municipal elections which took place on 11 and 12 October 2014.

Two EU citizens (from Poland and Slovakia) permanently residing in the Czech Republic have taken their cases to the court after their applications for having their names added to the appendix of the permanent list of voters had been refused by the municipal authorities. The Regional Court in Brno has issued a decision on 19 September 2014⁷⁸ (followed by an analogous decision of the Regional Court in Prague of 22 September 2014⁷⁹) which added the name of the plaintiff to the appendix of the permanent list of voters.

Both courts based their decisions on a direct application of the EU law (TFEU and 94/80/EC Directive) provisions which provide for the active electoral right of mobile EU citizens in municipal elections (see section 2.1.1 above) and stated that the condition of permanent residence under section 4 para. 1 of the Act No. 491/2001 Coll. shall not be applied for its discriminatory nature and non-compliance with EU law. The courts thus remedied the deficiency of legal regulation on the domestic law level and gave way to the exercise of the electoral right for the individual plaintiffs.

There have been no other courts' decisions either on the active electoral right, or on the passive electoral right of EU citizens and the related right to join and form political parties and political movements.

Question 4: Case law protecting civil rights

The Czech legal system is a civil law system. There is no doctrine of precedent comparable to the common law countries in the Czech Republic. The decisions of the courts are not binding in the same way as the statutory regulation (the courts do not "make" the law but rather "find" it) and the violation of previous case law cannot be invoked in courts as such. On the other hand, there has been a notable shift in understanding of the normative relevance of case law in the Czech legal system in the past several years. As a result, a limited lawmaking potential of case law has become generally accepted in both academia and legal practice. Especially the case law of the top courts in the judicial system (Supreme Court, Supreme Administrative

⁷⁶ Article 21 para. 1 of the Czech Charter: "Citizens have the right to participate in the administration of public affairs either directly or through the free election of their representatives."

⁷⁷ Article 20 paras. 1 and 2 of the Czech Charter: „(1) The right of association is guaranteed. Everybody has the right to associate together with others in clubs, societies, and other associations. (2) Citizens also have the right to form political parties and political movements and to associate therein.”

⁷⁸ Regional Court in Brno, File No. 64A 6/2014, decision of 19 September 2014.

⁷⁹ Regional Court in Prague, File No. 50 A 21/2014, decision of 22 September 2014.

Court, Constitutional Court) are instrumental in co-shaping of the contents of the Czech law (though only in a material sense, not as a formal source of law).⁸⁰

Recognition of the right of mobile EU citizens to vote and to stand as candidates in municipal elections by the regional courts (see section 2.1.3) was formally binding only *inter partes* in the two individual cases. However, the fact that the courts found the statutory regulation of electoral rights in the Act No. 491/2001 Coll. to be in contradiction with the EU law because of a systemic deficiency in transposition and directly applied the EU law provision provoked a systemic reaction of the executive. In reaction to the first decision of the Regional Court in Brno of 19 September 2014 (which attracted a wide media coverage right after its publication⁸¹), the State Electoral Commission issued a recommendation on 22 September 2014⁸² which supported the legal opinion of the court. Consequently, the Ministry of Interior issued a general instruction to all municipalities to accept the applications of EU citizens with a temporary residence permit in the Czech Republic to have their names added to the appendix of the list of permanent voters. This enabled all the EU citizens who lodged the applications to exercise their (at least) active electoral right in the municipal elections which took place on 11 and 12 October 2014.

As follows, in this case the two judicial decisions of regional courts have had an indirect general impact on the enforcement of the respective right of all mobile EU citizens with temporary residence permits. However, the general instruction of the Ministry of Interior is only a methodical executive order with no legal power to amend or derogate the law. The Ministry of Interior promised to propose an amendment in order to bring the domestic law into conformity with election rights of citizens of other EU Member States provided for in the EU law. However, the proposal has not been published so far.

Question 5: Judicial enforcement institutions and bodies

The judiciary in the Czech Republic is generally regulated in Articles 90 – 96 of the Czech Constitution. On the statutory level, the basic regulation of the judicial power is provided for by Act No. 6/2002 Coll., on Courts, Judges, Lay-judges and the State Administration of Courts and Amending Certain Acts, as amended (hereinafter “Act No. 6/2002 Coll.”). The procedural norms regulating the jurisdiction and judicial proceeding of the courts are 1) for civil justice Act No. 99/1963 Coll., the Code of Civil Procedure, as amended, 2) for criminal justice Act No. 141/1961 Coll., the Code of Criminal Justice, as amended, and 3) for administrative justice Act No. 150/2002 Coll., the Code of Administrative Justice, as amended (hereinafter “Act No. 150/2002 Coll.”).

⁸⁰ For more on this issue see e.g. Bobek, Kühn (eds.), *Judikatura a právní argumentace* [Case Law and Legal Argumentation], 2nd ed. (Prague, 2013). See also Kühn, “Prospective and Retrospective Overruling in the Czech Legal System”, 4 (2) *The Lawyer Quarterly* (2014), pp. 139-154.

⁸¹ See e.g. “V obecních volbách mohou volit i občané EU s přechodným pobytem”. Český rozhlas (Czech Radio), 19. 9. 2014, <http://www.rozhlas.cz/zpravy/politika/_zprava/v-obecnich-volbach-mohou-volit-i-obcane-eu-s-prechodnym-pobytem--1398602> (last visited 23 April 2015), “Bydlí tady a je z EU. Pak smí volit v českých volbách, řekl soud”, *Lidovky.cz*, 19. 9. 2014, <http://www.lidovky.cz/soud-obcane-eu-maji-pravo-volit-i-bez-trvaleho-pobytu-p0p-zpravy-domov.aspx?c=A140919_155027_ln_domov_ele> (last visited 23 April 2015).

⁸² Available at <<http://www.mvcr.cz/clanek/volit-ve-volbach-do-zastupitelstev-obci-mohou-i-obcane-eu-s-prechodnym-pobytem.aspx>> (last visited 16 April 2015).

The judicial review is based on two-instance proceeding. As regards the structure of judicial system,⁸³ there is a four-tier court system⁸⁴ comprising of:

- 1) District courts (their equivalents are district courts in Prague and The City Court in Brno) that perform a general first-instance jurisdiction in civil and criminal matters.
- 2) Regional courts (their equivalent is The Metropolitan Court in Prague), performing both second and first (in specific cases stipulated by law) instance jurisdiction in civil and criminal matters. At the same time, there are specialized administrative chambers and single judges that perform a first-instance jurisdiction in matters of administrative law.
- 3) Two high courts (in Prague and in Olomouc) that perform a second instance jurisdiction in civil and criminal cases where the court of first instance is the regional court.
- 4) The Supreme Court and The Supreme Administrative Court. The Supreme Court decides on extraordinary appeals against the second-instance decisions delivered by regional and high courts in civil and criminal matters. The Supreme Administrative Courts is specialized exclusively on administrative law matters and acts as a second-instance court in relation to the regional courts performing administrative jurisdiction in the first instance (The Supreme Administrative Court decides on cassation complaints against their decisions).

Outside this general court structure there is the Czech Constitutional Court which is responsible for the protection of constitutionality (Article 83 of the Czech Constitution). The jurisdiction of the Czech Constitutional Court is determined by Article 87 paras. 1 and 2 of the Czech Constitution⁸⁵ and the functioning of the Court is regulated by Act No. 182/1993 Coll., Constitutional Court Act, as amended.⁸⁶

According to Article 1 para. 1 of the Czech Constitution, “[t]he Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens.” The judiciary is independent on the legislative and executive powers, as stipulated in Article 2 para. 1 of the Czech Constitution.

⁸³ A detailed graphical structure of the court system of the Czech Republic is available at: http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/org_justice_cze_en.pdf (last visited 16 April 2015).

⁸⁴ Article 91 para. 1 of the Czech Constitution provides that: “The court system comprises the Supreme Court, the Supreme Administrative Court superior, regional, and district courts. They may be given a different denomination by statute.”

⁸⁵ Article 87 paras. 1 and 2 of the Czech Constitution: “(1) The Constitutional Court has jurisdiction: a) to annul statutes or individual provisions thereof if they are in conflicts with the constitutional order; b) to annul other legal enactments or individual provisions thereof if they are in conflict with the constitutional order, a statute; c) over constitutional complaints by the representative body of a self-governing region against an unlawful encroachment by the state; d) over constitutional complaints against final decisions or other encroachments by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms; e) over remedial actions from decisions concerning the certification of the election of a Deputy or Senator; f) to resolve doubts concerning a Deputy or Senator’s loss of eligibility to hold office or the incompatibility under Article 25 of some other position or activity with holding the office of Deputy or Senator; g) over a constitutional charge brought by the Senate against the President of the Republic pursuant to Article 65, paragraph 2; h) to decide on a petition by the President of the Republic seeking the revocation of a joint resolution of the Assembly of Deputies and the Senate pursuant to Article 66; i) to decide on the measures necessary to implement a decision of an international tribunal which is binding on the Czech Republic, in the event that it cannot be otherwise implemented; j) to determine whether a decision to dissolve a political party or other decisions relating to the activities of a political party is in conformity with constitutional acts or other laws; k) to decide jurisdictional disputes between state bodies and bodies of self-governing regions, unless that power is given by statute to another body. (2) Prior to the ratification of a treaty under Article 10a or Article 49, the Constitutional Court shall further have jurisdiction to decide concerning the treaty’s conformity with the constitutional order. A treaty may not be ratified prior to the Constitutional Court giving judgment.”

⁸⁶ For more details on the proceedings on constitutional complaints before the Czech Constitutional Court see <http://www.usoud.cz/en/guide-on-proceedings-on-constitutional-complaints/> (last visited 21 April 2015).

On the constitutional level, the independence and impartiality of the courts is specified in Articles 81 and 82 of the Czech Constitution.⁸⁷ On the statutory level, the independence of the judiciary is provided for by Act No. 6/2002 Coll. There are no concerns relating to the independence of judiciary in the Czech Republic,⁸⁸ which would have a negative impact on enforcement of the civil rights followed in this study.

Article 1 para. 2 of the Czech Constitution provides that the Czech Republic observes its obligations resulting from international law. The reception of international law into the Czech legal system is based on incorporation. There is no general reception norm in the Czech law. However, most of the important international treaties, including the human rights treaties, are incorporated by Article 10 of the Czech Constitution, which states that “[p]romulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.”⁸⁹ The international treaties under Article 10 of the Czech Constitution are part of the Czech legal order. The precedence of international law over the contravening domestic law relates to the statutory law and other legal acts; the Constitution and constitutional laws are not overridden by the international obligations (the international treaties are above the statutory law and below the Constitution and constitutional laws in the imaginary pyramidal hierarchy of the sources of law).

The EU law has been part of the Czech legal order since the accession of the Czech Republic to the EU in 2004. Membership of the Czech Republic in the EU is based on Article 10a of the Czech Constitution which provides that “[c]ertain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution.” Article 10a of the Czech Constitution also serves as the normative basis for the operation of EU law in the domestic legal order.⁹⁰ The precedence of EU law over the contravening domestic law is broader than in the case of international treaties under Article 10 and comprises also the precedence over the constitutional law, with certain exceptions determined by the substantive limits of competences transferred to the EU level.⁹¹

⁸⁷ Article 81 of the Czech Constitution: “The judicial power shall be exercised in the name of the Republic by independent courts.” Article 82 of the Czech Constitution: “(1) Judges shall be independent in the performance of their duties. Nobody may threaten their impartiality. (2) Judges may not be removed or transferred to another court against their will; exceptions resulting especially from disciplinary responsibility shall be laid down in a statute. (3) The office of a judge is incompatible with that of the President of the Republic, a Member of Parliament, as well as with any other function in public administration; a statute shall specify which further activities are incompatible with the discharge of judicial duties.”

⁸⁸ For more see e.g. Bobek, Kosař, “Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe”, 07 (15) German Law Journal (2014), pp. 1288-1289, <https://www.germanlawjournal.com/pdfs/Vol15-No7/PDF_Vol_15_No_07.02_Bobek.pdf> (last visited 19 April 2015).

⁸⁹ The treaties requiring the assent of Parliament for their ratification are enumerated in Article 49 of the Czech Constitution as follows: “treaties: a) affecting the rights or duties of persons; b) of alliance, peace, or other political nature; c) by which the Czech Republic becomes a member of an international organization; d) of a general economic nature; e) concerning additional matters, the regulation of which is reserved to statute.”

⁹⁰ See the first decision of the Czech Constitutional Court on the matter in the case *Sugar Quota III*, File No. Pl. ÚS 50/04, judgment of 8 March 2006, which has been affirmed also by later case law of the Czech Constitutional Court.

⁹¹ For the limits of operation of the EU law within the Czech constitutional law, as set out in the case law of the Czech Constitutional Court, see e.g. Bobek, Kosař, “The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia - An Overview”, Eric Stein Working Paper No. 2/2010, pp. 3-6, <<file:///C:/Users/HP/Downloads/SSRN-id1591370.pdf>> (last visited 19 April 2015).

The application of international (human rights) treaties and EU law in precedence to conflicting statutes is binding for all administrative and judicial organs of the Czech Republic. In relation to the judiciary, the obligation to consider them as sources of law is stipulated in Article 95 para. 1 of the Czech Constitution according to which “[i]n making their decisions, judges are bound by statutes and treaties which form a part of the legal order...” It follows that the Constitutional Court is not a judicial body which is primarily (or solely) responsible for ensuring the compliance with international, European or national human rights obligations.⁹² However, it is the final arbiter on the issue, as it has the authority under Article 87 para. 1 letter d) of the Czech Constitution to decide over constitutional complaints against final decisions by public authorities which infringe constitutionally guaranteed fundamental rights and basic freedoms.

According to section 28 para. 1 of the Act No. 491/2001 Coll., persons who are not the Czech citizens have to submit an application to the municipal authority for having their names added to the appendix of the permanent list of voters. The municipal authority is obliged to decide on the application within 48 hours. If the applicant does not agree with the negative decision of the municipal authority, he/she can file an action in the regional court (administrative division) pursuant to section 88 of the Act No. 150/2002 Coll. asking the court to review the decision and add his/her name to the appendix of the of the permanent list of voters. Under section 88 para. 3 of the Act No. 150/2002 Coll., the regional court is obliged to issue its decision within 3 days. If the legal action is successful, the name of the plaintiff is added to the appendix of the permanent list of voters directly by the court’s decision and the person is allowed to vote in the municipal election.

The issues of political parties and movements also fall within the jurisdiction of administrative courts pursuant to section 4 para. 2 let. b) of the Act No. 150/2002 Coll. In relation to the right of EU citizens to stand as candidates in municipal elections in their Member State of residence, a possible means of enforcing this right with reference to the EU law provisions is filing an action in the regional court pursuant to section 89 of the Act No. 150/2002 Coll. against a decision of the administrative organ which refused the registration of the list of candidates or crossed out a specific candidate from the list. If the legal action is successful, the court decides on the obligation of the respective administrative organ to register the list of candidates [section 89 para. 2 let. a) of the Act No. 150/2002 Coll.] or annuls its decision crossing out a specific candidate from the list [section 89 para. 2 let. b) of the Act No. 150/2002 Coll.]. Under section 89 para. 5 of the Act No. 150/2002 Coll., the court is obliged to issue its decision within 15 days.

As there has been a reluctance of the responsible state authorities (Ministry of Interior) to accept the arguments on insufficiency of the transposition of electoral rights of mobile EU citizens presented by the Public Defender of Rights and Committee for the Rights of Foreigners of the Government Council for Human Rights, the protection of the electoral rights concerned (or at least the right to vote) by means of judicial decision was perceived as an effective means of resolving the situation (see section 2.1.6). The short time limits for the decision-making of the courts significantly contribute to the enforceability of the right by judicial means and the efficiency of this means of remedy.

⁹² According to Article 4 of the Czech Constitution, the fundamental rights and basic freedoms shall enjoy the protection of judicial bodies (i.e. all courts operating in the Czech legal system).

Question 6: Non-judicial enforcement institutions and bodies relevant for the enforcement of the selected civil right

Foreigners including citizens of other EU Member States may turn with their complaints to the Public Defender of Rights, established by the Act No. 349/1999 Coll., on the Public Defender of Rights, as amended (hereinafter “the Act No. 349/1999 Coll.”).⁹³

Pursuant to sections 2 - 6 of the Act No. 349/1999 Coll., the Defender is elected by the Chamber of Deputies for a term of office of six years, from among candidates, of whom two shall be nominated by the President of the Republic and two by the Senate, while identical proposals are admissible. The Defender may be elected for a maximum of two consecutive periods. Any citizen of the Czech Republic who has the right to vote and has attained the age of forty can be elected as a Defender. The office of the Defender is incompatible with the office of the President of the Republic, Member of Parliament, senator and a judge, as well as any activities in public administration. The Defender may not be a member of a political party or a political movement. The Defender shall discharge his/her office independently and impartially. The Defender is accountable to the Chamber of Deputies for the discharge of office. The Defender shall lose office the date following the date of expiration of the term of office, when a court judgment comes into legal force whereby the Defender was convicted of a criminal act, the Defender ceases to be eligible for election to the Senate, the Defender assumes the discharge of the office of President of the Republic, Member of Parliament, senator and judge or performs activities in public administration or on the date following the Defender’s written declaration of resignation is delivered to the Chair of the Chamber of Deputies.

The Defender can open an inquiry, if there is no reason to suspend the complaint. Besides others, the Defender can study relating files or ask questions of the employees of authorities. Authorities shall be obliged to provide the Defender with information and explanations, files and other written materials, their standpoint in writing as to the facts of the case and legal matters, evidence proposed by the Defender or the performance of such supervisory actions to which they are authorized by law and which are proposed by the Defender.⁹⁴ State bodies and persons performing public administration are, within the scope of their competence, obliged to provide the Defender with all assistance requested by her during inquiries.⁹⁵ If, in the course of her inquiry, the Defender ascertains a breach of legal regulations or any other maladministration, she shall request the authority to provide a statement on the Defender’s findings within 30 days.⁹⁶ If the authority states that it has performed or is in the process of performing remedial measures, and the Defender considers these measures to be sufficient, the Defender may inform the complainant and the authority thereof. Otherwise, following receipt of the statement or expiry of the deadline to no effect, the Defender shall inform the complainant and the Authority in writing of the Defender’s final statement, which shall include a proposal for remedy. The authority is obliged to inform the Defender within 30 days of receipt of the final decision of the corrective measures that have been taken.⁹⁷ If the authority fails to fulfill this obligation, or if the remedial measures are insufficient in the Defender’s opinion, the Defender shall inform a superior authority, or if there is no such

⁹³ Since February 2014, the Public Defender of rights has been Mgr. Anna Šabatová, Ph.D.

⁹⁴ Section 15 para. 1 of the Act No. 349/1999 Coll.

⁹⁵ Section 16 of the Act No. 349/1999 Coll.

⁹⁶ Section 18 para. 1 of the Act No. 349/1999 Coll.

⁹⁷ Section 20 para. 1 of the Act No. 349/1999 Coll.

authority, the government, or may inform the public of her findings, including the disclosure of the names and surnames of persons authorized to act on behalf of the authority.

Another non-judicial enforcement institution is a Committee for the Rights of Foreigners at the Government Council for Human Rights. The Council is a permanent advisory body to the Government in the field of protection of human rights and fundamental freedoms in the territory of the Czech Republic.⁹⁸ The Competence of the Committee is stated by Art. 2 of its Statute, according to which “a) the Committee gives the Council for Human Rights initiatives to raise the level of status and respect for human rights in the Czech Republic, b) participates in the preparation of reports on the state of human rights in the Czech Republic and reports for the control mechanisms for international treaties, c) prepares for the Council proposals of partial and systemic measures to improve compliance, d) performs other tasks assigned by the Council.”⁹⁹ The Committee may also perform other tasks on its own initiative, unless they would be in conflict with the Statute and Procedure Rules of the Council and the Statute and Procedural Rules of the Committee.

The Public Defender of Rights and the Committee for the Rights of Foreigners of the Government Council for Human Rights have repeatedly drawn attention to the problem of insufficient transposition of the electoral rights of mobile EU citizens in the municipal election before it has been decided on by courts.

The Committee for the Rights of Foreigners approved a Motion on the participation of foreigners in public and political life on 13 December 2013 which criticized the discrimination of citizens of other EU Members States with a permanent residence permit (who are allowed to vote and stand as candidates in the municipal elections) in their exercise of passive electoral right which follows from their inability to join and form political parties and political movements. The Committee called for the amendment of law enabling them to join and form political parties and political movements.¹⁰⁰

The Public Defender of Rights published her legal opinion on the contradiction of the domestic law regulating municipal elections with the EU law in July 2014 and negotiated with the Minister of Interior on the issue.¹⁰¹ After failure of the negotiation with the Minister of Interior, who refused the Defender’s arguments by a letter of 5 September 2014, the Public Defender of Rights published a call to the EU citizens living in the Czech Republic on a temporary residence permit to turn to their municipalities and subsequently to the regional courts to enforce their active electoral right. To this end, she also published a detailed legal argumentation based on the direct application of the EU law to be used in the legal action. The Consortium of Migrants Assisting Organizations in the Czech Republic joined the effort

⁹⁸ The Government Council for Human Rights has been established under Government Resolution No. 809 of 9 December 1998.

⁹⁹ The Statute of the Committee is available at <<http://www.vlada.cz/cz/ppov/rlp/vybory/pro-prava-cizincu/uvod-55935/>> (last visited 19 April 2015).

¹⁰⁰ See “Usnesení Výboru pro práva cizinců ze dne 12. prosince 2013”, <<http://www.vlada.cz/cz/ppov/rlp/aktuality/usneseni-vyboru-pro-prava-cizincu-ze-dne-12--prosince-2013-114464/>> (last visited 19 April 2015).

¹⁰¹ See “Občané EU žijící v ČR mají právo účastnit se politického života”, The Public Defender of Rights, 23. 7. 2014, <<http://www.ochrance.cz/tiskove-zpravy/tiskove-zpravy-2014/obcane-eu-zijici-v-cr-maji-pravo-ucastnit-se-politickeho-zivota/>> (last visited 19 April 2015). See also “Ombudsmanka: nechme cizince volit”, The Czech Television, 23. 7. 2014, <<http://www.ceskatelevize.cz/ct24/domaci/281057-ombudsmanka-nechme-cizince-volit/>> (last visited 19 April 2015).

and offered contacts to their member-NGOs willing to provide free legal assistance to foreigners wishing to fight for their right.¹⁰²

In case damages occur due to the actions of an administrative authority or courts, it is possible to claim damages under Act No. 82/1998 Coll., on Liability for Damage Caused During the Exercise of Public Authority by a Decision or Incorrect Official Procedure, as amended (hereinafter the “Act No. 82/1998 Coll”). Damages can be either caused by an unlawful decision or by maladministration. The act also provides the possibility to seek financial compensation for non-pecuniary damages. First, the request for damages or financial compensation for non-pecuniary damages must be filed at the administrative authority responsible for causing damage. In case the administrative authority refuses to meet the request, an action can be taken at the civil courts.

Question 7: Access to Justice

In case an action is filed by the applicant in the court, his/her justice rights are respected by the courts. The main problem in this regard though is the length of the proceedings at courts and the financial cost.

The length of the proceedings is a long-standing problem in the Czech Republic. The Council for Human Rights has repeatedly pointed it out in its reports on the state of human rights in the Czech Republic.¹⁰³ Statistical information on the length of the procedures are available at the website of the Ministry of Justice,¹⁰⁴ but it is not possible to find exact data on the average length of proceedings in administrative law cases. The closest we can get is by following the length of the procedure in cases labelled as “A” at the regional courts. According to the overview from the time period from 1 to 31 March 2015, 22% of the cases were pending for 6 months to 1 year, 36% were pending for 1-3 years, 6% were pending for 3-5 years and one case was pending for 5-7 years. There were no cases which would be pending for more than 7 years.

Question 8: Support structures

There is a solid network of NGOs focusing on the right of migrants and refugees in the Czech Republic. Their umbrella organization is the Consortium of Migrants Assisting Organizations in the Czech Republic, which started its activity in September 2000 and currently comprises of eighteen organizations. The main objective of the Consortium is to actively participate in the formation of migration policy and to familiarize the public with the situation of migrants in the Czech and European context. The Consortium also provides media coverage of cases of migrants whose rights were seriously violated, supports further education of staff member organizations, promotes the exchange of information between NGOs and government on

¹⁰² See “Euroobčané, máte právo účastnit se komunálních voleb. Veřejný ochránce práv”, The Public Defender of Rights, 8. 9. 2014, <<http://www.ochrance.cz/tiskove-zpravy/tiskove-zpravy-2014/euroobcane-mate-pravo-ucastnit-se-komunalnich-voleb/>> (last visited 19 April 2015).

¹⁰³ Annual reports on the state of human rights in the Czech Republic for years 1998-2013 are available at <<http://www.vlada.cz/scripts/detail.php?pgid=302/>> (last visited 19 April 2015).

¹⁰⁴ Statistics are available at the website of the Ministry of Justice of the Czech Republic at: <<http://cslav.justice.cz/InfoData/prehledy-agend.html/>> (last visited 19 April 2015).

migration and coordinates the response of member organizations on current migration issues.¹⁰⁵

Some of the NGOs also provide free legal and social assistance to foreigners. However, the legal and social assistance provided by these NGOs depend on their projects which are in most cases financed by the European Commission's Refugee Fund, Integration Fund or Return Fund. NGOs have criticized that their functioning depends on the Ministry of Interior as it is the Ministry of Interior who decides which NGO's project proposal is approved and financed, while at the same time it is the Ministry of Interior against whom actions are taken by the NGOs. The main NGOs providing legal assistance to migrants are: Association for Integration and Migration (SIMI)¹⁰⁶, Centre for Integration of Foreigners¹⁰⁷, InBáze¹⁰⁸, Organization for Aid to Refugees (OPU)¹⁰⁹ and the Society of Citizens Assisting Migrants¹¹⁰.

The Consortium of Migrants Assisting Organizations in the Czech Republic has been instrumental in supporting the Public Defender of Rights' initiative to enforce the electoral rights of mobile EU citizens. The individual representatives of NGOs who were then members of the Committee for the Rights of Foreigners also participated on the drafting and approval of the Motion on the participation of foreigners in public and political life approved on 13 December 2013. (See section 2.1.6 for more details.)

In the Czech Republic the access to free legal aid is insufficient.¹¹¹ The main deficiencies include the unsystematic legal regulation, partial transfer of responsibility of the state to the Czech Bar Association without compensation, lack of awareness of people about the possibility to obtain free legal assistance and also that it is not possible to obtain legal aid before the judicial proceedings start.¹¹² The section 18 of the Act No. 85/1996 Coll., on Legal Profession, as amended (hereinafter "Act No. 85/1996 Coll."), provides that free legal aid may be granted to an applicant who addressed the Czech Bar Association and claimed that he or she was not able to find a lawyer. A draft of the Act on Free Legal Aid, which should ensure access to legal aid to those who for financial reasons cannot ensure it for themselves, was first prepared already by the end of year 2008, but the act has never been submitted to the parliament.

The Pro Bono Alliance is trying to develop pro bono legal assistance via the project of a Pro bono centre. Attorneys and law firms affiliated with the centre provide legal assistance to those who otherwise could not gain access to a qualified legal aid due to financial or other reasons. The Pro Bono Alliance has further launched an internet website in 2009 (under its sub-program Legal Aid Information Centre) which provides guidance through the system of free legal aid in the Czech Republic.¹¹³ The Pro Bono Alliance also organizes educational events, supports an exchange of experience and facilitates cooperation between lawyers from

¹⁰⁵ For further information see <<http://www.konsorcium-nno.cz/>> (last visited 27 April 2015).

¹⁰⁶ For further information see <<http://www.migrace.com/en/>> (last visited 27 April 2015).

¹⁰⁷ For further information see <<http://www.cicpraha.org/>> (last visited 27 April 2015).

¹⁰⁸ For further information see <<http://www.inbaze.cz/>> (last visited 27 April 2015).

¹⁰⁹ For further information see <<http://www.opu.cz/>> (last visited 27 April 2015).

¹¹⁰ For further information see <<http://www.soze.cz/>> (last visited 27 April 2015).

¹¹¹ For further information see e.g. Benák, Coufalík, Dostálová et al., *Bezplatná právní pomoc v České republice*, (MUNI Press, 2014).

¹¹² For further information see <<http://www.bezplatnapravnipomoc.cz/>> (last visited 27 April 2015).

¹¹³ For further information see <<http://www.potrebujipravnik.cz/>> (last visited 27 April 2015).

NGOs and other legal professions, participates in legislative procedures, supports pro bono activities of lawyers and spreads information about the protection of human rights.¹¹⁴

Legal education in the Czech Republic is available at private and state higher education institutions,¹¹⁵ while state higher education institutions (universities) are considered as more prestigious, traditional and important institutions. There are Law Faculties at four state universities in the Czech Republic – at Charles University in Prague, Masaryk University in Brno, Palacky University in Olomouc and University of West Bohemia in Pilsen. All these universities have mandatory courses of Constitutional Law, Public International Law and European Union Law in their curriculum. Specialized courses on various aspects of human rights protection are optional, except for the course “Human Rights and Judiciary” which is mandatory at the Masaryk University. There is also an optional course of Legal Clinic of Refugee Law run at all Czech Law Faculties except for the University of West Bohemia in Pilsen.

The Czech Bar Association performs public administration in the area of the legal profession. The conditions for being admitted to the Bar are stipulated in section 5 of the Act No. 85/1996 Coll. Besides other conditions, attorneys registered in the Register of Lawyers have to pass the Bar examination, which consists of a written and oral part in the following areas of law: 1. Constitutional and Administrative Law, 2. Criminal Law, 3. Civil, Family and Employment Law, 4. Business Law and 5. Regulations Governing the Provision of Legal Services.

There is only a limited dialog between civil society organizations, NGO’s working with migrants and the responsible areas of executive. Politicians are rather very negative relating to enforcement of civil rights of migrants. Some academicians and legal experts on migration are also represented in the Committee for the Rights of Foreigners, however their power is weak and the Committee constitutes rather a forum for discussion. There is nevertheless a strong civil society and professional element which enables the Committee to define recommendations, which are though not always listened to by the executive.

Question 9 Further practical barriers to the effective enjoyment of the selected civil rights

Information on the electoral rights of mobile EU citizens in municipal elections were effectively lacking in the public debate and the media until 2014. The awareness was especially low among the EU citizens living in the Czech Republic on the temporary residence permit. An increased level of media coverage in 2014 was the result of the initiative of the Public Defender of Rights and consequent reaction of the Ministry of Interior on the judgments by regional courts.

The generally insufficient awareness of the potential voters from other EU Member States on their electoral rights can be inferred from the research conducted by Marek Antoř after the municipal election of 2010 which revealed that only 2,4 % of the total number of EU citizens living in the Czech republic on the permanent residence permit in 2010 were registered in the appendix of the of the permanent list of voters for the municipal elections in 2010.¹¹⁶

¹¹⁴ For further information see <<http://www.probonoalliance.cz/en/>> (last visited 27 April 2015).

¹¹⁵ Act No. 111/1998 Coll., on Higher Education Institutions and Amending Certain Acts, as amended.

¹¹⁶ See Antoř, “Politická participace cizinců v České republice”, p. 119, 2 Politologický časopis/Czech Journal of Political Science (2012), pp. 113-127.

Question 10: Jurisdictional issues in practice

The difference in the effective enjoyment of the election rights depending on the status of the person follows from the differentiation between Czech citizens, EU citizens having a permanent residence permit and EU citizens having a temporary residence permit. It lies in the heart of the problematic statutory regulation described in section 2.1.1 above. However, the access to judicial review is not limited by any of these considerations.

There is no *de jure* difference in the effective enjoyment of the right to a fair trial depending on the status of third country nationals. In practice, the individual circumstances of migrants might cause a *de facto* limited access to enforcement of their civil rights. This might be caused by a language barrier, as most information regarding enforcement of civil rights is available in Czech or English language, by a level of integration and awareness of the person depending on the length of his/her stay in the Czech Republic. Also, for citizens of some states, fees for legal assistance (apart from the free legal services provided by NGOs) might be considered as too expensive, representing an obstacle to access to a quality legal aid.

There are no territorial differences in the effective enjoyment of the selected civil rights, as the Czech Republic is a unitary state.

In general, there is a high political sensitivity related to the issue of election rights of foreigners. This is evident from the debate and position of government on the issue of granting the electoral rights to municipal elections to foreigners from non-EU countries living in the Czech Republic on a permanent residence permit.¹¹⁷ It can be inferred that the willingness of the executive to enable EU citizens to fully exercise their electoral rights in municipal election would follow only from the binding nature of the legal obligations towards EU in this regard and the direct applicability of the relevant EU law provisions in the domestic law which was confirmed by the regional courts' decision of 2014. However, the general reluctance of the Czech political representation and executive towards this issue may have an impact on the timing and contents of statutory amendments which should be proposed by the Ministry of Interior in the near future.

Question 11: Systematic or notorious lack or deficient enforcement of the selected civil rights in the country under study

See replies to questions 9 and 10 for more details.

Question Good practices

The effective exercise of the electoral right of mobile EU citizens with a temporary residence was enabled due to an intensive cooperation of NGOs, experts of the Committee for the Rights of Foreigners and the Public Defender of Rights, whose legal argumentation has been approved by decisions of regional courts. (See sections 2.1.6 and 2.1.9 for more details)

¹¹⁷ The government considers the political participation of foreigners as a security threat. For more see e.g. Rozumek, "Bezpečnostní priorita v režimu důvěrné – cizinec s trvalým pobytem nesmí v obci volit!", *migraceonline.cz*, 3. 12. 2014, <http://migraceonline.cz/cz/e-knihovna/bezpecnostni-priorita-rezim-duverne-cizinec-trvaly-pobyt-nesmi-volit-obce> (last visited 16 April 2015).

Annexes

National provisions

- ✓ The Constitution of the Czech Republic of 16 December 1992, Constitutional Act No. 1/1993 Coll. as amended.
- ✓ The Charter of Fundamental Rights and Freedoms, Constitutional Act No. 23/1991 Coll., promulgated in the Czech Republic as No. 2/1993 Coll.
- ✓ Act No. 491/2001 Coll., on Elections to the Representative Bodies of Municipalities and Amending Certain Acts, as amended.
- ✓ Act No. 150/2002 Coll., the Code of Administrative Justice, as amended.

Case law

- ✓ Regional Court in Brno, File No. 64A 6/2014, decision of 19 September 2014.
- ✓ Regional Court in Prague, File No. 50 A 21/2014, decision of 22 September 2014.

Bibliography

- ✓ Antoš, “Politická participace cizinců v České republice” (Political Participation of Foreigners in the Czech Republic), 2 Politologický časopis/Czech Journal of Political Science (2012), pp. 113-127.

2.2. *Right to a fair trial (right to submit an application for visa or residence permit)*

When applying for some types of visa or residence permit, third country nationals from certain countries¹¹⁸ may file their application only after scheduling an appointment through an system called Visapoint. Visapoint is an internet system of the Ministry of Foreign Affairs of the Czech Republic. The purpose of introducing the system according to the Ministry of Foreign Affairs was enhancing equal and fair approach to all third country nationals, ensuring the same conditions for submitting an application for a residence permit at Czech embassies, increasing the effectiveness of the visa or residence permit procedure and improving the comfort of the applicant.¹¹⁹

The legal basis for the Visapoint system is provided in section 170 para. 2 of the Act No. 326/1999 Coll., according to which “[t]he Embassy can set an obligation to schedule an appointment for filing an application in advance. The Embassy allows the submission of the application within a period of 30 days from the date when the foreigner requested the appointment at the latest.” This provision was introduced to the Act No. 326/1999 Coll. by the

¹¹⁸ Currently, applications for visa and residence permits can be filed only after requesting an appointment via the Visapoint system by citizens of these countries: Albania, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Indonesia, Israel, Jordan, Kazakhstan, Libya, Moldova, Mongolia, Nigeria, People’s Republic of China, Republic of the Philippines, Russia, Serbia, Thailand, Turkey, Ukraine, United Arab Emirates, Ukraine, United Kingdom, Uzbekistan and Vietnam.

¹¹⁹ See “Obecné informace”, Ministry of Foreign Affairs of the Czech Republic, 14. 11. 2015, <http://www.mzv.cz/jnp/cz/informace_pro_cizince/obecne_vizove_informace/visapoint/obecne_informace/obecne_informace.html> (last visited 25 April 2015).

amending Act No. 427/2010 Coll., which came into force on 1 January 2011. According to the explanatory report to the amending act,¹²⁰ this measure was supposed to ease the intake of visa or residence permit applications even at Embassies where there is a higher number of foreigners interested in filing certain types of applications. The amendment was inspired by Article 9 para. 2 of Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas.¹²¹ The longer maximum period within which the appointment should take place that provided for by the Regulation reflects, according to the explanatory report, the fact that processing a long-term visa requires more time than the applications for a short-term visa.

There has been a problem with the Visapoint system since its implementation in 2009, as it actually makes it almost impossible for third country nationals from some countries to file applications for certain visas or residence permits. The system should offer appointments for filing a visa or a residence permit and the applicant should choose online from the available dates. However, third country nationals from some countries repeatedly reported that no dates were ever available to file applications for some types of residence permits. Therefore, requesting an appointment via the Visapoint system is in some countries an unrealizable condition for submitting an application for a visa or residence permit, while **the right to file an application and access to the administrative authority is part of right to a fair trial.**¹²² This might also present a breach of the EU law in cases when the Visapoint system prevents third country nationals from filing applications for residence permits to which they are entitled by EU directives, such as the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (hereinafter “Council Directive 2003/86/EC”) or the Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (hereinafter “Council Directive 2004/114/EC”).

Question 1: Source of protection

In general, access to filing an application falls under the right to a fair trial, protected on the constitutional level by Article 36 of the Czech Charter of Fundamental Rights and Freedoms.¹²³

Filing an application for a long-term residence permit for the purpose of family reunification is furthermore established by the EU Council Directive 2003/86/ES from 22 September 2003 on the right to family reunification and filing an application for long-term residence permit for the purpose of studies is established by EU Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.

Question 2: Scope and limits of the right (including balancing with other rights)

¹²⁰ Available at <<http://www.psp.cz/sqw/text/tiskt.sqw?O=6&CT=70&CT1=0>> (last visited 25 April 2015).

¹²¹ Article 9 para. 2 of the Regulation (EC) No. 810/2009: “Applicants may be required to obtain an appointment for the lodging of an application. The appointment shall, as a rule, take place within a period of two weeks from the date when the appointment was requested.”

¹²² See e.g. “Nedostatky systému Visapoint odporují mezinárodním závazkům ČR”, the Public Defender of Rights, 11.9.2012, <<http://www.ochrance.cz/tiskove-zpravy/tiskove-zpravy-2012/nedostatky-systemu-visapoint-odporuji-mezinarodnim-zavazkum-cr/>> (last visited on 27 April 2015).

¹²³ According to Article 36 para. 1 of the Charter: “Everyone may assert, through a legally prescribed procedure, his rights before an independent and impartial court or, in specified cases, before another body.”

The Ministry of Foreign Affairs has argued in cases on Visapoint system at the Supreme Administrative Court (see section 2.2.3 for more details) that there is no right to visa and therefore preventing a foreigner from filing an application for a long-term visa is not a breach of their right.

In general, states have the right to decide who can enter and reside on their territory. However, making it possible to file an application does not mean that the application will automatically be approved. The right to be able to submit an application and have a decision made on it is an integral element of a basic civil right to fair trial.

The situation is different as regards the applications for residence permits for the purpose of family reunification or studies filed on the basis of Council Directive 2003/86/EC and Council Directive 2004/114/EC. If the applicant fulfils the requirements set forth in these directives, the residence permit must be granted and the Member States have no possibility to impose further limits to these rights. In applications for some types of visas (typically the visas having origin in the domestic law), quotas for these applications can be implemented, however it must be made in an open manner prescribed by law. The lack of available appointments in the Visapoint system might present an effort to limit the number of submitted applications in certain countries and therefore de facto limiting the number of third country nationals in the Czech Republic.

Question 3: Interpretation and application

According to the Czech Constitutional Court¹²⁴ there is a fundamental procedural right to file an application for starting a procedure and also a right to have a decision issued and be informed about it. This right falls within the scope of the right to fair trial protected by Article 36 of the Czech Charter.

The case law of the Supreme Administrative Court has been similar on this issue. The Court held that despite an applicant has no right to be granted visa, she or he has a right to a fair trial when processing applications for a visa. This right includes mostly procedural conditions for submitting and processing an application that are predictable and by ordinary applicants generally possible to fulfil, for which it is necessary to have the opportunity to submit an application in a reasonable time and in a humanly dignified way, for example, without having to turn to unofficial agents.¹²⁵

So far, the Supreme Administrative Court has not ruled on the functioning and the legality of the Visapoint system (nor has any other judicial organ). However, it has ordered the Municipal Court in Prague to consider these questions in further proceedings after the previous decision of the Municipal Court was cancelled by the Supreme Administrative Court. The Municipal Court already issued a new decision in the matter which has not yet been made available to the public. From the information to the procedure available at the website of the Supreme Administrative Court it appears that the Ministry of Foreign Affairs filed a cassation complaint in the case to the Supreme Administrative Court.¹²⁶

¹²⁴ Czech Constitutional Court, File No. IV. US 114/96, judgement of 25 September 1997.

¹²⁵ Supreme Administrative Court, File No. 8 As 90/2011-62, judgment of 30 August 2012.

¹²⁶ The Supreme Administrative Court in its judgment of 3 December 2014, File No. 6 Azs 242/2014-41, cancelled the judgment of the Municipal Court in Prague of 22 August 2014, File No. 10 A 175/2012-37. The Municipal Court in Prague issued a new judgment of 18 March 2015, No. 10 A 175/2012-78 on 18 March 2015, which came into force on 30 March 2015, but the Ministry of Foreign Affairs filed a cassation complaint to the

Question 4: Case law protecting civil rights

The Czech legal system is a civil law system. There is no doctrine of precedent comparable to the common law countries in the Czech Republic. The decisions of the courts are not binding in the same way as the statutory regulation (the courts do not “make” the law but rather “find” it) and the violation of previous case law cannot be invoked in courts as such. On the other hand, there has been a notable shift in understanding of the normative relevance of case law in the Czech legal system in the past several years. As a result, a limited lawmaking potential of case law has become generally accepted in both academia and legal practice. Especially the case law of the top courts in the judicial system (Supreme Court, Supreme Administrative Court, Constitutional Court) are instrumental in co-shaping of the contents of the Czech law (though only in a material sense, not as a formal source of law).¹²⁷

Question 5: Judicial enforcement institutions and bodies

The judiciary in the Czech Republic is generally regulated in Articles 90 – 96 of the Czech Constitution. On the statutory level, the basic regulation of the judicial power is provided for by Act No. 6/2002 Coll., on Courts, Judges, Lay-judges and the State Administration of Courts and Amending Certain Acts, as amended (hereinafter “Act No. 6/2002 Coll.”). The procedural norms regulating the jurisdiction and judicial proceeding of the courts are 1) for civil justice Act No. 99/1963 Coll., the Code of Civil Procedure, as amended, 2) for criminal justice Act No. 141/1961 Coll., the Code of Criminal Justice, as amended, and 3) for administrative justice Act No. 150/2002 Coll.

The judicial review is based on two-instance proceeding. As regards the structure of judicial system,¹²⁸ there is a four-tier court system¹²⁹ comprising of:

- 1) District courts (their equivalents are district courts in Prague and The City Court in Brno) that perform a general first-instance jurisdiction in civil and criminal matters.
- 2) Regional courts (their equivalent is The Metropolitan Court in Prague), performing both second and first (in specific cases stipulated by law) instance jurisdiction in civil and criminal matters. At the same time, there are specialized administrative chambers and single judges that perform a first-instance jurisdiction in matters of administrative law.
- 3) Two high courts (in Prague and in Olomouc) that perform a second instance jurisdiction in civil and criminal cases where the court of first instance is the regional court.
- 4) The Supreme Court and The Supreme Administrative Court. The Supreme Court decides on extraordinary appeals against the second-instance decisions delivered by regional and high courts in civil and criminal matters. The Supreme Administrative Courts is specialized exclusively on administrative law matters and acts as a second-instance court in relation to the regional courts performing administrative jurisdiction in the first instance (The Supreme Administrative Court decides on cassation complaints against their decisions).

Supreme Administrative Court and the proceeding is pending at the Supreme Administrative Court under File No. 6 Azs 77/2015.

¹²⁷ For more on this issue see e.g. Bobek, Kühn (eds.), *Judikatura a právní argumentace* [Case Law and Legal Argumentation], 2nd ed. (Prague, 2013). See also Kühn, “Prospective and Retrospective Overruling in the Czech Legal System”, 4 (2) *The Lawyer Quarterly* (2014), pp. 139-154.

¹²⁸ A detailed graphical structure of the court system of the Czech Republic is available at: <http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/org_justice_cze_en.pdf> (last visited 16 April 2015).

¹²⁹ Article 91 para. 1 of the Czech Constitution provides that: “The court system comprises the Supreme Court, the Supreme Administrative Court superior, regional, and district courts. They may be given a different denomination by statute.”

Outside this general court structure there is the Czech Constitutional Court which is responsible for the protection of constitutionality (Article 83 of the Czech Constitution). The jurisdiction of the Czech Constitutional Court is determined by Article 87 paras. 1 and 2 of the Czech Constitution¹³⁰ and the functioning of the Court is regulated by Act No. 182/1993 Coll., Constitutional Court Act, as amended.¹³¹

According to Article 1 para. 1 of the Czech Constitution, “[t]he Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens.” The judiciary is independent on the legislative and executive powers, as stipulated in Article 2 para. 1 of the Czech Constitution. On the constitutional level, the independence and impartiality of the courts is specified in Articles 81 and 82 of the Czech Constitution.¹³² On the statutory level, the independence of the judiciary is provided for by Act No. 6/2002 Coll. There are no concerns relating to the independence of judiciary in the Czech Republic,¹³³ which would have a negative impact on enforcement of the civil rights followed in this study.

Article 1 para. 2 of the Czech Constitution provides that the Czech Republic observes its obligations resulting from international law. The reception of international law into the Czech legal system is based on incorporation. There is no general reception norm in the Czech law. However, most of the important international treaties, including the human rights treaties, are incorporated by Article 10 of the Czech Constitution, which states that “[p]romulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech

¹³⁰ Article 87 paras. 1 and 2 of the Czech Constitution: “(1) The Constitutional Court has jurisdiction: a) to annul statutes or individual provisions thereof if they are in conflicts with the constitutional order; b) to annul other legal enactments or individual provisions thereof if they are in conflict with the constitutional order, a statute; c) over constitutional complaints by the representative body of a self-governing region against an unlawful encroachment by the state; d) over constitutional complaints against final decisions or other encroachments by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms; e) over remedial actions from decisions concerning the certification of the election of a Deputy or Senator; f) to resolve doubts concerning a Deputy or Senator’s loss of eligibility to hold office or the incompatibility under Article 25 of some other position or activity with holding the office of Deputy or Senator; g) over a constitutional charge brought by the Senate against the President of the Republic pursuant to Article 65, paragraph 2; h) to decide on a petition by the President of the Republic seeking the revocation of a joint resolution of the Assembly of Deputies and the Senate pursuant to Article 66; i) to decide on the measures necessary to implement a decision of an international tribunal which is binding on the Czech Republic, in the event that it cannot be otherwise implemented; j) to determine whether a decision to dissolve a political party or other decisions relating to the activities of a political party is in conformity with constitutional acts or other laws; k) to decide jurisdictional disputes between state bodies and bodies of self-governing regions, unless that power is given by statute to another body. (2) Prior to the ratification of a treaty under Article 10a or Article 49, the Constitutional Court shall further have jurisdiction to decide concerning the treaty’s conformity with the constitutional order. A treaty may not be ratified prior to the Constitutional Court giving judgment.”

¹³¹ For more details on the proceedings on constitutional complaints before the Czech Constitutional Court see <<http://www.usoud.cz/en/guide-on-proceedings-on-constitutional-complaints/>> (last visited 21 April 2015).

¹³² Article 81 of the Czech Constitution: “The judicial power shall be exercised in the name of the Republic by independent courts.” Article 82 of the Czech Constitution: “(1) Judges shall be independent in the performance of their duties. Nobody may threaten their impartiality. (2) Judges may not be removed or transferred to another court against their will; exceptions resulting especially from disciplinary responsibility shall be laid down in a statute. (3) The office of a judge is incompatible with that of the President of the Republic, a Member of Parliament, as well as with any other function in public administration; a statute shall specify which further activities are incompatible with the discharge of judicial duties.”

¹³³ For more see e.g. Bobek, Kosař, “Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe”, 07 (15) German Law Journal (2014), pp. 1288-1289, <https://www.germanlawjournal.com/pdfs/Vol15-No7/PDF_Vol_15_No_07.02_Bobek.pdf> (last visited 19 April 2015).

Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.”¹³⁴ The international treaties under Article 10 of the Czech Constitution are part of the Czech legal order. The precedence of international law over the contravening domestic law relates to the statutory law and other legal acts; the Constitution and constitutional laws are not overridden by the international obligations (the international treaties are above the statutory law and below the Constitution and constitutional laws in the imaginary pyramidal hierarchy of the sources of law).

The EU law has been part of the Czech legal order since the accession of the Czech Republic to the EU in 2004. Membership of the Czech Republic in the EU is based on Article 10a of the Czech Constitution which provides that “[c]ertain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution.” Article 10a of the Czech Constitution also serves as the normative basis for the operation of EU law in the domestic legal order.¹³⁵ The precedence of EU law over the contravening domestic law is broader than in the case of international treaties under Article 10 and comprises also the precedence over the constitutional law, with certain exceptions determined by the substantive limits of competences transferred to the EU level.¹³⁶

The application of international (human rights) treaties and EU law in precedence to conflicting statutes is binding for all administrative and judicial organs of the Czech Republic. In relation to the judiciary, the obligation to consider them as sources of law is stipulated in Article 95 para. 1 of the Czech Constitution according to which “[i]n making their decisions, judges are bound by statutes and treaties which form a part of the legal order...” It follows that the Constitutional Court is not a judicial body which is primarily (or solely) responsible for ensuring the compliance with international, European or national human rights obligations.¹³⁷ However, it is the final arbiter on the issue, as it has the authority under Article 87 para. 1 letter d) of the Czech Constitution to decide over constitutional complaints against final decisions by public authorities which infringe constitutionally guaranteed fundamental rights and basic freedoms.

Proceedings providing protection against the malfunction of the Visapoint system are regulated by the Act No. 150/2002 Coll., Code of Administrative Justice. Actions under this Act are filed to regional courts in general in the area of which the administrative authority against which the action is taken is based. In case of an action on the interference of the Ministry of Foreign Affairs, as its headquarters are based in Prague, the competent court to decide about these actions is the Municipal Court in Prague. In case one of the parties to the action is not satisfied with the outcome, they can file a cassation complaint to the Supreme Administrative Court. Cassation complaints to the Supreme Administrative Court have no

¹³⁴ The treaties requiring the assent of Parliament for their ratification are enumerated in Article 49 of the Czech Constitution as follows: “treaties: a) affecting the rights or duties of persons; b) of alliance, peace, or other political nature; c) by which the Czech Republic becomes a member of an international organization; d) of a general economic nature; e) concerning additional matters, the regulation of which is reserved to statute.”

¹³⁵ See the first decision of the Czech Constitutional Court on the matter in the case *Sugar Quota III*, File No. Pl. ÚS 50/04, judgment of 8 March 2006, which has been affirmed also by later case law of the Czech Constitutional Court.

¹³⁶ For the limits of operation of the EU law within the Czech constitutional law, as set out in the case law of the Czech Constitutional Court, see e.g. Bobek, Kosař, “The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia - An Overview”, Eric Stein Working Paper No. 2/2010, pp. 3-6, <file:///C:/Users/HP/Downloads/SSRN-id1591370.pdf> (last visited 19 April 2015).

¹³⁷ According to Article 4 of the Czech Constitution, the fundamental rights and basic freedoms shall enjoy the protection of judicial bodies (i.e. all courts operating in the Czech legal system).

automatic suspensive effect, but the applicant can request the court to grant it pursuant to section 107 of the Act No. 150/2002 Coll. If no redress is achieved, a complaint may be submitted to the Constitutional Court, if the applicant alleges that his or her fundamental rights and basic freedoms guaranteed by a constitutional act have been infringed as a result of the final decision in a proceeding to which she or he was a party, of a measure, or of some other encroachment by a public authority¹³⁸

There are three main procedural ways of judicial protection against the malfunctioning of the Visapoint system that have been considered by the Czech courts so far:

1. Filing an action on unlawful interference of the administrative authority by preventing foreigners from filing an application for visa or residence permit.
2. Filing an application for a visa or residence permit via post and requesting the embassy that the obligation to file an application in person would be waived.
3. Attaching the application to another one and filing a complaint on the inaction of the administrative authority (see further below).

Ad 1) As the problem with Visapoint lies not with the decision of the administrative authority, but simply with the lack of access to submitting the application, the most efficient way of judicial enforcement of the rights of the applicant is probably to initiate the proceedings on protection against unlawful interference, instruction or enforcement from an administrative authority pursuant to section 82 and further of the Act No. 150/2002 Coll. This action may be filed by anyone who claims that her or his rights have been infringed by unlawful interference, instruction or enforcement (hereinafter “interference”) from an administrative authority which is not a decision and was aimed directly against the person or as a consequence of it the person was directly acted against. The petitioner may either seek protection against the interference or an acknowledgment that the interference was unlawful.

The applicant has to prove that she or he has been directly shortened on his or her rights by the interference, order or enforcement of an administrative authority, which is not a decision and was directed against the applicant. The respondent is the administrative authority, which interfered with the right of the petitioner. The action has to be filed within two months from the day when the applicant learned of the unlawful interference. The latest date for filing the complaint is within two years from the moment the interference took place. The action is however inadmissible if protection or rectification may be sought by other legal remedies, this does not apply in case the applicant only seeks determination that the interference is unlawful. The burden of proof lies with the applicant who seeks protection from the unlawful interference.

The regional court can order the Ministry of Foreign Affairs to refrain from further interference with the right of the applicant. However it is unclear, what impact would such a decision have on the Ministry of Foreign Affairs – whether the embassy would allow the applicant to submit the application for a visa or residence permit without scheduling an appointment via the Visapoint system or whether it would have to make more appointments available through the Visapoint system in general.

¹³⁸ See section 72 para. 1 of the Act No. 182/1993 Coll., on the Constitutional Court.

Ad 2) According to section 169 para 14. of the Act No. 326/1999 Coll., an application for a long-term residence permit or permanent residence permit shall be required to be filed by a foreign national in person. In justified cases, an Embassy may waive this obligation. The same rule is established for long-term visa in section 170 para. 1 of the Act No. 326/1999 Coll.

In case the application for a visa or a residence permit is submitted via post and the embassy is requested to waive the obligation to submit the application in person, the embassy must first make a decision about the request. The applicant must prove that submitting the application in person would present to her or him an unreasonable burden. Usually, this obligation would not be waived as the embassy would not find this condition to be fulfilled just based on the reason that the Visapoint system does not offer any or offers only a very few appointments for submitting an application. An appeal to the Minister of Foreign Affairs is possible against the decision on not waiving the obligation to submit an application in person. If the minister confirms the decision of the embassy, this decision can be challenged at the court by filing an action against it pursuant to section 65 of the Act No. 150/2002 Coll.

Action against the decision can be filed by anyone whose rights have been infringed directly or due to the violation of their rights in the preceding proceedings by an act of an administrative authority whereby the person's rights or obligations are created, changed, nullified or bindingly determined may seek the cancellation of this act, or the declaration of its nullity. The defendant in the proceedings is the administrative authority which has made the last instance decision, i.e. in this case it would be the Minister of Foreign Affairs.

The Act No. 150/2002 Coll. enumerates which acts of an administrative authority are excluded from judicial review, e.g. which are of a provisional nature or which regulate the administration of proceedings before the administrative authority. The Supreme Administrative Court has already ruled that the decision by which the request to waive the obligation to file an application for a long-term visa in person is a decision which is subject to judicial review pursuant to section 65 of the Code of Administrative Justice.¹³⁹

If the court finds the action justified, the court revokes the contested decision as unlawful or for procedural faults. The court also revokes the contested decision as unlawful if it finds that the administrative authority exceeded the legally defined bounds of discretionary power, or abused it. The legal position of the court is binding for the Minister of Foreign Affairs, but in case the decision was cancelled only due to procedural faults and the Municipal Court refrains from assessing the legality and the functionality of the Visapoint system as such, then the outcome is unsure and in fact a new decision on refusal to waive the obligation to file the application in person might be issued.

Ad 3) Based on a case decided by the Municipal Court in Prague on 10 December 2014, it is obvious that third country nationals who cannot schedule an appointment to submit their visa application are trying to find other ways to be able to submit it. In the referred case a citizen of Vietnam and her not even 4-year-old daughter were trying to reunite with their husband and father. As she could not schedule an appointment for submitting an application for a long-term residence permit for the purpose of family reunification, she scheduled this appointment for filing an application for a long-term residence permit for the purpose of scientific research. After submitting the application, she asked for a change in her application, which was allowed and she was granted the residence permit. The case at the Municipal Court in Prague was

¹³⁹ Supreme Administrative Court, File No. 9 Aps 6/2010-106, judgment of 31 May 2011.

concerning her daughter, whose application for a long-term residence permit for the purpose of family reunification she attached to her own application (at that time for a long-term residence permit for the purpose of scientific research). The Embassy has not dealt with this attachment and did not consider it to be a separate application.

The mother filed a request for a measure against inaction of the Ministry of Interior to the Commission for Decision-Making in the Matters of Foreign Nationals (hereinafter “the Commission”).¹⁴⁰ The Commission did not meet the request and has stated that the application was not filed in compliance with the law, it was not confirmed and registered, and therefore could neither be processed. The applicants therefore turned to the Municipal Court in Prague with an action against the inaction of the Ministry of Interior¹⁴¹. The Municipal Court ordered the Ministry of Interior to issue a decision about the application of the minor child within 60 days from the date when the decision enters into legal force. The Ministry of Interior filed a cassation complaint to the Supreme Administrative Court against this decision and requested the court to grant suspensive effect to the complaint. The Supreme Administrative Court has so far ruled on the request for suspensive effect, which has been refused and the Ministry of Interior must therefore make a decision on the application for permanent residence permit within 60 days since the entry into legal force of the decision of the Municipal Court in Prague. The proceedings at the Supreme Administrative Court on the merits are still pending.¹⁴²

Question 6: Non-judicial enforcement institutions and bodies relevant for the enforcement of the selected civil right

Third country nationals may turn with their complaints to the Public Defender of Rights, established by the Act No. 349/1999 Coll.¹⁴³

Pursuant to sections 2 - 6 of the Act No. 349/1999 Coll., the Defender is elected by the Chamber of Deputies for a term of office of six years, from among candidates, of whom two shall be nominated by the President of the Republic and two by the Senate, while identical proposals are admissible. The Defender may be elected for a maximum of two consecutive periods. Any citizen of the Czech Republic who has the right to vote and has attained the age of forty can be elected as a Defender. The office of the Defender is incompatible with the office of the President of the Republic, Member of Parliament, senator and a judge, as well as any activities in public administration. The Defender may not be a member of a political party or a political movement. The Defender shall discharge his/her office independently and impartially. The Defender is accountable to the Chamber of Deputies for the discharge of office. The Defender shall lose office the date following the date of expiration of the term of office, when a court judgment comes into legal force whereby the Defender was convicted of a criminal act, the Defender ceases to be eligible for election to the Senate, the Defender assumes the discharge of the office of President of the Republic, Member of Parliament, senator and judge or performs activities in public administration or on the date following the Defender's written declaration of resignation is delivered to the Chair of the Chamber of Deputies.

The Defender can open an inquiry, if there is no reason to suspend the complaint. Besides others, the Defender can study relating files or ask questions of the employees of authorities.

¹⁴⁰ Complaint under section 80 of the Act No. 500/2004 Coll, the Administrative Code, as amended.

¹⁴¹ Action under section 79 of the Act No. 150/2002 Coll.

¹⁴² The case is pending under File No. 7 Azs 282/2014, for further information see www.nssoud.cz

¹⁴³ Since February 2014, the Public Defender of rights has been Mgr. Anna Šabatová, Ph.D.

Authorities shall be obliged to provide the Defender with information and explanations, files and other written materials, their standpoint in writing as to the facts of the case and legal matters, evidence proposed by the Defender or the performance of such supervisory actions to which they are authorized by law and which are proposed by the Defender.¹⁴⁴ State bodies and persons performing public administration are, within the scope of their competence, obliged to provide the Defender with all assistance requested by her during inquiries.¹⁴⁵ If, in the course of her inquiry, the Defender ascertains a breach of legal regulations or any other maladministration, she shall request the authority to provide a statement on the Defender's findings within 30 days.¹⁴⁶ If the authority states that it has performed or is in the process of performing remedial measures, and the Defender considers these measures to be sufficient, the Defender may inform the complainant and the authority thereof. Otherwise, following receipt of the statement or expiry of the deadline to no effect, the Defender shall inform the complainant and the Authority in writing of the Defender's final statement, which shall include a proposal for remedy. The authority is obliged to inform the Defender within 30 days of receipt of the final decision of the corrective measures that have been taken.¹⁴⁷ If the authority fails to fulfill this obligation, or if the remedial measures are insufficient in the Defender's opinion, the Defender shall inform a superior authority, or if there is no such authority, the government, or may inform the public of her findings, including the disclosure of the names and surnames of persons authorized to act on behalf of the authority.

Since its implementation in 2009, the Visapoint system has been largely criticized by the Public Defender of Rights. The Defender has repeatedly pointed out to the Ministry of Foreign Affairs the deficiencies of the Visapoint system and the possible breach of EU Directives as a result of its operation.

On 4 July 2014, the Public Defender of Rights issued a report on inquiry¹⁴⁸ on a complaint of third country nationals who were unsuccessfully trying to file an application for a long-term visa at the Czech Embassy in Kazakhstan. One of the applicants stated that she was trying to schedule an appointment with the Embassy via the Visapoint system 3 to 4 times a day from 28 April 2012 to 15 June 2012 and even in cases when some appointments were offered by the Embassy the system informed her right after filling out the form that the offered appointment has already been taken by someone else. In some states, the limited access to filing an application for visa or residence permit was due to government resolution No. 1205/2009, but according to the statement of the Ministry of Foreign Affairs, the reason for limited appointments for filing an application at the Czech Embassy in Astana was that the Visapoint system was supposed to function as electronic office hours which would limit the numbers of appointments to only as many as could be handled by the employees of the Embassy. The Public Defender of Rights found that this limitation of access to filing an application constitutes a breach of the right to a fair trial stated protected by Article 36 of the Czech Charter. The case of the Visapoint malfunctioning is still pending at the Public Defender of Rights.

Another non-judicial enforcement institution is a Committee for the Rights of Foreigners at the Government Council for Human Rights. The Council is a permanent advisory body to the Government in the field of protection of human rights and fundamental freedoms in the

¹⁴⁴ Section 15 para. 1 of the Act No. 349/1999 Coll.

¹⁴⁵ Section 16 of the Act No. 349/1999 Coll.

¹⁴⁶ Section 18 para. 1 of the Act No. 349/1999 Coll.

¹⁴⁷ Section 20 para. 1 of the Act No. 349/1999 Coll.

¹⁴⁸ The report is available in the Database of the Defender's Opinions (Evidence stanovisek ochrance), Case No. 4483/2012/VOP, <<http://eso.ochrance.cz/>> (last visited on 27 April 2015).

territory of the Czech Republic.¹⁴⁹ The Competence of the Committee is stated by Art. 2 of its Statute, according to which “a) the Committee gives the Council for Human Rights initiatives to raise the level of status and respect for human rights in the Czech Republic, b) participates in the preparation of reports on the state of human rights in the Czech Republic and reports for the control mechanisms for international treaties, c) prepares for the Council proposals of partial and systemic measures to improve compliance, d) performs other tasks assigned by the Council.”¹⁵⁰ The Committee may also perform other tasks on its own initiative, unless they would be in conflict with the Statute and Procedure Rules of the Council and the Statute and Procedural Rules of the Committee.

In case damages occur due to the actions of an administrative authority or courts, it is possible to claim damages under Act No. 82/1998 Coll. Damages can be either caused by an unlawful decision or by maladministration. The act also provides the possibility to seek financial compensation for non-pecuniary damages. First, the request for damages or financial compensation for non-pecuniary damages must be filed at the administrative authority responsible for causing damage. In case the administrative authority refuses to meet the request, an action can be taken at the civil courts. No information is available relating to how many actions seeking protection from interference of the Ministry of Foreign Affairs due to the malfunction of the Visapoint system have been filed.

Question 7: Access to Justice

In case an action is filed by the applicant in the court, his/her justice rights are respected by the courts. The main problem in this regard though is the length of the proceedings at courts and the financial cost.

The length of the proceedings is a long-standing problem in the Czech Republic. The Council for Human Rights has repeatedly pointed it out in its reports on the state of human rights in the Czech Republic.¹⁵¹ Statistical information on the length of the procedures are available at the website of the Ministry of Justice,¹⁵² but it is not possible to find exact data on the average length of proceedings in administrative law cases. The closest we can get is by following the length of the procedure in cases labelled as “A” at the regional courts. According to the overview from the time period from 1 to 31 March 2015, 22% of the cases were pending for 6 months to 1 year, 36% were pending for 1-3 years, 6% were pending for 3-5 years and one case was pending for 5-7 years. There were no cases which would be pending for more than 7 years.

The court proceedings on the filed action against the functioning of Visapoint system might be lengthy as well. For example, in a case of an action filed by Vietnamese citizens who could not schedule an appointment for submitting a visa application, the action was filed on 3 September 2008 and a decision was issued by the Municipal Court in Prague on 13 July 2010,

¹⁴⁹ The Government Council for Human Rights has been established under Government Resolution No. 809 of 9 December 1998.

¹⁵⁰ The Statute of the Committee is available at <<http://www.vlada.cz/cz/ppov/rlp/vyborny/pro-prava-cizincu/uvod-55935/>> (last visited 19 April 2015).

¹⁵¹ Annual reports on the state of human rights in the Czech Republic for years 1998-2013 are available at <<http://www.vlada.cz/scripts/detail.php?pgid=302/>> (last visited 19 April 2015).

¹⁵² Statistics are available at the website of the Ministry of Justice of the Czech Republic at: <<http://cslav.justice.cz/InfoData/prehledy-agend.html/>> (last visited 19 April 2015).

i.e. the proceedings took almost 2 years¹⁵³. In this case, the Municipal Court in Prague prohibited the Embassy of the Czech Republic in Hanoi from further infringement with the right of the applicant to process his application for a long-term visa. The Czech Embassy in Hanoi ordered to renew the situation before the unlawful interference. However, the Ministry of Foreign Affairs filed a cassation complaint against this decision and the decision of the Municipal Court was cancelled by the Supreme Administrative Court and the case was returned to it for further proceedings.

Furthermore, third country nationals who cannot schedule an appointment to submit their applications for a visa or residence permit have access to justice rights, but as they are still outside of the territory of the Czech Republic, turning to a court is in practice a limited option as they have to contact an attorney, who can practice law in the Czech Republic. This means that even before filing the application for a visa, the applicant must pay for the legal assistance provided by the attorney.

Question 8: Support structures

There is a solid network of NGOs focusing on the right of migrants and refugees in the Czech Republic. Their umbrella organization is the Consortium of Migrants Assisting Organizations in the Czech Republic, which started its activity in September 2000 and currently comprises of eighteen organizations. The main objective of the Consortium is to actively participate in the formation of migration policy and to familiarize the public with the situation of migrants in the Czech and European context. The Consortium also provides media coverage of cases of migrants whose rights were seriously violated, supports further education of staff member organizations, promotes the exchange of information between NGOs and government on migration and coordinates the response of member organizations on current migration issues.¹⁵⁴

Some of the NGOs also provide free legal and social assistance to foreigners. However, applicants for visa or residence permit might not always have access to information about this option. Moreover, the legal and social assistance provided by these NGOs depend on their projects which are in most cases financed by the European Commission's Refugee Fund, Integration Fund or Return Fund. NGOs have criticized that their functioning depends on the Ministry of Interior as it is the Ministry of Interior who decides which NGO's project proposal is approved and financed, while at the same time it is the Ministry of Interior against whom actions are taken by the NGOs. The main NGOs providing legal assistance to migrants are: Association for Integration and Migration (SIMI)¹⁵⁵, Centre for Integration of Foreigners¹⁵⁶, InBáze¹⁵⁷, Organization for Aid to Refugees (OPU)¹⁵⁸ and the Society of Citizens Assisting Migrants¹⁵⁹.

NGOs and the civil society have been active in bringing awareness to the problem with the Visapoint system. For example in January 2012 the Organization for Aid to Refugees sent an

¹⁵³ Proceedings at the Municipal Court in Prague, File No. 11 Ca 303/2008-58, information available at <www.justice.cz /> (last visited 19 April 2015).

¹⁵⁴ For further information see <<http://www.konsorcium-nno.cz/>> (last visited 27 April 2015).

¹⁵⁵ For further information see <<http://www.migrace.com/en/>> (last visited 27 April 2015).

¹⁵⁶ For further information see <<http://www.cicpraha.org/>> (last visited 27 April 2015).

¹⁵⁷ For further information see <<http://www.inbaze.cz/>> (last visited 27 April 2015).

¹⁵⁸ For further information see <<http://www.opu.cz/>> (last visited 27 April 2015).

¹⁵⁹ For further information see <<http://www.soze.cz/>> (last visited 27 April 2015).

open letter to Karel Schwarzenberg, the Minister of Foreign Affairs, in which it requested him to take steps leading to the improvement of the Visapoint system.¹⁶⁰

In the Czech Republic the access to free legal aid is insufficient.¹⁶¹ The main deficiencies include the unsystematic legal regulation, partial transfer of responsibility of the state to the Czech Bar Association without compensation, lack of awareness of people about the possibility to obtain free legal assistance and also that it is not possible to obtain legal aid before the judicial proceedings start.¹⁶² The section 18 of the Act No. 85/1996 Coll., on Legal Profession, as amended (hereinafter “Act No. 85/1996 Coll.”), provides that free legal aid may be granted to an applicant who addressed the Czech Bar Association and claimed that he or she was not able to find a lawyer. A draft of the Act on Free Legal Aid, which should ensure access to legal aid to those who for financial reasons cannot ensure it for themselves, was first prepared already by the end of year 2008, but the act has never been submitted to the parliament.

The Pro Bono Alliance is trying to develop pro bono legal assistance via the project of a Pro bono centre. Attorneys and law firms affiliated with the centre provide legal assistance to those who otherwise could not gain access to a qualified legal aid due to financial or other reasons. The Pro Bono Alliance has further launched an internet website in 2009 (under its sub-program Legal Aid Information Centre) which provides guidance through the system of free legal aid in the Czech Republic.¹⁶³ The Pro Bono Alliance also organizes educational events, supports an exchange of experience and facilitates cooperation between lawyers from NGOs and other legal professions, participates in legislative procedures, supports pro bono activities of lawyers and spreads information about the protection of human rights.¹⁶⁴

Legal education in the Czech Republic is available at private and state higher education institutions,¹⁶⁵ while state higher education institutions (universities) are considered as more prestigious, traditional and important institutions. There are Law Faculties at four state universities in the Czech Republic – at Charles University in Prague, Masaryk University in Brno, Palacky University in Olomouc and University of West Bohemia in Pilsen. All these universities have mandatory courses of Constitutional Law, Public International Law and European Union Law in their curriculum. Specialized courses on various aspects of human rights protection are optional, except for the course “Human Rights and Judiciary” which is mandatory at the Masaryk University. There is also an optional course of Legal Clinic of Refugee Law run at all Czech Law Faculties except for the University of West Bohemia in Pilsen.

The Czech Bar Association performs public administration in the area of the legal profession. The conditions for being admitted to the Bar are stipulated in section 5 of the Act No. 85/1996 Coll. Besides other conditions, attorneys registered in the Register of Lawyers have to pass the Bar examination, which consists of a written and oral part in the following areas of law: 1.

¹⁶⁰ The letter from Mr. Martin Rozumek, Director of the Organization for Aid to refugees is available at: <<http://docs.opu.cz/Dopis%20ministru%20Schwarzenbergovi%20k%20syst%C3%A9mu%20Visapoint-1.pdf>> (last visited 27 April 2015)

¹⁶¹ For further information see e.g. Benák, Coufalík, Dostálová et al., *Bezplatná právní pomoc v České republice*, (MUNI Press, 2014).

¹⁶² For further information see <<http://www.bezplatnapravnipomoc.cz/>> (last visited 27 April 2015).

¹⁶³ For further information see <<http://www.potrebujipravnik.cz/>> (last visited 27 April 2015).

¹⁶⁴ For further information see <<http://www.probonoalliance.cz/en/>> (last visited 27 April 2015).

¹⁶⁵ Act No. 111/1998 Coll., on Higher Education Institutions and Amending Certain Acts, as amended.

Constitutional and Administrative Law, 2. Criminal Law, 3. Civil, Family and Employment Law, 4. Business Law and 5. Regulations Governing the Provision of Legal Services.

Some academicians and legal experts on migration are also represented in the Committee for the Rights of Foreigners, however their power is rather weak and the Committee constitutes primarily a forum for discussion. There is nevertheless a strong civil society and professional element which enables the Committee to define recommendations, which are though not always listened to by the executive.

Civil society organizations assisting migrants and legal elites focusing on Immigration and Refugee Law agree that the current situation cannot be upheld as it causes a systematic breach of EU Law. Political and governmental elites are not contributing to the protection of civil rights of migrants and they rather undermine civil rights litigation and resist any meaningful dialog between civil society organizations, NGO's working with migrants and the responsible areas of executive on the issue of Visapoint malfunctioning.

Question 9: Further practical barriers to the effective enjoyment of the selected civil rights

Foreigners who are trying to schedule an appointment via the Visapoint system are usually still in their country of origin, therefore they do not have a full access to the information on how their civil rights might be protected by the assistance of attorneys or NGOs. Also many of them live in countries where there are concerns regarding the independence and effectiveness of the judiciary and therefore they usually do not tend to solve their problem through courts in the first place.

Question 10: Jurisdictional issues in practice

There is no *de jure* difference in the effective enjoyment of the right to a fair trial depending on the status of third country nationals. In practice, the individual circumstances of migrants might cause a *de facto* limited access to enforcement of their civil rights. This might be caused by a language barrier, as most information regarding enforcement of civil rights is available in Czech or English language. Also, for citizens of some states, fees for legal assistance (apart from the free legal services provided by NGOs) might be considered as too expensive, representing an obstacle to access to a quality legal aid.

As only in eighteen states submitting an application for visa or a residence permit is possible only after scheduling an appointment via the Visapoint system, while in some countries there are no complaints regarding the functioning of the system, not all third country nationals are limited on their right to a fair trial. Main problems were observed at the embassies in Astana, Hanoi, Lvov and Tashkent.¹⁶⁶

Question 1:1 Systematic or notorious lack or deficient enforcement of the selected civil rights in the country under study

See answers to questions 5,9 and 10 for more details.

Question 12: Good practices

¹⁶⁶ “Nedostatky systému Visapoint odporují mezinárodním závazkům ČR”, the Public Defender of Rights, 11.9.2012, <<http://www.ochrance.cz/tiskove-zpravy/tiskove-zpravy-2012/nedostatky-systemu-visapoint-odporuji-mezinarodnim-zavazkum-cr/>> (last visited on 27 April 2015).

There has been no particular good practice observed in relation to the enforcement of selected right, other than the judicial means of enforcement described in section 2.1.5 and the long-term initiative of the Public Defender of Rights and NGOs to improve the situation relating to the Visapoint. (See sections 2.1.6 and 2.1.9 for more details).

Annexes

National provisions

- ✓ The Constitution of the Czech Republic of 16 December 1992, Constitutional Act No. 1/1993 Coll. as amended.
- ✓ The Charter of Fundamental Rights and Freedoms, Constitutional Act No. 23/1991 Coll., promulgated in the Czech Republic as No. 2/1993 Coll.
- ✓ Act No. 326/1999 Coll., on the Residence of Foreign Nationals in the Territory of the Czech Republic and Amending Certain Acts, as amended
- ✓ Act No. 150/2002 Coll., the Code of Administrative Justice, as amended.
- ✓ Act No. 500/2004 Coll., the Administrative Code, as amended.

Case law

- ✓ Czech Constitutional Court, File No. IV. US 114/96, judgement of 25 September 1997.
- ✓ Supreme Administrative Court, File No. 8 As 90/2011-62, judgment of 30 August 2012.
- ✓ Supreme Administrative Court, File No. 6 Azs 242/2014-41, judgment of 3 December 2014.

2.3. Right to private and family life, protection of property and the right to equal treatment (prohibition of discrimination) in relation to public health insurance

Question 1: Source of protection

The public health insurance is the basic mode of financing and providing the health care in the Czech Republic. It is regulated by Act No. 48/1997 Coll., on Public Health Insurance, as amended (hereinafter “Act No. 48/1997 Coll.”). According to this Act, the participants of public health insurance¹⁶⁷ are either persons with a permanent residence in the Czech Republic [section 2 para. 1 let. a) of the Act] or persons without permanent residence, as long as they are employed with the employer seated in the Czech Republic [section 2 para. 1 let. b) and c) of the Act].

¹⁶⁷ The personal scope of the public health insurance set by the Act No. 48/1997 Coll. is mandatory. Therefore, all categories of persons enumerated in section 2 of the Act are compulsory participants of the system (with no possibility to opt out). On the other hand, a person who does not fall within one of the enumerated categories has no possibility of voluntarily joining the insurance system and contributing to it on his/her own initiative.

As a result, the third country nationals¹⁶⁸ who do not have a permanent residence permit and are not employed (i.e. self-employed persons, children of working migrants, parents taking care of their children, students, etc.) are excluded from the public health insurance system and have to rely on the private health insurance instead. The exclusion from public health insurance system concerns also those migrants with a long-term residence permit who have worked in the Czech Republic for a substantial periods of time (possibly even several years) and contributed by their monthly payments to the health insurance system as employees. However, once their employment relationship terminated, they became excluded from the possibility of claiming insurance benefit and participation in the public health insurance system. For example, this situation often concerns migrant women working on a fixed-term contracts who become pregnant, have to take a maternity leave (or a sick leave because of a high-risk pregnancy) and in the meantime lose their work as a result¹⁶⁹.

The private health insurance shows many deficiencies – the insurance companies are not obliged to conclude the contract with migrants who are not profitable, for example who are already ill (especially new-born children with health problems, pregnant women with complications or elderly persons – these categories of migrants are *de facto* uninsurable), the terms of insurance include many saving clauses, limits on insurance payments and insurance companies in general show reluctance to fully reimburse the health care provided to the insured party.¹⁷⁰ As a result, many of these migrants have to pay for their health care in cash, or become heavily indebted to the hospitals for the health care provided to them in case of more complicated injuries or serious illnesses.¹⁷¹ Moreover, the terms of private health insurance can cause a worse quality of the health care provided to migrants in practice and many medical interventions have to be paid in cash in advance to the health care providers.¹⁷²

¹⁶⁸ The mobile EU citizens and their family members, as well as the third country nationals exercising the right to free movement within the EU, are included in the public health insurance from the first day of their stay in the Czech Republic based on the Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, and on the Regulation (EU) No 1231/2010 of the European Parliament and of The Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality.

¹⁶⁹ Fixed-term contracts are a typical type of contract concluded with migrants who do not have a permanent residence permit, because of the time limitation of working permits of foreigners with a long-term residence permit.

¹⁷⁰ Viz Hnilicová et al., “Analýza komerčního zdravotního pojištění cizinců” (Analysis of the Private Health Insurance of Foreigners), October 2012, <http://www.konsorcium-nno.cz/dokumenty/analyza_komerčního_zdravotního_pojistění_pro_vybor171012_201210180815049.pdf> (last visited 19 April 2015).

¹⁷¹ See e.g. Kaličinská, “Zadlužen hned v porodnici”, Deník Referendum, 10. 7. 2014, see also Rychlík, “Děti cizinců narážejí na limity v léčbě”, Lidové noviny, 17. 7. 2014, or “Děti cizinců se stále rodí zadlužené až do smrti”, The Czech Television, 22. 12. 2013, <<http://www.ceskatelevize.cz/ct24/regiony/255760-deti-cizincu-se-stale-rodí-zadlužene-az-do-smrti/>> (last visited 19 April 2015). For more details on the specific situation of pregnant migrant women see also Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women for the Czech Republic Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women For its Consideration at the 47th Session 4 – 22 October 2010, point 8.3. Česká ženská lobby, La Strada, Pedagogická fakulta University Karlovy, 2010, <http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/Czech_Womens_Lobby_forthesession.pdf> (last visited 19 April 2015).

¹⁷² See Oral Statement to the CEDAW Committee. Presentation of the Shadow Report by the NGO Coalition for the Czech Republic, Alexandra Jachanova Dolezelova. 47th Session 4 – 22 October 2010, Committee on the Elimination of All Forms of Discrimination Against Women, <http://www.feminismus.cz/download/CR_ORAL_STATEMENT.pdf> (last visited 19 April 2015).

In the Czech Charter, the **right to property** is protected under Article 11.¹⁷³ The right to social benefits has been considered by the European Court of Human Rights (hereinafter the “ECtHR”) as falling within the protection of the right to property under Article 1 of the Protocol No. 1 to the Convention of Human Rights and Fundamental Freedoms (hereinafter “the Convention”).¹⁷⁴

In the case *Gaygusuz v. Austria* (in a similar situation as regards the Czech public health insurance scheme) the ECtHR found a violation of the **prohibition of discrimination** according to Article 14 of the Convention taken **in conjunction with the right to property** under Article 1 of the Protocol No. 1 to the Convention. The ECtHR considered that inability of the applicant to draw a social benefit from the insurance system to which he has contributed in the past solely because he was not a citizen of Austria constituted discrimination on the basis of nationality.¹⁷⁵ Later in the case *Okpiz v. Germany* the ECtHR found that the discriminatory reason in accessing the social benefit claim was a type of residence permit of foreigners (the applicant did not have the type of long term residence permit required by law for being eligible for the social benefit).¹⁷⁶

The condition of a permanent residence in the Czech Republic set out in section 2 para 1 let. a) of the Act No. 48/1997 Coll. may seem neutral. However, the term “permanent residence” has a different meaning in the Czech law for the Czech citizens on the one hand and foreigners on the other hand. Whereas for the Czech citizens the permanent residence fulfils only a registration function,¹⁷⁷ for foreigners it means a permanent residence permit under the Act No. 326/1999 Coll., which is the highest residence status of foreigners and can be typically obtained only after a minimum of 5 years of continuous residence in the Czech Republic.¹⁷⁸ Therefore, the condition of a permanent residence is discriminatory on the basis of nationality (distinguishing between citizens and non-citizens of the Czech Republic).

The impact of the alternative condition allowing a person to enter the public health insurance system without a permanent residence, as long as he/she is employed, which is set out in section 2 para 1 let. b) and c) of the Act No. 48/1997 Coll., may further lead to a violation of the **right to private and family life** protected under Article 8 of the Convention.

The provision of section 2 para 1 let. b) and c) of the Act No. 48/1997 Coll. entails an inherent negative consequences of becoming a parent for employed migrant women who become pregnant, as they risk losing their work (as a result of pregnancy and the consequent maternity/parental leave), which immediately terminates their participation in the public

¹⁷³ Article 11 para 1 of the Czech Charter: “Everyone has the right to own property. Each owner’s property right shall have the same content and enjoy the same protection.”

¹⁷⁴ See e.g. Kratochvíl, *Sociální práva v Evropské úmluvě na ochranu lidských práv a Mezinárodním paktu o občanských a politických právech*, (Praha, 2010), pp. 158-161.

¹⁷⁵ ECtHR, *Gaygusuz v Austria*, Appl. No. 17371/90, judgment of 16 September 1996.

¹⁷⁶ In this case, the ECtHR found a violation of Article 14 of the Convention taken in conjunction with Article 8, as the case concerned child benefits, which the ECtHR considered to be within the scope of the right to private and family life. ECtHR, *Okpiz v. Germany*, Appl. No. 59140/00, judgment of 25 October 2005.

¹⁷⁷ Under section 10 para. 1 of the Act No. 133/2000 Coll., on the Population Register and on Birth Certificate Numbers and Amending Certain Acts, as amended, the place of permanent residence is the address of the Czech Citizens in the Czech Republic, which is registered in the population register.

¹⁷⁸ In respect of EU citizens see section 87g para. 1 of the Act No. 326/1999 Coll., in respect of third country nationals see section 68 para 1 of the Act.

health insurance.¹⁷⁹ Moreover, children who do not have a permanent residence permit (irrespective of whether their parents are employed and contribute to the system or not) are always excluded from the public health insurance and are under potential risk of becoming indebted in case of serious illness.

All these considerations and their practical consequences may have a serious impact on the decision to become a parent for migrant women (and possibly also migrant men). The decision to become a parent falls within the scope of the right to private life protected under Article 8 of the Convention, as well as the accessibility of health care (especially in relation to pregnancy and giving birth).¹⁸⁰

The notion of private life protected by Article 8 of the Convention has a very broad meaning according to the jurisprudence of the ECtHR.¹⁸¹ The scope of the right to private life includes also the access to health care.¹⁸² The ECtHR confirmed the existence of “positive obligations of the State to secure the physical integrity of mothers-to-be,”¹⁸³ found that the right to private life entails also the right to respect for the decision to become a parent¹⁸⁴ and considered that “the circumstances of giving birth incontestably form part of one's private life” for the purposes of Article 8.¹⁸⁵

Question 2: Scope and limits of the right (including balancing with other rights)

The limit of the civil rights related to issue of (non)participation of migrants in the public health insurance system is determined by a legitimate effort of the government to protect the system from abuse by migrants coming only in order to claim insurance payments from the system for the health care they need. It is also legitimate to limit the participation in the system to only those migrants with a reasonable perspective of a long-term stay in the country and consequently also of a long-term contributing to the system.

However, there is no justification in terms of proportionality and necessity of the statutory regulation to the pursued legitimate aim. The regulation essentially enables the migrants (third country nationals) who are not employees to enter the public health insurance only after 5 years of a continuous residence in the Czech Republic at the earliest. Such a measure is unprecedented also in comparison with the situation in other EU Member States.¹⁸⁶

¹⁷⁹ This may also constitute discrimination on the basis of gender, as only women can become pregnant. As a result, becoming a parent has a disproportionately different impact on the working and legal standing of men and women, both in migration situation.

¹⁸⁰ For migrant women, the relevant source of protection is also the Convention on the Elimination of All Forms of Discrimination against Women. See Committee on the Elimination of Discrimination against Women General Recommendation No. 26 on women migrant workers, CEDAW/C/2009/WP.1/R, 5 December 2008, paras 17-18.

¹⁸¹ See e.g. ECtHR, *Pretty v. United Kingdom*, Appl. No. 2346/02, judgment of 29 April 2002, point 61.

¹⁸² See e.g. ECtHR, *Sentges v. Netherlands*, Appl. No. 27677/02, judgment of 8 July 2003. See also Kmec, Kosař, Kratochvíl, Bobek, *Evropská úmluva o lidských právech. Komentář*, (Praha, 2012), pp. 901 - 902.

¹⁸³ ECtHR, *Tysiác v. Poland*, Appl. No. 5410/03, judgment of 20 March 2007.

¹⁸⁴ ECtHR, *Evans v. United Kingdom*, Appl. No. 6339/05, Grand Chamber judgment of 10 April 2007, points 71 - 72.

¹⁸⁵ ECtHR, *Ternovsky v. Hungary*, Appl. No. 67545/09, judgment of 14 December 2010, point 22.

¹⁸⁶ In other EU Member States the rights of the migrants with a long-term residence permits in the area of health insurance are set on equal footing with nationals of the state concerned usually after 3 months (i.e. France) to 12 months (i.e. Netherlands, Germany, United Kingdom) of the migrants' stay in the territory. See Hnilicová, “Souhrn důvodů pro zahrnutí migrantů ze třetích zemí a jejich rodinných příslušníků do veřejného zdravotního pojištění v ČR”, 14 March 2013, 1st Faculty of Medicine, Charles University in Prague, pp. 2 - 3. The Material has been presented to the Committee for the Rights of Foreigners of the Government Council for Human Rights.

In the light of the ECtHR case law relating to the prohibition of discrimination according to Article 14 of the Convention taken in conjunction with the right to property under Article 1 of the Protocol No. 1 to the Convention, as well as the case law on the right to private life under Article 8 of the Convention, the current statutory regulation of the participation in the public health insurance arguably constitutes a violation of these rights.

Question 3: Interpretation and application

So far, there has been no final decision of the court on the compliance of the access to health insurance of migrants excluded from the public health insurance in the Czech Republic.

Currently, there is a pending proceeding before the Metropolitan Court in Prague on the issue (File No. 10 Ad 18/2014), which has suspended the proceeding pursuant to section 48 para 1 let. a) of the Act No. 150/2002 Coll. and turned to the Czech Constitutional Court with the proposal pursuant to Article 95 of the Czech Constitution to abolish sections 2 and 3 of the Act No. 48/1997 Coll. for their conflict with the constitutional order (largely for the above described reasons).¹⁸⁷ The decision of the Czech Constitutional Court is pending.

Question 4: Case law protecting civil rights

The Czech legal system is a civil law system. There is no doctrine of precedent comparable to the common law countries in the Czech Republic. The decisions of the courts are not binding in the same way as the statutory regulation (the courts do not “make” the law but rather “find” it) and the violation of previous case law cannot be invoked in courts as such. On the other hand, there has been a notable shift in understanding of the normative relevance of case law in the Czech legal system in the past several years. As a result, a limited lawmaking potential of case law has become generally accepted in both academia and legal practice. Especially the case law of the top courts in the judicial system (Supreme Court, Supreme Administrative Court, Constitutional Court) are instrumental in co-shaping of the contents of the Czech law (though only in material sense, not as a formal source of law).¹⁸⁸

According to Article 95 para 2 of the Czech Constitution, it is the competence of a court to submit the matter to the Constitutional Court, should it come to conclusion that a statute which should be applied in the resolution of a matter is in conflict with the constitutional order (i.e. with civil rights protected by the Czech Charter and international human rights treaties to which the Czech Republic is a party). The parties to the dispute can propose such a motion in their actions brought to the court, however they are not allowed to directly turn to the Constitutional Court themselves (this is possible only after the final decision in the dispute had been issued by the court).¹⁸⁹

Question 5: Judicial enforcement institutions and bodies

¹⁸⁷ Article 95 para 2 of the Czech Constitution: „Should a court come to the conclusion that a statute which should be applied in the resolution of a matter is in conflict with the constitutional order, it shall submit the matter to the Constitutional Court.”

¹⁸⁸ For more on this issue see e.g. Bobek, Kühn (eds.), *Judikatura a právní argumentace*, [Case Law and Legal Argumentation], 2nd ed. (Praha, 2013). See also Kühn, “Prospective and Retrospective Overruling in the Czech Legal System”, 4 (2) *The Lawyer Quarterly* (2014), pp. 139-154.

¹⁸⁹ According to section 75 para 1 of the Act No. 182/1993 Coll., for the constitutional complaint to be admissible, all ordinary and extraordinary means of remedy that the law provides for the protection of the right have to be exhausted. For more on the proceedings on constitutional complaints before the Czech Constitutional Court see <<http://www.usoud.cz/en/guide-on-proceedings-on-constitutional-complaints/>> (last visited 20 April 2015).

The judiciary in the Czech Republic is generally regulated in Articles 90 – 96 of the Czech Constitution. On the statutory level, the basic regulation of the judicial power is provided for by Act No. 6/2002 Coll., on Courts, Judges, Lay-judges and the State Administration of Courts and Amending Certain Acts, as amended (hereinafter “Act No. 6/2002 Coll.”). The procedural norms regulating the jurisdiction and judicial proceeding of the courts are 1) for civil justice Act No. 99/1963 Coll., the Code of Civil Procedure, as amended, 2) for criminal justice Act No. 141/1961 Coll., the Code of Criminal Justice, as amended, and 3) for administrative justice Act No. 150/2002 Coll., the Code of Administrative Justice, as amended (hereinafter “Act No. 150/2002 Coll.”).

The judicial review is based on two-instance proceeding. As regards the structure of judicial system,¹⁹⁰ there is a four-tier court system¹⁹¹ comprising of:

- 1) District courts (their equivalents are district courts in Prague and The City Court in Brno) that perform a general first-instance jurisdiction in civil and criminal matters.
- 2) Regional courts (their equivalent is The Metropolitan Court in Prague), performing both second and first (in specific cases stipulated by law) instance jurisdiction in civil and criminal matters. At the same time, there are specialized administrative chambers and single judges that perform a first-instance jurisdiction in matters of administrative law.
- 3) Two high courts (in Prague and in Olomouc) that perform a second instance jurisdiction in civil and criminal cases where the court of first instance is the regional court.
- 4) The Supreme Court and The Supreme Administrative Court. The Supreme Court decides on extraordinary appeals against the second-instance decisions delivered by regional and high courts in civil and criminal matters. The Supreme Administrative Courts is specialized exclusively on administrative law matters and acts as a second-instance court in relation to the regional courts performing administrative jurisdiction in the first instance (The Supreme Administrative Court decides on cassation complaints against their decisions).

Outside this general court structure there is the Czech Constitutional Court which is responsible for the protection of constitutionality (Article 83 of the Czech Constitution). The jurisdiction of the Czech Constitutional Court is determined by Article 87 paras. 1 and 2 of the Czech Constitution¹⁹² and the functioning of the Court is regulated by Act No. 182/1993 Coll., Constitutional Court Act, as amended.¹⁹³

¹⁹⁰ A detailed graphical structure of the court system of the Czech Republic is available at: <http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/org_justice_cze_en.pdf> (last visited 16 April 2015).

¹⁹¹ Article 91 para. 1 of the Czech Constitution provides that: “The court system comprises the Supreme Court, the Supreme Administrative Court superior, regional, and district courts. They may be given a different denomination by statute.”

¹⁹² Article 87 paras. 1 and 2 of the Czech Constitution: “(1) The Constitutional Court has jurisdiction: a) to annul statutes or individual provisions thereof if they are in conflicts with the constitutional order; b) to annul other legal enactments or individual provisions thereof if they are in conflict with the constitutional order, a statute; c) over constitutional complaints by the representative body of a self-governing region against an unlawful encroachment by the state; d) over constitutional complaints against final decisions or other encroachments by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms; e) over remedial actions from decisions concerning the certification of the election of a Deputy or Senator; f) to resolve doubts concerning a Deputy or Senator’s loss of eligibility to hold office or the incompatibility under Article 25 of some other position or activity with holding the office of Deputy or Senator; g) over a constitutional charge brought by the Senate against the President of the Republic pursuant to Article 65, paragraph 2; h) to decide on a petition by the President of the Republic seeking the revocation of a joint resolution of the Assembly of Deputies and the Senate pursuant to Article 66; i) to decide on the measures necessary to implement a decision of an international tribunal which is binding on the Czech Republic, in the event that it cannot be otherwise implemented; j) to determine whether a decision to dissolve a political party or other decisions relating to the activities of a political party is in conformity with constitutional acts or other laws; k) to decide jurisdictional disputes between state

According to Article 1 para. 1 of the Czech Constitution, “[t]he Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens.” The judiciary is independent on the legislative and executive powers, as stipulated in Article 2 para. 1 of the Czech Constitution. On the constitutional level, the independence and impartiality of the courts is specified in Articles 81 and 82 of the Czech Constitution.¹⁹⁴ On the statutory level, the independence of the judiciary is provided for by Act No. 6/2002 Coll. There are no concerns relating to the independence of judiciary in the Czech Republic,¹⁹⁵ which would have a negative impact on enforcement of the civil rights followed in this study.

Article 1 para. 2 of the Czech Constitution provides that the Czech Republic observes its obligations resulting from international law. The reception of international law into the Czech legal system is based on incorporation. There is no general reception norm in the Czech law. However, most of the important international treaties, including the human rights treaties, are incorporated by Article 10 of the Czech Constitution, which states that “[p]romulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.”¹⁹⁶ The international treaties under Article 10 of the Czech Constitution are part of the Czech legal order. The precedence of international law over the contravening domestic law relates to the statutory law and other legal acts; the Constitution and constitutional laws are not overridden by the international obligations (the international treaties are above the statutory law and below the Constitution and constitutional laws in the imaginary pyramidal hierarchy of the sources of law).

The EU law has been part of the Czech legal order since the accession of the Czech Republic to the EU in 2004. Membership of the Czech Republic in the EU is based on Article 10a of the Czech Constitution which provides that “[c]ertain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution.” Article 10a of the Czech Constitution also serves as the normative basis for the operation of EU law in the

bodies and bodies of self-governing regions, unless that power is given by statute to another body. (2) Prior to the ratification of a treaty under Article 10a or Article 49, the Constitutional Court shall further have jurisdiction to decide concerning the treaty’s conformity with the constitutional order. A treaty may not be ratified prior to the Constitutional Court giving judgment.”

¹⁹³ For more details on the proceedings on constitutional complaints before the Czech Constitutional Court see <<http://www.usoud.cz/en/guide-on-proceedings-on-constitutional-complaints/>> (last visited 21 April 2015).

¹⁹⁴ Article 81 of the Czech Constitution: “The judicial power shall be exercised in the name of the Republic by independent courts.” Article 82 of the Czech Constitution: “(1) Judges shall be independent in the performance of their duties. Nobody may threaten their impartiality. (2) Judges may not be removed or transferred to another court against their will; exceptions resulting especially from disciplinary responsibility shall be laid down in a statute. (3) The office of a judge is incompatible with that of the President of the Republic, a Member of Parliament, as well as with any other function in public administration; a statute shall specify which further activities are incompatible with the discharge of judicial duties.”

¹⁹⁵ For more see e.g. Bobek, Kosař, “Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe”, 07 (15) German Law Journal (2014), pp. 1288-1289, <https://www.germanlawjournal.com/pdfs/Vol15-No7/PDF_Vol_15_No_07.02_Bobek.pdf> (last visited 19 April 2015).

¹⁹⁶ The treaties requiring the assent of Parliament for their ratification are enumerated in Article 49 of the Czech Constitution as follows: “treaties: a) affecting the rights or duties of persons; b) of alliance, peace, or other political nature; c) by which the Czech Republic becomes a member of an international organization; d) of a general economic nature; e) concerning additional matters, the regulation of which is reserved to statute.”

domestic legal order.¹⁹⁷ The precedence of EU law over the contravening domestic law is broader than in the case of international treaties under Article 10 and comprises also the precedence over the constitutional law, with certain exceptions determined by the substantive limits of competences transferred to the EU level.¹⁹⁸

The application of international (human rights) treaties and EU law in precedence to conflicting statutes is binding for all administrative and judicial organs of the Czech Republic. In relation to the judiciary, the obligation to consider them as sources of law is stipulated in Article 95 para. 1 of the Czech Constitution according to which “[i]n making their decisions, judges are bound by statutes and treaties which form a part of the legal order...” It follows that the Constitutional Court is not a judicial body which is primarily (or solely) responsible for ensuring the compliance with international, European or national human rights obligations.¹⁹⁹ However, it is the final arbiter on the issue, as it has the authority under Article 87 para. 1 letter d) of the Czech Constitution to decide over constitutional complaints against final decisions by public authorities which infringe constitutionally guaranteed fundamental rights and basic freedoms.

The inclusion or exclusion of a person from the health insurance system is defined directly by law. There is no formal decision of the competent administrative body (public health insurance company) issued on the matter, as the start and termination of one’s participation in the public health insurance takes place directly as a result of one of the conditions set forth in section 3 of the Act No 48/1997 Coll. (granting or withdrawal of a permanent residence permit to the foreigner, start or termination of an employment, etc.).

To bring an action in the court, a possible procedure available is to initiate a proceeding with the respective public health insurance company pursuant to section 142 of the Act No. 500/2004 Coll., Code of Administrative Procedure, as amended. According to section 142 para 1 of the Act, an administrative organ decides, on the request of anyone who proves it necessary for the effective enforcement of his/her rights, on the existence of a legal relationship (if a certain legal relationship has emerged and if so, when it has happened, if the relationship still exists and if it does not, when it has terminated). In case a non-existence or termination of the participation in the public health insurance is determined by the public health insurance company in the first instance and confirmed by a decision of the head of the company in the second instance, it is possible to turn to the regional court (administrative section) and file an action against such a decision pursuant to section 65 of the Act No. 150/2002 Coll.

So far, the courts have not been much used by migrants to enforce their civil rights connected to the issue of their exclusion from the public health insurance system. By contrast, there has been a long-term and concentrated activity and criticism of the situation by many professional and civil society organizations, as well as other non-judicial bodies dealing with protection of

¹⁹⁷ See the first decision of the Czech Constitutional Court on the matter in the case *Sugar Quota III*, File No. Pl. ÚS 50/04, judgment of 8 March 2006, which has been affirmed also by later case law of the Czech Constitutional Court.

¹⁹⁸ For the limits of operation of the EU law within the Czech constitutional law, as set out in the case law of the Czech Constitutional Court, see e.g. Bobek, Kosař, “The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia - An Overview”, Eric Stein Working Paper No. 2/2010, pp. 3-6, <file:///C:/Users/HP/Downloads/SSRN-id1591370.pdf> (last visited 19 April 2015).

¹⁹⁹ According to Article 4 of the Czech Constitution, the fundamental rights and basic freedoms shall enjoy the protection of judicial bodies (i.e. all courts operating in the Czech legal system).

human rights (the Public Defender of Rights, treaty bodies of international human rights treaties etc.) – see section 2.3.8 for more details.

Question 6: Non-judicial enforcement institutions and bodies relevant for the enforcement of the selected civil right

Foreigners may turn with their complaints to the Public Defender of Rights, established by the Act No. 349/1999 Coll.²⁰⁰

Pursuant to sections 2 - 6 of the Act No. 349/1999 Coll., the Defender is elected by the Chamber of Deputies for a term of office of six years, from among candidates, of whom two shall be nominated by the President of the Republic and two by the Senate, while identical proposals are admissible. The Defender may be elected for a maximum of two consecutive periods. Any citizen of the Czech Republic who has the right to vote and has attained the age of forty can be elected as a Defender. The office of the Defender is incompatible with the office of the President of the Republic, Member of Parliament, senator and a judge, as well as any activities in public administration. The Defender may not be a member of a political party or a political movement. The Defender shall discharge his/her office independently and impartially. The Defender is accountable to the Chamber of Deputies for the discharge of office. The Defender shall lose office the date following the date of expiration of the term of office, when a court judgment comes into legal force whereby the Defender was convicted of a criminal act, the Defender ceases to be eligible for election to the Senate, the Defender assumes the discharge of the office of President of the Republic, Member of Parliament, senator and judge or performs activities in public administration or on the date following the Defender's written declaration of resignation is delivered to the Chair of the Chamber of Deputies.

The Defender can open an inquiry, if there is no reason to suspend the complaint. Besides others, the Defender can study relating files or ask questions of the employees of authorities. Authorities shall be obliged to provide the Defender with information and explanations, files and other written materials, their standpoint in writing as to the facts of the case and legal matters, evidence proposed by the Defender or the performance of such supervisory actions to which they are authorized by law and which are proposed by the Defender.²⁰¹ State bodies and persons performing public administration are, within the scope of their competence, obliged to provide the Defender with all assistance requested by her during inquiries.²⁰² If, in the course of her inquiry, the Defender ascertains a breach of legal regulations or any other maladministration, she shall request the authority to provide a statement on the Defender's findings within 30 days.²⁰³ If the authority states that it has performed or is in the process of performing remedial measures, and the Defender considers these measures to be sufficient, the Defender may inform the complainant and the authority thereof. Otherwise, following receipt of the statement or expiry of the deadline to no effect, the Defender shall inform the complainant and the Authority in writing of the Defender's final statement, which shall include a proposal for remedy. The authority is obliged to inform the Defender within 30 days of receipt of the final decision of the corrective measures that have been taken.²⁰⁴ If the authority fails to fulfill this obligation, or if the remedial measures are insufficient in the

²⁰⁰ Since February 2014, the Public Defender of rights has been Mgr. Anna Šabatová, Ph.D.

²⁰¹ Section 15 para. 1 of the Act No. 349/1999 Coll.

²⁰² Section 16 of the Act No. 349/1999 Coll.

²⁰³ Section 18 para. 1 of the Act No. 349/1999 Coll.

²⁰⁴ Section 20 para. 1 of the Act No. 349/1999 Coll.

Defender's opinion, the Defender shall inform a superior authority, or if there is no such authority, the government, or may inform the public of her findings, including the disclosure of the names and surnames of persons authorized to act on behalf of the authority.

The Public Defender of Rights has made a long-term effort to draw attention to the problem and find support for an amendment of the unsatisfactory statutory regulation of public health insurance which hampers the migrants' civil and social rights.²⁰⁵

Another non-judicial enforcement institution is a Committee for the Rights of Foreigners at the Government Council for Human Rights. The Council is a permanent advisory body to the Government in the field of protection of human rights and fundamental freedoms in the territory of the Czech Republic.²⁰⁶ The Competence of the Committee is stated by Art. 2 of its Statute, according to which "a) the Committee gives the Council for Human Rights initiatives to raise the level of status and respect for human rights in the Czech Republic, b) participates in the preparation of reports on the state of human rights in the Czech Republic and reports for the control mechanisms for international treaties, c) prepares for the Council proposals of partial and systemic measures to improve compliance, d) performs other tasks assigned by the Council."²⁰⁷ The Committee may also perform other tasks on its own initiative, unless they would be in conflict with the Statute and Procedure Rules of the Council and the Statute and Procedural Rules of the Committee.

The necessity of upholding the rights of migrants excluded from the public health insurance and their inclusion to the system has been repeatedly requested by the Government Council for Human Rights based on the recommendation of the Committee.²⁰⁸

Question 7: Access to Justice

In case an action is filed by the applicant in the court, his/her justice rights are respected by the courts. The main problem in this regard though is the length of the proceedings at courts and the financial cost.

The length of the proceedings is a long-standing problem in the Czech Republic. The Council for Human Rights has repeatedly pointed it out in its reports on the state of human rights in the Czech Republic.²⁰⁹ Statistical information on the length of the procedures are available at

²⁰⁵ See Stanovisko veřejné ochránkyně práv k návrhu zákona o soukromém zdravotním pojištění cizinců při pobytu na území České republiky a o změně zákona o pobytu cizinců (Position of the Public Defender of Rights on the Proposal of the Law on Private Health Insurance of Foreigners in the Territory of the Czech Republic), The Public Defender of Rights, 11. 7. 2014, <http://www.ochrance.cz/fileadmin/user_upload/Zvladni_opravneni/Pripominky/2014/PDCJ1968-2014_MLP_cizinci-zdrav-pojisteni.pdf> (last visited 20 April 2015). See also Legislative Recommendations of the Defender to the Chamber of Deputies of the Parliament of the Czech Republic for the year 2014 <http://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemovnu/Souhrnna-zprava_VOP_2014.pdf> (last visited 20 April 2015), and in all the previous years since 2012, <http://www.ochrance.cz/fileadmin/user_upload/zpravy_pro_poslaneckou_snemovnu/Souhrnna_zprava_VOP_2012-web.pdf> (last visited 20 April 2015).

²⁰⁶ The Government Council for Human Rights has been established under Government Resolution No. 809 of 9 December 1998.

²⁰⁷ The Statute of the Committee is available at <<http://www.vlada.cz/cz/ppov/rlp/vybory/pro-prava-cizincu/uvod-55935/>> (last visited 19 April 2015).

²⁰⁸ Resolution of the Government Council for Human Rights of 26 February 2009 and 7 October 2013 on the health insurance of migrants.

²⁰⁹ Annual reports on the state of human rights in the Czech Republic for years 1998-2013 are available at <<http://www.vlada.cz/scripts/detail.php?pgid=302/>> (last visited 19 April 2015).

the website of the Ministry of Justice,²¹⁰ but it is not possible to find exact data on the average length of proceedings in administrative law cases. The closest we can get is by following the length of the procedure in cases labelled as “A” at the regional courts. According to the overview from the time period from 1 to 31 March 2015, 22% of the cases were pending for 6 months to 1 year, 36% were pending for 1-3 years, 6% were pending for 3-5 years and one case was pending for 5-7 years. There were no cases which would be pending for more than 7 years.

Question 8: Support structures

There is a solid network of NGOs focusing on the right of migrants and refugees in the Czech Republic. Their umbrella organization is the Consortium of Migrants Assisting Organizations in the Czech Republic, which started its activity in September 2000 and currently comprises of eighteen organizations. The main objective of the Consortium is to actively participate in the formation of migration policy and to familiarize the public with the situation of migrants in the Czech and European context. The Consortium also provides media coverage of cases of migrants whose rights were seriously violated, supports further education of staff member organizations, promotes the exchange of information between NGOs and government on migration and coordinates the response of member organizations on current migration issues.²¹¹

Some of the NGOs also provide free legal and social assistance to foreigners. However, the legal and social assistance provided by these NGOs depend on their projects which are in most cases financed by the European Commission’s Refugee Fund, Integration Fund or Return Fund. NGOs have criticized that their functioning depends on the Ministry of Interior as it is the Ministry of Interior who decides which NGO’s project proposal is approved and financed, while at the same time it is the Ministry of Interior against whom actions are taken by the NGOs. The main NGOs providing legal assistance to migrants are: Association for Integration and Migration (SIMI)²¹², Centre for Integration of Foreigners²¹³, InBáze²¹⁴, Organization for Aid to Refugees (OPU)²¹⁵ and the Society of Citizens Assisting Migrants²¹⁶.

In the Czech Republic the access to free legal aid is insufficient.²¹⁷ The main deficiencies include the unsystematic legal regulation, partial transfer of responsibility of the state to the Czech Bar Association without compensation, lack of awareness of people about the possibility to obtain free legal assistance and also that it is not possible to obtain legal aid before the judicial proceedings start.²¹⁸ The section 18 of the Act No. 85/1996 Coll., on Legal Profession, as amended (hereinafter “Act No. 85/1996 Coll.”), provides that free legal aid may be granted to an applicant who addressed the Czech Bar Association and claimed that he or she was not able to find a lawyer. A draft of the Act on Free Legal Aid, which should ensure access to legal aid to those who for financial reasons cannot ensure it for themselves,

²¹⁰ Statistics are available at the website of the Ministry of Justice of the Czech Republic at: <<http://cslav.justice.cz/InfoData/prehledy-agend.html/>> (last visited 19 April 2015).

²¹¹ For further information see <<http://www.konsorcium-nno.cz/>> (last visited 27 April 2015).

²¹² For further information see <<http://www.migrace.com/en/>> (last visited 27 April 2015).

²¹³ For further information see <<http://www.cicpraha.org/>> (last visited 27 April 2015).

²¹⁴ For further information see <<http://www.inbaze.cz/>> (last visited 27 April 2015).

²¹⁵ For further information see <<http://www.opu.cz/>> (last visited 27 April 2015).

²¹⁶ For further information see <<http://www.soze.cz/>> (last visited 27 April 2015).

²¹⁷ For further information see e.g. Benák, Coufalík, Dostálová et al., *Bezplatná právní pomoc v České republice*, (MUNI Press, 2014).

²¹⁸ For further information see <<http://www.bezplatnapravnipomoc.cz/>> (last visited 27 April 2015).

was first prepared already by the end of year 2008, but the act has never been submitted to the parliament.

The Pro Bono Alliance is trying to develop pro bono legal assistance via the project of a Pro bono centre. Attorneys and law firms affiliated with the centre provide legal assistance to those who otherwise could not gain access to a qualified legal aid due to financial or other reasons. The Pro Bono Alliance has further launched an internet website in 2009 (under its sub-program Legal Aid Information Centre) which provides guidance through the system of free legal aid in the Czech Republic.²¹⁹ The Pro Bono Alliance also organizes educational events, supports an exchange of experience and facilitates cooperation between lawyers from NGOs and other legal professions, participates in legislative procedures, supports pro bono activities of lawyers and spreads information about the protection of human rights.²²⁰

Legal education in the Czech Republic is available at private and state higher education institutions,²²¹ while state higher education institutions (universities) are considered as more prestigious, traditional and important institutions. There are Law Faculties at four state universities in the Czech Republic – at Charles University in Prague, Masaryk University in Brno, Palacky University in Olomouc and University of West Bohemia in Pilsen. All these universities have mandatory courses of Constitutional Law, Public International Law and European Union Law in their curriculum. Specialized courses on various aspects of human rights protection are optional, except for the course “Human Rights and Judiciary” which is mandatory at the Masaryk University. There is also an optional course of Legal Clinic of Refugee Law run at all Czech Law Faculties except for the University of West Bohemia in Pilsen.

The Czech Bar Association performs public administration in the area of the legal profession. The conditions for being admitted to the Bar are stipulated in section 5 of the Act No. 85/1996 Coll. Besides other conditions, attorneys registered in the Register of Lawyers have to pass the Bar examination, which consists of a written and oral part in the following areas of law: 1. Constitutional and Administrative Law, 2. Criminal Law, 3. Civil, Family and Employment Law, 4. Business Law and 5. Regulations Governing the Provision of Legal Services.

There is only a limited dialog between civil society organizations, NGOs working with migrants and the responsible executive organs. Politicians are rather negative relating to enforcement of civil rights of migrants.

There has been a national-wide campaign of the Consortium of Migrants Assisting Organizations in the Czech Republic on the health insurance of migrants since 2012 which aims to bring awareness and attention to the issue and provoke an amendment of the law, so that most of the migrants can become participants of the public health insurance.²²²

Apart from NGOs, the request for inclusion of migrants to the system has been called for by the Czech Medical Association,²²³ Czech Association of Patients and several hospitals.²²⁴

²¹⁹ For further information see <<http://www.potrebujipravnik.cz/>> (last visited 27 April 2015).

²²⁰ For further information see <<http://www.probonoalliance.cz/en/>> (last visited 27 April 2015).

²²¹ Act No. 111/1998 Coll., on Higher Education Institutions and Amending Certain Acts, as amended.

²²² See **Prohlášení** Konsorcium nevládních organizací pracujících s migranty a NESEHNUTÍ, 2 October 2012, <<http://www.konsorcium-nno.cz/prohlaseni-ke-zdravotnimu-pojisteni-migrantu.html>> (last visited 22 April 2015).

²²³ Resolution of the XXVI. Congress of Delegates of the Czech Medical Association on 3-4 November 2012 in Prague, <http://www.lkcr.cz/doc/clanky_file/xxvi-sjezd-clk-usneseni-99346.pdf> (last visited 22 April 2015).

The human rights concerns that follow from the health insurance of migrants in the Czech Republic has also been repeatedly brought up by treaty bodies of international human rights treaties within the periodic monitoring of the Czech Republic.²²⁵

The academics and experts have been active in supporting the enforcement of the rights of migrants affected by the health insurance regulation.²²⁶ An enhanced activity of the academics and experts of the Academy of Sciences of the Czech Republic on the issue has been provoked by a tragedy of their colleagues, Australian scientists working in the research centre at the Academy whose 14-year old daughter fell ill with cancer (and died after 8 months of treatment), while the family had to pay an immense debt for her treatment to the hospital, as the private health insurance did not cover most of the costs of her treatment.²²⁷

Question 9: Further practical barriers to the effective enjoyment of the selected civil rights

There are no further practical barriers other than those identified and described in answer to question 5.

Question 10: Jurisdictional issues in practice

There is no *de jure* difference in the effective enjoyment of the right. In practice, the individual circumstances of migrants might cause a *de facto* limited access to enforcement of their civil rights. This might be caused by a language barrier, as most information regarding enforcement of civil rights is available in Czech or English language, by a level of integration of the person depending on the length of his/her stay in the Czech Republic. Also, for citizens of some states, fees for legal assistance (apart from the free legal services provided by NGOs) might be considered as too expensive, representing an obstacle to access to a quality legal aid.

There are no territorial differences in the effective enjoyment of the selected civil rights.

²²⁴ See Kampaň za zdravotní pojištění migrantů a migrantek, section „Podpořili nás“. Consortium of Migrants Assisting Organizations in the Czech Republic, <<http://www.konsorcium-nno.cz/zdravotni-pojisteni-migrantu.html>> (last visited 22 April 2015).

²²⁵ Committee on the Elimination of All Forms of Discrimination Against Women, 47th Meeting, 4-22 October 2010, Final Conclusions (CEDAW/C/CZE/CO/5), paras 32 - 33. Committee for the Rights of the Child, 57th Meeting, 30 May-17 June 2011, Final Conclusions (CRC/C/CZE/CO/3-4), paras 53 - 54. Committee on the Economic, Social and Cultural Rights, Final Recommendations (E/C.12/CZE/CO/2), 23 May 2014, point 15.

²²⁶ For example PhDr. Helena Hnilicová, Ph.D. of the 1st Faculty of Medicine, Charles University in Prague, or prof. RNDr. Václav Hofejší, Csc. of the Academy of Sciences of the Czech Republic. See e.g. “Odborníci a ombudsmanka: Místo úprav komerčního zdravotního pojištění je třeba migranty zahrnout do veřejného systému”, Consortium of Migrants Assisting Organizations in the Czech Republic, Press Release, 13 November 2014. For previous media coverage of the issue see the media monitoring at <http://www.konsorcium-nno.cz/monitoring_tisku.html> (last visited 22 April 2015). Other active supporters from the academia include JUDr. Olga Sovová, Ph.D. from the Palacky University in Olomouc, or Mgr. Selma Muhič Dizdarević, PhD. Of the Faculty of Humanities, Charles University in Prague (see <<http://www.konsorcium-nno.cz/zdravotni-pojisteni-migrantu.html>>).

²²⁷ See e.g. “Ústav molekulární genetiky AV ČR založil veřejnou sbírku na pomoc nemocné dívce”, 7. 8. 2014, <<http://www.biocev.eu/ustav-molekularni-genetiky-zalozil-verejnou-sbirku-na-pomoc-nemocne-divce/>> (last visited 22 April 2015). See also “Děti druhé kategorie”, 6.10.2014, <<http://zdravi.e15.cz/denni-zpravy/z-domova/deti-druhe-kategorie-476902>> (last visited 22 April 2015). “Na veřejné zdravotní pojištění nedosáhne v ČR až sto tisíc cizinců”, 5. 12. 2014, <<http://www.euractiv.cz/cr-v-evropske-unii/clanek/na-verejne-zdravotni-pojisteni-nedosahne-v-cr-az-sto-tisic-cizincu>> <<http://zdravi.e15.cz/denni-zpravy/z-domova/deti-druhe-kategorie-476902u-012339>> (last visited 22 April 2015).

In general, there is a high political sensitivity related to the issue of health insurance of migrants, both on the side of government and public health insurance companies²²⁸ and on the side of the private health insurance companies offering the products of health insurance to foreigners with a long-term residence in the Czech Republic.²²⁹ There is a disagreement about the necessity and impacts of inclusion of migrants to the public health insurance between the executive, part of political representation and insurance companies on the one hand, and civil society organizations, experts, international human rights institutions and the Public Defender of Rights on the other hand.

The Government of the Czech Republic has recently approved two resolutions on the issue of the health insurance of migrants.²³⁰ On the basis of these resolutions, Ministry of Interior and Ministry of Health are expected to present an amendment of the Act No. 326/1999 Coll., which would provide a more detailed regulation of the health insurance of foreigners excluded from the public health insurance. However, it is not expected that the proposal will effectively react to the existing concerns arising about the current regulation of the issue and enforce the civil rights of migrants affected by the current regulation.

Question 11: Systematic or notorious lack or deficient enforcement of the selected civil rights in the country under study

See answers to questions 5, 9 and 10 for more details.

Question 12: Good practices

The efficient networking and cooperation of various interested actors (professional and civil society organizations, NGOs, The Public Defender of Rights etc.) in order to bring about a legislative change to guarantee the rights of migrants to health insurance and adequate health care is an element of good practice worth highlighting.

Annexes

National provisions

- ✓ The Constitution of the Czech Republic of 16 December 1992, Constitutional Act No. 1/1993 Coll. as amended.

²²⁸ The Ministry of Health is concerned about the financial impact of opening the public health insurance to so far excluded categories of migrants. See e.g. *Analýza zdravotního pojištění cizinců při jejich pobytu na území České republiky*. Ministry of Health, 2014. The Material has been presented to the Government of the Czech Republic and approved by the Government Resolution of the Czech Republic No. 992 of 1 December 2014.

²²⁹ See e.g. “Vyhraje opět lobbying komerčních pojišťoven?”, NESEHNUTÍ and Consortium of Migrants Assisting Organizations in the Czech Republic, 3 3. 2014, <<http://spolecnekrozmanitosti.cz/vystupy/vyhraje-opet-lobbying-komercnich-pojistoven/>> (last visited 22 April 2015)..

²³⁰ The Government has accepted a Resolution No. 930 of 12 November 2014 on the Summary report on Fulfilling the Priorities and Actions of the Government in Enforcement of Equal Rights of Men and Women in 2013, <<https://apps.odok.cz/attachment/-/down/VPRA9R9BDP1A>>. Point 33 of the Updated Measures of the Priorities obliges the Ministry of Interior and Ministry of Health to amend the law, so that most of the excluded categories of migrants can access public health insurance system (<https://apps.odok.cz/attachment/-/down/VPRA9R9BDR35>). However a few weeks later, on 1 December 2014, Resolution No. 992 of the Government was accepted, which took notice of the Analysis of the ministry of Health which expresses concern about the impact of inclusion of migrants to the public health insurance and rejects the idea (<https://apps.odok.cz/attachment/-/down/VPRA9RLAKAXF>).

- ✓ The Charter of Fundamental Rights and Freedoms, Constitutional Act No. 23/1991 Coll., promulgated in the Czech Republic as No. 2/1993 Coll.
- ✓ Act No. 326/1999 Coll., on the Residence of Foreign Nationals in the Territory of the Czech Republic and Amending Certain Acts, as amended
- ✓ Act No. 150/2002 Coll., the Code of Administrative Justice, as amended.
- ✓ Act No. 48/1997 Coll., on Public Health Insurance, as amended.

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- ✓ Hnilicová et al., “Analýza komerčního zdravotního pojištění cizinců” (Analysis of the Private Health Insurance of Foreigners), October 2012, <http://www.konsorcium-nno.cz/dokumenty/analyza_komerčního_zdravotního_pojistění_pro_vybor171012_201210180815049.pdf> (last visited 19 April 2015).



BEUCITIZEN
BARRIERS TOWARDS EU CITIZENSHIP

Contribution towards Deliverable 7.2:
Mechanisms for enforcing civil rights

Country: Denmark

Author: Postdoc, PhD Silvia Adamo
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Document identifier
Contribution towards
Deliverable 7.2

Version
1.0 – April 30, 2015
Date due

Submission date
April 30, 2015
Work Package
7 Civil rights of citizens
Leadbeneficiary

Disseminationlevel



Change log

Version	Date	Amended by	Changes

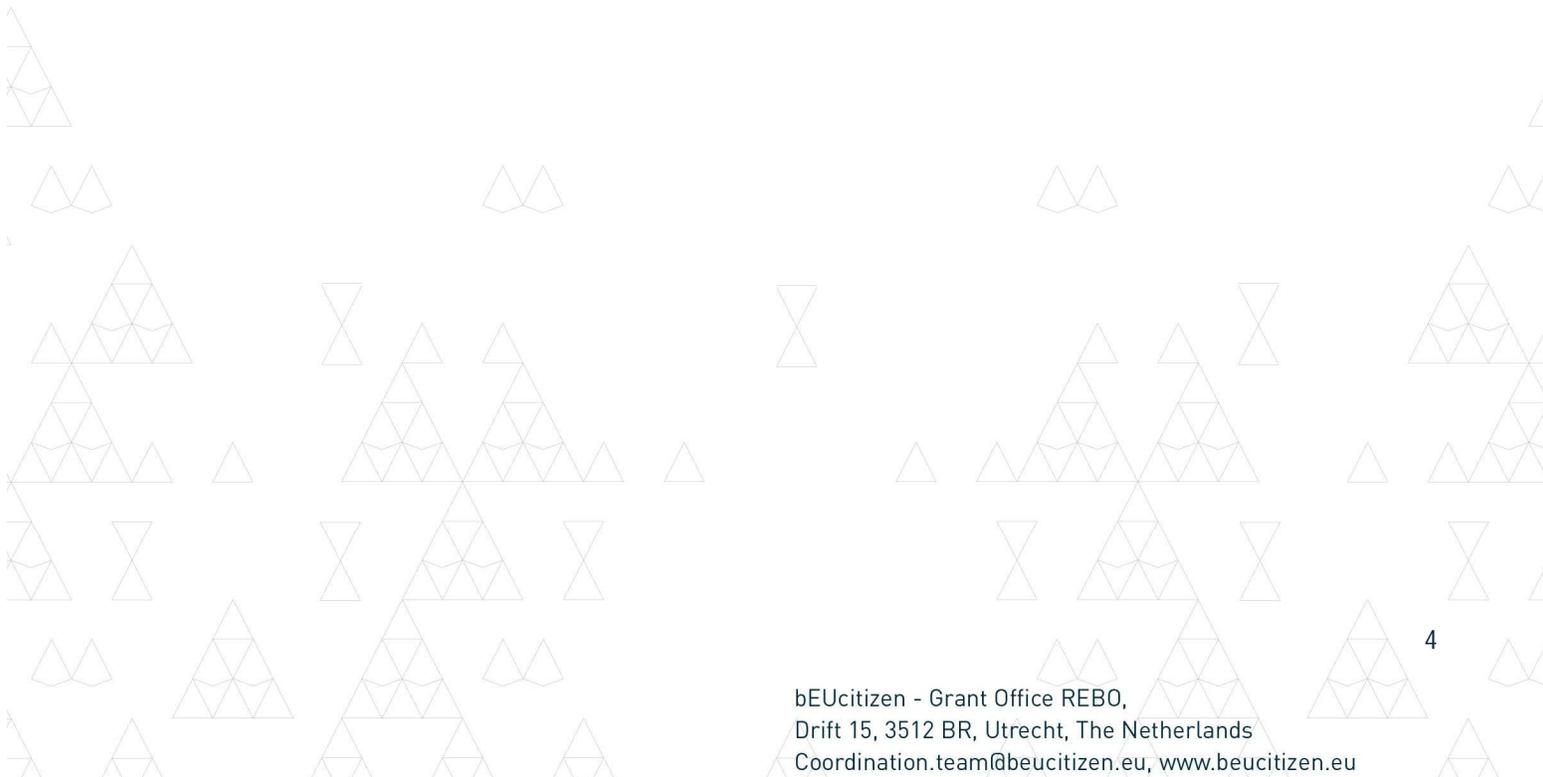
Partners involved in this deliverable

Beneficiary number	Partner	People involved	

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1. The (legislative) transposition, (executive/administrative) implementation and (judicial) application of EU legislative instruments which provide protection for specific civil rights

In this part, which adopts a *top-down* approach, the idea is to study the impact of different sets of EU legislative measures on the civil rights of EU citizens and third country nationals. EU legislation has sometimes been adopted to specifically confer protection to civil rights on EU citizens (Victims Rights Directive, e-Privacy Directive, etc), whilst other EU legislative measures have, on the contrary, the potential to undermine them (the most notorious probably being the European Arrest Warrant and the – now defunct - Data Retention Directive).

For each of the instruments identified below, answer the following set of questions.

Note: comparative data available on national judicial mechanisms at http://ec.europa.eu/civiljustice/index_en.htm

Question 1 – Transposition of the EU instruments protecting or potentially affecting civil rights

- ✓ How are the EU instruments listed below transposed in the country of study? Have there been notorious failures or defects in the national transposition? Is the national legislative transposition of these EU instruments reinforcing, or, on the contrary, threatening civil rights norms?

Question 2 – Executive/administrative implementation of EU instruments affecting civil rights

- ✓ How are the EU instruments below and their national transposition measures implemented through regulatory/executive or administrative measures? Have these EU instruments been implemented in ways which afford further protection or potentially undermine civil rights norms?

Question 3 – Judicial interpretation and application of EU instruments affecting civil rights

- ✓ How are the EU instruments listed below and their transposition and implementation measures interpreted and applied by courts? Is the judicial interpretation and application of these instruments and their domestic transposition and implementation measures furthering civil rights protection or, on the contrary, raising concerns in that respect?

1.1 EU legislation affording protection or potentially undermining civil rights in judicial proceedings

1.1.1 Protection of rights in civil proceedings (mutual recognition instruments)

- Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Regulation') – in particular articles 1, 2, 3, 4, 5, 6, 7, 31, 32-56 ; 57-58, 61.

The Brussels I Regulation has been transposed by means of parallel agreement into Danish law by Act no 1563 of 20/12/2006 (*Lov om Bruxelles I-forordningen m.v.*), most recently amended by Act no 518 of 28/05/2013 (*Lov om ændring af lov om Bruxelles I-forordningen m.v.*), which implemented the revised Regulation from 2012.¹ The notable transposition problem with the Bruxelles I regulation has been the Danish opt-out in the area of Justice and Home Affairs (hereinafter: JHA), which excluded Denmark for participation in the Brussel I regulation until 2007. Since only this regulation, the regulation on service of documents², and the regulation on enforcement of decisions on maintenance obligations³ are implemented via parallel agreements in Danish law, Denmark has practically stood isolated for the last fifteen years as regards civil cooperation in the EU.⁴

As brief background information on the opt-out (the consequences of which are reflected in the lack of transposition of a number of instruments below), it is worth noting that the opt-out entails Danish participation only in *intergovernmental* cooperation, for example in the ostensible fight against terrorism. When Denmark is interested in participating also in *supranational* cooperation, the country applies to the

* The report has primarily been elaborated by Silvia Adamo, but supervised and/or commented upon throughout the process by Ulla Neergaard and Catherine Jacqueson.

¹ The full name of this latter act is *Gennemførelse af samarbejdsforordning om retternes kompetence og om anerkendelse og fuldbyrdelse af retsafgørelser på det civil- og handelsretlige område m.v.* The act implemented Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

² Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000.

³ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

⁴ The Council for The Danish Bar and Law Society (*Advokatrådet*) Response to hearing request, 12 January 2015, available at <<http://www.justitsministeriet.dk/nyt-og-presse/pressemeddelelser/2015/aftale-om-en-tilvalgsordning>>.

European Union for a parallel agreement in order to be included and subject to particular acts or regulations. In virtue of this, the parallel agreements are intergovernmental agreements concluded by the European Commission (given the mandate by the Council of Ministers) and Denmark, and finally approved by the Danish Parliament. The effect of the parallel agreement is that the relevant provisions in the regulations at stake are also applicable and enforced in Denmark, even though they have a supranational character.

The latest development on the opt-out is that the Government in March 2015 has announced a referendum for adopting a selective opt-out system, in order to have an 'opt in' (*tilvalg*) on a series of EU legal instruments. The agreement⁵ proposes to opt in inter alia the Brussels IIa regulation and a series of instruments of JHA on cooperation in criminal matters, especially in light of an impending revision of the EUROPOL. However, many areas would still remain opt-out areas (e.g. cooperation on asylum and immigration, except for the Schengen cooperation).

The system of parallel agreements is a bit technical, since it is the *content* of the agreement reproducing the regulation that is enforced on an intergovernmental basis. It is therefore not the regulation as such, which is enforced in Denmark, but its '*provisions* as a part of the parallel agreement's international (i.e. intergovernmental) basis'.⁶

A parallel agreement was concluded as regards the Brussels I Regulation, thus Denmark can benefit too from the EU-wide cooperation on jurisdiction and enforcement of judgements in civil and commercial matters. Art. 3, section 1 in the parallel agreement entails that Denmark does not participate in the passing of amendments and these are not binding for Denmark. In case Denmark wants to adhere to the amendments, it has 30 days to communicate to the Commission whether that will be done by act or administrative rule (Art. 3, sections 2 and 3). In case Denmark does not want to adhere to the amendments, the parallel agreement would be repealed. This strict rule has meant that the amendments to the regulation have been implemented in Denmark too. Consequently, the amendment in the 2013-act made it possible to implement the provisions in regulation EU 1215/2012 (recast), so that the rules for implementing it are expressly stated in the law.

The parallel agreement on the Brussels I Regulation has been implemented through a series of executive orders (*bekendtgørelser*, alias: BEK) and guidelines (*vejledninger*, alias: VEJL).

⁵Ministry of Justice, Press release 17 March 2015: *Aftale om tilvalg af retsakter på området for retlige og indre anliggender*, <<http://www.justitsministeriet.dk/nyt-og-presse/pressemeddelelser/2015/aftale-om-en-tilvalgsordning>>. See also Government (*Regering*) 2015, *Samarbejdet om retlige og indre anliggender. En analyse af EU-lovgivning omfattet af retsforbeholdet*.

⁶Italics in the original, my translation, Arnt Nielsen, P. (2007), *Danmarks civilretlige parallelaftaler, Ugeskrift for Retsvæsen* U.2007B.175, p. 178.

Among these, BEK 424 of 08.05.2007 can be highlighted as it concerns specific questions regarding the transposition of the parallel agreement.⁷ The executive order establishes that the certificates re. Art. 54 of the Brussels I regulation on enforcement of judgements in Denmark are issued by the court which has given the judgement. Moreover, certificates according to Art. 58 the Brussels I regulation on the enforcement of settlements are issued by the court where the settlement took place. Finally, certificates according to Art. 57 (4) of the Brussels I regulation, regarding enforcement of officially authenticated documents are issued by the authority which has authenticated the document.

Among the guidelines, VEJL no 9012 of 2011 concerns the collection of Danish maintenance payments abroad, among other conventions also after the Brussels I Regulation.⁸ The guidelines list the involved authorities, describe the administrative procedure, and enclose the templates for the letters, certificates etc. VEJL no 91 of 2011⁹ and VEJL no 9329 of 2013¹⁰ deal exclusively with the application of the Brussels I Regulation in relation to the collection of maintenance payments abroad, more precisely with the tasks of the concerned authorities.

As regards the judicial interpretation of the Act transposing the Brussels I regulation, we found that the Danish Courts both refer to and apply the Brussels I Regulation, at a city court level and at appeal levels, as well as in the Supreme Court.¹¹

- Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ('Brussels IIa Regulation'). All provisions.

The Brussels IIa Regulation is not transposed into Danish law. According to the preamble, point 31:

'Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the

⁷ *Bekendtgørelse nr. 424 af 8. maj 2007 om visse spørgsmål vedrørende gennemførelse af parallelaftale om Bruxelles I-forordningen.*

⁸ *Vejledning nr. 9012 af 4. januar 2011 om inddrivelse af danske bidragskrav i udlandet.*

⁹ *Vejledning nr. 91 af 17. november 2011 om inddrivelse af udenlandske bidragskrav i Danmark efter underholdspligtforordningen.*

¹⁰ *Vejledning nr. 9329 af 28. juni 2013 om inddrivelse af udenlandske bidragskrav i Danmark efter underholdspligtforordningen.*

¹¹ E.g. in case U.2009.1424H, U.2011.2310H, ØLK af 7. september 2010, nr. B-1999-10, 4. afd., VLK af 2. april 2012, nr. B-2964-11. In the database of Danish Courts' case rulings (Karnov) there are ca. 50 rulings related to the Act implementing the Brussels I Regulation.

Treaty establishing the European Community, is not participating in the adoption of this Regulation and is therefore not bound by it nor subject to its application.'

See also Art. 2, nr. 3:

'Definitions

For the purposes of this Regulation:

(...)

3. the term "Member State" shall mean all Member States with the exception of Denmark'

Denmark's request to participate in an agreement to opt in was previously rejected by the European Commission.¹² As mentioned above, the Government has recently agreed to repeal the country's opt-out on the Brussels IIa Regulation. In its analysis, the Government stated that opting into the regulation would entail an advantage for citizens in the form of a facilitation of the return of children abducted from Denmark to another Member State, and also regarding the enforcement of Danish contact orders (*samværafgørelser*) in other Member States. This would affect only a small number of cases, since The Danish Central Authority for Child Abduction treats only about 50-60 cases of child abduction annually, while almost no requests for the enforcement of contact orders are received.¹³

- Regulation No 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters. All provisions.

The Regulation No 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters is not transposed into Danish law.

According to the preamble, point 41:

'In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.'

¹²Government (Regering) 2015, *Samarbejdet om retlige og indre anliggender. En analyse af EU-lovgivning omfattet af retsforbeholdet*, p. 30.

¹³Government (Regering) 2015, *Samarbejdet om retlige og indre anliggender. En analyse af EU-lovgivning omfattet af retsforbeholdet*, p. 104.

1.1.2 Protection of rights in criminal proceedings (due process, right to a fair trial, etc.)

Background instrument on judicial cooperation

- Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.

The Convention on Mutual Assistance in Criminal Matters can be employed in the Danish legal system after the changes introduced by Act no 258 of 08.05.2002¹⁴, which amended inter alia the Criminal Code (*straffeloven*¹⁵) and the Administration of Justice Act (*retsplejeloven*). The convention was later ratified (on 12.12.2002) and entered into force on 23.08.2005.

There are no specific executive or administrative implementation measures that deal exclusively with the Convention on Mutual Assistance in Criminal Matters.

The only judgement that explicitly refers to the Convention on Mutual Assistance in Criminal Matters is U.2011.154H. In this judgement, the Danish Supreme Court made a reference to the procedures in Art. 5 in the Convention in order to establish the interpretation of an article in the Danish Administration of Justice Act.

1.1.2.1. Mutual recognition instruments in criminal matters

- Framework Decision 2002/584/JHA of 13 June 2002 on the *European arrest warrant* and the surrender procedure between member states: all provisions potentially relevant.

Denmark transposed Framework Decision 2002/584/JHA into Danish law by the end of May 2003. The Directive was implemented by means of Act 433 of 10 June 2003 amending the 1967 Act on Extradition of Offenders and the 1960 Act on the Extradition of offenders to Finland, Iceland, Norway and Sweden (Transposition of the EU-

¹⁴ *Lov om ændring af straffeloven, retsplejeloven, lov om konkurrence- og forbrugerforhold på telemarkedet og lov om international fuldbyrdelse af straf m.v. – Gennemførelse af EU-retshjælpskonventionen, den 2. tillægsprotokol til Europarådets retshjælpskonvention og EU-rammeafgørelse om fælles efterforskningshold.*

¹⁵ The current version is Consolidation Act no 871 of 4 July 2014, Criminal Code.

Framework Decision on the European Arrest Warrant, etc.).¹⁶ The amended provisions came into force on the 1st of January 2004 and were applied to arrest warrants presented after that date.

There were few issues that gave rise to problems during the transposition processes and those were mainly of technical character, but not political nor practical. The concerns about leaving behind the principles and requirements of the previous law on extradition in order to give space to the European arrest warrant were overcome during the legislative effort, trying at the same time to safeguard the individual's interests and fundamental freedoms.¹⁷ The problems in transposition were said to be stemming from the clashing of different legal traditions in Europe as regards procedural and sentencing issues. These clashes were thought to have an impact on the national set-up for the procedures and rules in criminal cases. The legal problems that rose around the issue of optional grounds for refusal were solved by deciding to let the courts consider them in the concrete cases, if they may arise.¹⁸

The European arrest warrant is by far the most commonly known EU instrument of cooperation in criminal matters used by Danish authorities. The practitioners in the field, as well as the key-figures involved in the transposition of the framework decision, viewed it as an important step taken towards an increased harmonisation of the European criminal law systems. In a study on the implementation of the European arrest order in Denmark, respondents (practitioners) to a survey indicated that the harmonisation of procedural rules in the matters of extradition did not automatically entail an improvement in legal certainty, or in the protection of fundamental rights of citizens.¹⁹

In 2003 the Ministry of Justice issued a set of guidelines on the handling of requests for the extradition of offenders on the basis of a European arrest warrant.²⁰ Supplementary guidelines were issued in 2004.²¹ The European Arrest Warrant is both well-known and widely used by Danish officials.²²

¹⁶*Lov om ændring af lov om udlevering af lovovertrædere og lov om udlevering af lovovertrædere til Finland, Island, Norge og Sverige –Gennemførelse af EU-rammeafgørelse om den europæiske arrestordre mv.*

¹⁷ See Vestergaard, J. and Adamo, S. (2009), Mutual recognition in criminal matters: the Danish Experience, in Vernimmen-Van Tiggelen, G., Surano L. and Weyembergh A. (eds.): *The future of mutual recognition in criminal matters in the European Union*, Editions de l'Université de Bruxelles, p. 157.

¹⁸ See Vestergaard, J. and Adamo, S. (2009), p. 161-162.

¹⁹ Vestergaard, J. and Adamo, S. (2009), p. 172.

²⁰*Justitsministeriets vejledning nr. 9498 af 19. december 2003 om behandlingen af anmodninger om udlevering af lovovertrædere på grundlag af en europæisk arrestordre.*

²¹*Supplement til vejledning om behandling af anmodninger om udlevering af lovovertrædere på grundlag af en europæisk arrestordre, cirkulære skrivelse nr. 9678 af 14. december 2004.*

²²Vestergaard, J. and Adamo, S. (2009), p. 166-168.

Since the implementation of the act transposing the Framework Decision on the European arrest warrant, the Danish courts have been applying the legislation adopted in the relevant cases.²³ In a majority of cases, the defendants contested the decision to extradite, while no Government authority was contesting the issue of a European arrest warrant.

- Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition for judgments imposing custodial sentences or measures involving deprivation of liberty, in particular Arts 1, 2, 3, 6, 7, 8, 9, 10, 11, 14, 18, 19, 29

Framework Decision 2008/909/JHA was implemented by means of Act no 347 of 14/05/2008 (*Lov om ændring af lov om fuldbyrdelse af visse strafferetlige afgørelser i Den Europæiske Union mv. – Bekendtgørelse om ikrafttræden af visse bestemmelser i lov om ændring af lov om fuldbyrdelse af visse strafferetlige afgørelser i Den Europæiske Union, lov om udlevering af lovovertrædere og lov om Det Centrale Dna-profil-register*)

The latest version of the act is Consolidation Act (*Lovbekendtgørelsen*, LBK) no 213 of 22/02/2013 (*Bekendtgørelse af lov om fuldbyrdelse af visse strafferetlige afgørelser i Den Europæiske Union*). See more on this Act in the following (p. 13).

A recent Commission Report on the implementation of Framework Decision 2008/909/JHA (together with Framework Decisions 2008/947/JHA and 2009/829/JHA) has evaluated that the implementation of these complementary instruments has not yet been satisfactory. As regards Denmark in particular, the report noted that the country has not implemented all grounds for refusal to requests for transfer, but has chosen a mix of optional and mandatory grounds.²⁴

The executive orders that implemented certain provisions of the Framework Decision have only temporal scope.²⁵

²³ See for example U.2004.2229H; U.2006.7V; TfK 2007.732V.

²⁴ Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention. COM(2014) 57 Final, Brussels 5.2.2014, p. 9-10.

²⁵ See BKG nr. 1045 af 03.11.2011 (*Ikrafttræden af visse bestemmelser i lov om ændring af lov om fuldbyrdelse af visse strafferetlige afgørelser i Den Europæiske Union og lov om udlevering af lovovertrædere*), BKG nr. 1044 af 03.11.2011 (*Ikrafttræden af visse bestemmelser i lov om ændring af lov om fuldbyrdelse af visse strafferetlige afgørelser i Den Europæiske Union, lov om udlevering af lovovertrædere og lov om Det Centrale Dna-profil-register*); BKG nr. 340 af 19.04.2011 (*Ikrafttræden af visse bestemmelser i lov om ændring af lov om fuldbyrdelse af visse strafferetlige afgørelser i Den*

- Framework Decision 2008/947/JHA of 27 November 2008 on probation decisions and alternative sanctions, in particular Arts 1, 2, 3, 4, 10, 11, 19

Framework Decision 2008/947/JHA on probation decisions and alternative sanctions was implemented by means of Act no 271 of 04.04.2011 (*Lov om ændring af lov om fuldbyrdelse af visse strafferetlige afgørelser i Den Europæiske Union og lov om udlevering af lovovertrædere*).

The current version of the Act is Consolidation Act LBK no 213 of 22/02/2013. The executive orders that implemented certain provisions of the Framework Decision have only temporal scope.²⁶

- Framework Decision 2008/978/JHA of 18 December 2008 on the *European evidence warrant* for the purpose of obtaining objects, documents and data for use in criminal proceedings, in particular Arts 1-19.

Framework Decision 2008/978/JHA was implemented by means of Act no 347 of 14/05/2008 (*Lov om ændring af lov om fuldbyrdelse af visse strafferetlige afgørelser i Den Europæiske Union mv. – Bekendtgørelse om ikrafttræden af visse bestemmelser i lov om ændring af lov om fuldbyrdelse af visse strafferetlige afgørelser i Den Europæiske Union, lov om udlevering af lovovertrædere og lov om Det Centrale Dna-profil-register*)

The current version of the Act is Consolidation Act LBK no 213 of 22/02/2013. The executive orders that implemented certain provisions of the Framework Decision have only temporal scope.²⁷

Europæiske Union og lov om udlevering af lovovertrædere); BKG nr. 27 af 14.01.2011 (*Ikrafttræden af visse bestemmelser i lov om ændring af lov om fuldbyrdelse af visse strafferetlige afgørelser i Den Europæiske Union, lov om udlevering af lovovertrædere og lov om Det Centrale Dna-profil-register*).

²⁶ See references above at footnote 13.

²⁷ See references above at footnote 13.

- Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence, in particular Arts 1-2-3, 7,8, 10, 11.
- Framework Decision 2006/783/JHA on the application of the principle of mutual recognition for confiscation orders, in particular Arts 1,2,6,7,8,9, 11, 14. 18

By means of Act no 1434 of 22. december 2004 of Execution of Decisions in Criminal Matters in the European Union (*Lov om fuldbyrdelseafvissestrafferetligeafgørelseri Den Europæiske Union*) Denmark has transposed in one single piece of legislation

- the Framework Decision 2003/577/JHA on the *freezing of assets and evidence*;
- the Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to *confiscation orders*
- and also the Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to *financial penalties* (not mentioned in the present questionnaire).

The Act entered into force on 1 January 2005 and applies to requests for execution filed after that date. In 2008, the Act was amended as to pre-implement the proposal COM (2003)688 for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents, and data for use in proceedings in criminal matters and the initiative JAI(2005)2 of Austria, Finland, and Sweden with a view towards adopting a Council Framework Decision on the European enforcement order and the transfer of sentenced persons between Member States of the EU.²⁸

The current version of the Act is Consolidation Act LBK no 213 of 22/02/2013. Consequently, as of the time of this writing this Act is the implementation tool for the abovementioned Framework Decisions 2008/909/JHA, 2008/947/JHA, 2008/978/JHA, 2003/577/JHA, and 2006/783/JHA. The Danish Act entails that decisions on probation, alternative sanctions, freezing of property etc. made in another Member State can be recognized in Denmark without previous examination of the basis for the decision by a Danish court. Although not expressly stated in the Act, the execution of the decision cannot happen if this is contrary to Denmark's international obligations, for example those deriving from the European Convention on Human Rights Art. 6 on fair trial. However it is worth noting that several Articles in the Act especially point out that execution of the decision can be refused if there is ground to presume that the Member State's decision has been made with the objective of persecuting or punishing a person

²⁸Vestergaard, J. and Adamo, S. (2009), p. 157.

on grounds of gender, race, religion, ethnic background nationality, language, political beliefs, or sexual orientation.²⁹

1.1.2.2 'Approximation' measures

1.1.2.2.1. Victims' rights

- (Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings)

The adoption of Directive 2012/29/EU entailed that Framework Decision 2001/220/JHA is replaced for those Member States that have participated in its adoption (Denmark not being one of them; see in the following sections). At the time of the adoption of the Framework Decision it was established that the instrument would not have legal consequences for the Danish set-up on the standing of victims in criminal proceedings.³⁰

In the Report from the Commission of 20 April 2009 pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (COM (2009)166, p. 3) is noted that Denmark, along with other Member States, had not transposed the Framework Decision into one single piece of legislation.

- Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

Since the directive is adopted on the basis of TFEU, Part Three, Title V it is included in the Danish opt-out on the JHA. Denmark has thus not participated in the adoption of the directive, which is not binding for, and does not apply in Denmark.

As stated in the preamble of the Directive, at point 71,

'In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.'

²⁹ See Art. 7 (3), Art.13 f, no 4, Art.20 (3), Art 29d, no 5, Art.29p, no 3, and Art.33 (3).

³⁰ For a description of the Danish protection system for victims, see the national report on the website [victimsprotection.eu](http://www.victimprotection.eu), at <http://www.victimprotection.eu/index.php/2014-05-01-19-31-19/jd/finish/9-dk-denmark/81-dk-national-report>.

The Directive is not among the EU-legislation that the Danish Government has recently proposed to opt in, as it is evaluated that the Directive on some issues goes further than the Danish legislation has done so far on grounds of rule of law.³¹ Several associations that volunteer to help victims of crime in Denmark have lamented this political decision.³²

- Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims

The implementation of the directive did not require any legal amendments in the Danish legal system as the requirement of having a system for compensation to crime victims was deemed to be fulfilled by already existing rules. As stated in report for deliverable 7.1 (p.13) this is one of the modes of implementation of international and EU-rules in Denmark (principle of harmony among norms, in Danish: *normharmoní*). The Danish rules are to be found in State Compensation to Victims of Crime Consolidation Act no 688 of 28.06.2004 (*Lovbekendtgørelse om erstatningfrastatentilofre for forbrydelser – Offererstatningsloven*), whose latest version is LBK no 1209 of 18/11/2014.

Also the rules on assistance in cross-border situations are already observed in the administrative case law of the Criminal Injuries Compensation Board (*Erstatningsnævnet*).³³

A number of executive orders and circulars regulate the administration of the Act on State Compensation to Victims of Crime. The executive orders regulate, on a yearly basis, the adjustment of the amount of the compensations.³⁴ The circulars are instructions on different topics, such as:

- The modes for police officers to interact with victims of crime (psychological first-aid, how to deal with children, how to handle stress and crisis situations etc.)³⁵;
- Information regarding the payment of compensation by the police³⁶;

³¹ *Aftale om tilvalg af retsakter på området for retlige og indre anliggender*, p. 11.

³² Among these, Victim Support Denmark (*Offerrådgivningen*, <<http://www.offerraadgivning.dk/>>); Pro Vest, A counselling and health care service for migrant sex workers and victims of forced labour and human trafficking (<<http://www.provest.dk/>>); and Association Victim Aid Denmark (*Foreningen Hjælp Voldsofre*) association helping victims of violence, rape, robbery and incest (<<http://voldsofre.com/home/>>). See their response to an hearing request at <<http://www.justitsministeriet.dk/nyt-og-presse/pressemeddelelser/2015/aftale-om-entilvalgsordning>>.

<<http://www.erstatningsnaevnet.dk/da/GlobalMenu/english.aspx>>

³⁴ The latest is BEK no1186 of 06/11/2014 (*Bekendtgørelse om regulering af erstatningsbeløb i henhold til lov om erstatning fra staten til ofre for forbrydelser*).

³⁵ CIS no 9028 of 23/01/2006 (*Cirkulæreskrivelse vedrørende politiets relationer til ofre for forbrydelser og ulykker og deres pårørende. Til anklagemyndigheden og politiet – Ofre for forbrydelser*).

- Information regarding the Criminal Injuries Compensation Board³⁷;
- General information on state compensation for criminal injuries and the procedures for application.³⁸

The Criminal Injuries Compensation Board works as both an assistant and decision-making authority. The decisions of the Criminal Injuries Compensation Board are published online on the European Judicial Atlas in Civil matters.³⁹

- Directive 2011/99/EU on 13 December 2011 on the European Protection Order

Directive 2011/99/EU is not transposed into Danish law.

According to the Directive's preamble, point 42,

'In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application'.

1.1.2.2.2. Rights of suspects and accused persons

- Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings

Directive 2010/64/EU is not transposed into Danish law. According to the Directive's preamble, point 36:

'In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application'.

³⁶CIS no 11067 of 25/01/1988 (*Cirkulæreskrivelse til politiet og anklagemyndigheden om ændret forretningsgang vedrørende udbetaling m.v. af erstatning fra staten til ofre for forbrydelser*).

³⁷CIS no 11195 of 24/04/1987 (*Cirkulæreskrivelse til politiet og anklagemyndigheden om ændret forretningsgang vedrørende udbetaling m.v. af erstatning fra staten til ofre for forbrydelser*).

³⁸CIS no 11421 of 28/10/1976 (*Cirkulæreskrivelse om erstatning fra staten til ofre for forbrydelser*).

³⁹<http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm>

- Directive 2012/13/EU of 22 May 2012 on the Right to Information in Criminal Proceedings

Directive 2012/13/EU is not transposed into Danish law. According to the Directive's preamble, point 45:

'In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application'.

1.2. EU legislation related to the protection of personal data

- Directive 95/46 on the protection of individuals with regard to processing of personal data and on the free movement of such data (Data Protection Directive) [1995] OJ L281/31

Directive 95/46 has been transposed with considerable delay into Danish law by means of Act on Processing of Personal Data no 429 of 31.05.2000 (*Lov om behandling af personoplysninger – Persondataloven*). At the time of the discussion of the Directive Denmark was not particularly enthusiastic about its adoption, and this may have caused the directive to have 'a bad reputation'.⁴⁰ In contrast, nowadays the directive is evaluated to have introduced an improved system over the previous (regulated by the registry acts – *registerlovene*⁴¹) and to have promoted new and better rights for citizens.⁴²

At the time of the implementation it was discussed whether the directive was expected to bring about harmonisation or if it was a minimum standard directive. The answer to that seems to be both. The directive has had a great impact on the Danish rules, which have been formulated in close correspondence with the Directive's text. Unfortunately, not adopting a more free linguistic style in the redaction of the Danish rules has created a legal text that is a bit inaccessible and difficult to understand.⁴³

⁴⁰ Blume, P. (2013), *Databeskyttelsesret*. 4. udgave, Jurist- og Økonomforbundets Forlag, p. 98-99.

⁴¹ The now repealed *Lov om offentlige myndigheders registre* and *Lov om private registre*.

⁴² Blume, P. (2013), *ibid*.

⁴³ Blume, P. (2013), p. 100.

In 2009, a committee was appointed in order to investigate the overlap between the rules in the Act on Public Administration (*Forvaltningsloven*) and the Act on Processing of Personal Data as regards the exchange of personal data between authorities.⁴⁴ The committee recommended among other things that the Act on Processing of Data should regulate the access to exchange personal data between authorities, either manually or electronically.

The Danish Data Protection Agency⁴⁵ has the duty and authority to monitor the enforcement of the Act on Processing of Personal Data. The agency provides guidance and advice to authorities, companies, and individual citizens. The agency also controls the more sensitive processing of personal data by companies and authorities via notifications and authorisations. Moreover, the Agency handles complaints from citizens; it can take up cases out of its own initiative; it conducts visits and inspections; and can issue criticism, bans, or enforcement notices for violations of the Act on Processing of Personal Data. On its website, the Agency publishes its decisions from the year 2000 onwards.⁴⁶ The decisions of the Agency are binding and final, and cannot be brought to another administrative authority. However, a decision can be brought to the Parliamentary Ombudsman or the Courts.

An infringement of the Act on Processing of Personal Data can entail compensation for damages⁴⁷ or sanctions in the form of fines or even prison sentences. The Danish Data Protection Agency does not have the authority to sanction infringements, but it can report infringements to the Police. Not respecting the decision of the Agency does also entail a sanction.⁴⁸ However, being important 'symbolic signs' from the legislator's side, neither sanctions nor compensation play a relevant part in practice, and the level of sanctions is also considered low in comparison to other countries.⁴⁹ Offenders do not incur high value fines in Denmark⁵⁰, and this leads to the question of whether the protection of personal data is taken seriously in the Danish legal system.⁵¹ Recent comments have focused on data protection on social media platforms, and questioned how effective the protection of the right to privacy is in face of the requirement of user

⁴⁴Ministry of Justice, Justistministeriet (2009), *Betænkning om udveksling af oplysninger inden for den offentlige forvaltning. Betænkning nr. 1500.*

⁴⁵<http://www.datatilsynet.dk/english/>.

⁴⁶<http://www.datatilsynet.dk/afgoerelser/>.

⁴⁷ Compensation has to be decided by the Courts. See f.ex. U.2007.1967V.

⁴⁸ Fines are usually given to private companies, as in cases U.2007.334Ø; Datatilsynet j.nr. 2001-631-0064; Datatilsynet j. nr. 2005-321-0399. Cases described in Høilund, D. (2012), *Persondataloven. En indføring*. Hans Reitzel Forlag.

⁴⁹Blume, P. (2013), p. 108-109.

⁵⁰ In case U.2004.2204Ø, a 5.000 Dkk. (ca. 670 €) fine was given for collecting data without a legitimate purpose (violation of Art. 5(2) and 6 (1) of the Act on Processing of Personal Data).

⁵¹Blume, P. (2013), p. 185-186.

consent for personal data in social networks.⁵² There have been a number of cases in the years 2013-2014 where sensitive personal data has been leaked, and a Committee has been appointed in 2014 to look more in depth at the issue of IT-security, which cannot be treated separately from the issue of protection of personal data.⁵³ Many companies are still not complying with the regulations in force, and the Data Protection Agency has also highlighted that public authorities have troubles complying as well.

- Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector (ePrivacy Directive) [2002] OJ L201/37

Directive 2002/58 is partly implemented by Act on Electronic Communication's Networks and Services, (*Lov om elektroniske kommunikationsnetog –tjenester*), no 169 of 03/03/2011, now Act no 128 of 07.02.2014 ; Executive Order on Provision of Electronic Communications' Network and Services (*Bekendtgørelse om udbud af elektroniske kommunikationsnetog –tjenester*) no 715 of 23/06/2011; and especially Executive Order on Information and Consent Required in Case of Storing and Accessing Information in End-User Terminal Equipment (informally known as the 'Cookie-executive order' or *Cookie-bekendtgørelse*), BEK no 1148 of 09/12/2011.⁵⁴

Guidelines were issued at the time the Cookie-executive order came into force in 2011.⁵⁵ The stated purpose of the guidelines is to remedy the 'lack of clarity and considerable technical challenges in observing the EU rules in practice' by giving companies and public authorities 'a more practical approach to how the rules can be observed'.⁵⁶ The guidelines also refer to its dialogue with the Commission and other Member States, and states that the Danish Business Authority has decided not to enforce the rule on prior consent and instead 'put emphasis on the website owner's efforts to ensure comprehensive information to the user about the website's use of cookies, and the user's ability to accept or refuse cookies'.⁵⁷ The Business Authority also informs about the Danish legislation and the ePrivacy Directive on its website.⁵⁸

⁵² See a Danish study among high school students conducted among others by the Danish Institute for Human Rights, in Jørgensen, R. F. (2014), The unbearable lightness of user consent. *Internet Policy Review*, 3(4). DOI: 10.14763/2014.4.330.

⁵³ Jørgensen, R. F. (2014), Rettentildigitaltprivatliv, *Information* (daily Danish newspaper), 3 November 2014.

⁵⁴ The Cookie Executive order was issued pursuant to Act no 169 of 03.03.2011, now Act no 128 of 07.02.2014 (*Lov om elektroniske kommunikationsnetog –tjenester*).

⁵⁵ English version available at <<https://erhvervsstyrelsen.dk/sites/default/files/media/engelsk-vejledning-cookiebekendtgorelse.pdf>>.

⁵⁶ Danish Business Authority (2013), Guidelines on Executive Order no 1148 of 09/12/2011, p. 3.

⁵⁷ Danish Business Authority (2013), Guidelines on Executive Order no 1148 of 09/12/2011, p. 4.

⁵⁸ See <<https://erhvervsstyrelsen.dk/lovgivning-og-vejledning-til-cookiebekendtgorelsen>>.

- Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive (Data Retention Directive) [2006] OJ L105/54. [annulled]

Directive 2006/24 was partly implemented by Executive Order on Providers of Electronic Communications' Networks and Electronic Communications' Services recording and storing data on Telecommunications (*Bekendtgørelse om udbydereafelektroniskekommunikationsnetsogelektroniskekommunikationstjenestersregistreringogopbevaringafoplysninger om teletrafik (logningsbekendtgørelsen)*), BEK no 988 of 28/09/2006. Also to mention are the guidelines to the executive order.⁵⁹

The Danish rule came into force on 15 September 2007, which is a particularly historical date on which Danish legislation considerably modified the practices of the monitoring of communication made via telephone and internet: the monitoring of data has from that day become a common, every day phenomenon, although citizens may not always be aware of it.⁶⁰ Denmark was then a sort of pioneer, while other countries contested the Directive for undermining citizens' rights.⁶¹ It is in fact dubious whether the reduction in the right to privacy of citizens has been counterbalanced by an increased security and protection against criminal/terrorist activity.

The executive order establishes that data shall be stored for one year but there are many exceptions to this rule which raises the question as to whether the system is effective and if it actually attains its objectives.⁶² In any case, the monitoring of citizens in Denmark is now intensive and has increased tremendously (e.g. 100.000 registrations per citizen in 2010), while the police only rarely use any of the gathered information (in the same year the police requested access to internet information 170 times and mobile telephone information 3.801 times).⁶³

⁵⁹ Guidelines no 74/2006, *Vejledning til bekendtgørelse om udbydere af elektroniske kommunikationsnets og elektroniske kommunikationstjenesters registrering og opbevaring af oplysninger om teletrafik (logningsbekendtgørelsen)*.

⁶⁰ P. Blume (2013), p. 448.

⁶¹ P. Blume (2013), p. 451.

⁶² P. Blume (2013), p. 451-453.

⁶³ Data reported in P. Blume (2013), p. 453.

2. Enforcement of selected civil rights

In this second part of the questionnaire, which follows a *bottom up* approach, the idea is to focus on particularly problematic areas for the protection and exercise of particular civil rights. We ask you to identify at least three civil rights, irrespective of their source of protection, which are particularly salient and problematic from the point of view of the ability of EU citizens and other persons in the EU to effectively exercise them in the country under study. In the selection, bear in mind difficulties which may be specific to 'mobile' EU citizens and Third Country Nationals, and those which affect all EU citizens or Third Country Nationals irrespective of whether they have exercised their EU citizenship right to free movement or not.

2.1 Right to family life

The right to family life is very controversial in the Danish legal system. Controversies as regards its protection involve mostly third country nationals (hereinafter: TCN) seeking family reunification as spouses or children of a foreigner residing in Denmark. We chose this right as a specific and illustrative example of legal barrier that TCN, and Danish nationals married with TCN, experience in Denmark. Also, although not targeting family life and rights of other Member States' citizens directly, the provisions may have an impact on 'mobile', cross-borders TCN and Union citizens living in Denmark with family members from non EU countries.

2.1.1 – Source of protection

- ✓ What is the source of protection of each of these rights? Do you see any problems in this regard? (eg the right is recognized only in a lower level norm, or multiple sources with different authority and meanings, etc.)

There is no express right to family life in either the statutory law (Aliens Consolidation Act⁶⁴) or the Constitutional Act of Denmark.⁶⁵ The provisions on family reunification are to be found in Art.9 of the Aliens Consolidation Act. The legislation for family reunification in general has become a confused area of law. The rules are a

⁶⁴ Aliens Consolidation Act (*Bekendtgørelse af udlændingeloven*) LBK no 1021 of 19/09/2014 subsequently referred to in the text as 'Aliens Act'.

⁶⁵ The Constitutional Act of Denmark of June 5th 1953 (*Danmarks Riges Grundlov af 5. Juni 1953*).

consolidation of countless legal amendments in Art. 9, which currently has thirty-seven sections (*stk.*) and it is therefore very difficult to apply in practice.

Thus there is no verbatim correspondence between Article 7 of the Charter of Fundamental Rights on respect for private and family life and Article 72 of the Danish Constitution, which only concerns the right to the inviolability of the home and privacy of correspondence. The provisions on family reunification in the Aliens Consolidation Act (Art. 9) require applicants to meet a long list of self-sufficiency requirements, and also prove 'attachment' to the country if the spouse residing in Denmark is not a Danish national or has not resided in the country for at least 28 years.⁶⁶ Moreover, in virtue of its opt-out on JHA, Denmark has decided neither to be bound by the Council Directive on the right to family reunification⁶⁷, nor by the Council Directive on the status of third country nationals who are long term residents.⁶⁸ There are therefore no direct obligations stemming from a supranational or national legal context for Denmark to grant a permission to stay to protect the family life of a foreigner (TCN) residing in the country. However, Article 8 of the European Convention on Human Rights (hereinafter: ECHR), and the case law of the European Court of Human Rights (hereinafter: ECtHR) indirectly commit Denmark to the protection of family life of certain categories of individuals.⁶⁹ How far-reaching the future application of article 7 of the EU Charter will be in Denmark is still unknown.

This lack of transparency in the legal foundation for a right to family life in Denmark is the first great obstacle to its implementation and enforcement.

2.1.2 – Scope and limits of the right (including balancing with other rights)

- ✓ What is the scope and what are the limits of this right? Are there any deficiencies in this regard (eg non-compliance with EU or ECHR standards)? How are they balanced against other rights, values or interests?

The limitations to the right to family life counterbalance the founding values and underlying policies of Danish immigration law. Since 2002, the provisions in the Aliens Act have been designed so that family-sponsored immigration from non-Western

⁶⁶ See Report D 7.1, p. 33.

⁶⁷ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, see point 18 in the preamble.

⁶⁸ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, see point 26 in the preamble.

⁶⁹ Adamo, S. (2007), *The Legal Position of Migrants in Denmark: Assessing the Context around the "Cartoon Crisis"*. *European Journal of Migration and Law* 9 (2007) 1-24.

countries is sought to be reduced. The preparatory work to the bill justified this reduction in the sake of the integration of foreigners already residing in Denmark.⁷⁰

The peculiarity of this set-up⁷¹ derived in part by frequent ad-hoc amendments to the legislation, its approach to the limits of breaching Article 8 in the ECHR and the non-transparency of the administration⁷² have inflamed the Danish political and legal debates on family reunification for years. A tentative final full stop to this discussion was set by the Danish Supreme Court, which stated in 2010 that the attachment requirement and the 28 years rule do not constitute a breach of either ECHR or the European Convention on Nationality.⁷³ In 2014 the Second Section of the ECtHR arrived to the same conclusion in the same case, stating (unanimously) that there had been no violation of Article 8 of the Convention or of Article 14 (by four votes to three) in conjunction with Article 8 of the Convention.⁷⁴

2.1.3 – Interpretation and application

- ✓ How is this right interpreted and applied by courts? Are there any deficiencies in this regard?

The main field of application of the right to family life is in the administrative arena, as most cases never end up in a court but are decided by the Immigration Service or appealed to the Immigration Board of Appeals.

Article 8 has been invoked in Danish case law, but in most cases the courts have not found the Danish legislation to be in violation of the ECHR.⁷⁵ The case law of the ECtHR was also applied in a case of denial of a right to family reunification where the applicant (Danish naturalised) had not lived in Denmark for 28 years; the 28-years-rule was not found to breach Article 8 ECHR.⁷⁶ In three recent judgements, the Supreme Court has

⁷⁰ Draft bill LF 152 2001/2.

⁷¹ This section is based on the Danish report for D 7.1, p. 33.

⁷² Christoffersen, J. (2006), Forvaltningsretligtransparens: Om familiesammenføringspraksis [Transparency in administrative law: On family reunification in practice], *Juristenno* 2, p. 37-45.

⁷³ U2010.1035H.

⁷⁴ Case of Biao v. Denmark, Judgment of 25 March 2014 (Request for referral to the Grand Chamber pending).

⁷⁵ See for example U.2011.3083H, where the Supreme Court decided on the refusal to grant family reunification for the spouse of a convention refugee residing in Denmark since 1999, stating that the appellant and his child (born in Denmark) could have resumed family life in his country of origin (Afghanistan). The court did not find that the Danish legislation at the base of the judgement were in breach of neither Article 8 ECHR nor other international obligations, citing the Danish law as compliant with a very scarce remark.

⁷⁶ U.2010.1035H. The Supreme Court reached a verdict after voting (4-3), which is an unusual occurrence, revealing how tortuous the application of the highly contested 28-years-rule is.

also found that the requirement for 'a successful integration' in the Danish society for children is also not breaching Art. 8 ECHR, although this can imply denial of family reunification in Denmark for children as young as 8 years old.⁷⁷

Article 7 of the Charter of Fundamental Rights has been invoked in one judgement⁷⁸ by 49 appellants, who claimed that denial of family reunification in their cases, although in line with Danish law, was contrary to EU law and the protection of family life as foreseen by the Charter. The City Court and the Appeal Court rejected the case, stating that the 49 claims could not be treated as one case, since they had been decided in light of concrete and different circumstances. The Courts thus did not assess the Danish provisions on family reunification against the EU Charter.

2.1.4. – Case law protecting civil rights

- ✓ When the right in question is recognised through case law, how are they enforced? Is there a relevant doctrine of precedent? Can violation of judge-made principle be invoked in courts? Must judges bring up of their own motion civil rights violations? Etc.

Unfortunately, the case law on the recognition of the right to family life is scarce. Most administrative decisions by the Immigration Service are never appealed. When they are applied, the Immigration Board (*Udlændingenævnet*)⁷⁹ functions as an administrative appeal instance on a variety of cases which fall under the Aliens' Act. The case law of the Immigration Board can be found online and the decisions on family reunification from the year 2013 on are now made available to the general public.⁸⁰ The Immigration Board also publishes a yearly report (*Årsberetning*) in which exemplary rulings on the various topic of competence are reported.⁸¹

In the Danish legal system there is not an expressed doctrine of precedent as known in the Anglo-Saxon legal tradition, but rulings by the Courts are considered as the correct application of the law, and therefore they can be used to interpret the law in other cases. Judge-made principles are not a frequent sight in the Danish legal system either, as the Courts are not expected to create law, but only to apply it (this is also one of the main problems that Danish legal scholars and civil servants see with the 'activism' of the European Court of Justice). The need for reforms is expected to be addressed by the legislative power. Consequently, Danish judges may not, of their own motion, bring up civil rights violations. However, a previous Supreme Court judge put forward the idea of

⁷⁷ U.2010.1590H, U.2010.1599H and U.2009.974H.

⁷⁸ U2011.1864V.

⁷⁹ See <<http://udln.dk/>>.

⁸⁰ See <<http://udln.dk/da/Praksis/aegtefaellesammenforing.aspx>>.

⁸¹ For the year 2013, see the publication at <<http://udln.dk/da/Publikationer/Aarsberetninger.aspx>>.

a more active role of the Danish Supreme Court in some rulings which have reversed the lower courts' rulings also in application of the ECHR; the area of fundamental rights is, according to him, one of the areas where this development can more easily be observed.⁸² Also in private law, which is governed by statute, 'judge-made law is not uncommon'.⁸³

2.1.5 – Judicial enforcement institutions and bodies

- ✓ Which institutions are responsible for the enforcement of this right in your country? Please expose here the structure of the judicial system of the country under study. Indicate, in particular, whether the country under study has a constitutional court or equivalent body. If not, how is compliance with international, European (including EU) and national (constitutional) civil rights guaranteed. Explain the role of other relevant bodies (e.g. ordinary courts, specialised courts, etc.)
- ✓ How are these institutions regulated at national level (constitutions or constitutional instruments, special (i.e. organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other)
- ✓ Is the independence of these institutions and organs guaranteed? If so, how? Have there been concerns related to the independence of the judiciary in the country of study, which could undermine the effective enforcement of the selected civil right? Please indicate the different modes and modalities of enforcement of civil right carried out by the different judicial institutions involved.
- ✓ What are currently the main judicial procedures available to sanction, remedy or compensate for violations of the selected civil right (eg judicial review, damages, emergency measures, etc.). Indicate for each of them important information related in particular to time limits, costs, legal aid availability, length of proceedings, type of actions (eg collective action, class action), admissibility criteria (including standing conditions, delays, etc) as well as merits conditions (acceptable grounds, substantive conditions, degree of control, evidential aspects, burden of proof, etc.). What are the consequences of successful or unsuccessful legal actions under each of the procedures (annulment, compensation, sanctions, etc.)
- ✓ Is the judiciary effective and/or trusted to protect civil rights, or do people turn to alternative modes of action in order to protect these rights (ie demonstration, media involvement, social network activities, lobbying, etc).

Please indicate particular weaknesses and deficiencies, or on the contrary, elements of good practice, which are worth highlighting in that they are likely to have a particular impact on the enforcement of civil rights in the EU.

The protection of civil rights via enforcement in Denmark is normally entrusted to the judicial authorities. The Danish judiciary is regulated both at constitutional level (Art. 3 on the separation of powers) and by means of statute (Administration of Justice Act).

A three tier system organizes the Danish Courts into 24 jurisdictions, each having its own town court (with one or two judges dealing with civil and criminal matters) as first tier; two regional courts of appeal (one in Copenhagen – *ØstreLandsret* – and one in Viborg – *VestreLandsret* – with ca. 100 judges each) as the second tier; and finally the Supreme Court – *Højesteret*– with a President and 18 judges as the third tier (the Supreme Court is an appellate court for judgements rendered by the two regional courts of appeal and by the Maritime and Commercial Court – *Sø- og Handelsretten*).⁸⁴ In 1999 a major structural reform transferred the administration of the courts from the Ministry of Justice to a designated authority, the Court Administration Board (*Domstolsstyrelsen*).

Denmark does not have a Constitutional Court or a specialised court dealing with the protection of civil rights. It is expected that the ordinary courts ensure the compliance with international, European, and national civil rights. Constitutional questions are rare, and if they emerge, constitutional control may be exercised by ordinary courts.⁸⁵ There are no administrative courts in Denmark either; disputes between the citizens and public authorities are dealt by ordinary courts or quasi-judicial boards of appeal as an intermediate body between public authority and courts (for example the Immigration Appeals Board).⁸⁶

The independence of the Courts is not a matter of concern in Denmark. It is stated in the Constitutional Act at Art. 64, that ‘In the performance of their duties, the judges shall be governed solely by the law. Judges shall not be dismissed except by judgement, nor shall they be transferred against their will, except in cases in which a rearrangement of the courts of justice is made.’ The independence of judges is ensured by a special court (*Den Særlige Klageret*), where the members are a judge from the Supreme Court, one from a court of appeal, one from a town court, a lawyer, and a law professor. The special court considers cases of removal or transfer against the will of the judge (which can only take place in case of gross misconduct or lasting illness) and cases where disciplinary action is taken against a judge (for example if she shows inability to deal with a case within reasonable time). The lack of interference from the executive and legislative powers in judicial decision is of course the cornerstone of the independence of the judiciary.⁸⁷

The main judicial procedure to remedy the violation of the right to family life is judicial review, which can, in case of denial of family reunification, overturn a negative

⁸⁴ Melchior, T. (2002), p. 118.

⁸⁵ Melchior, T. (2002), p. 111.

⁸⁶ Melchior, T. (2002), p. 115.

⁸⁷ Melchior, T. (2002), p. 109-110.

administrative decision. Collective action is not admitted; see case U2011.1864V (mentioned above in 2.1.3). The media are particularly used in order to raise awareness of the difficulties in ensuring protection of family life in Denmark. Individuals may resort to telling their stories to the media when everything else (appeals etc.) has failed.

2.1.6 – Non-judicial enforcement institutions and bodies relevant for the enforcement of the selected civil right

- ✓ Are there non-judicial/administrative procedures available to enforce the selected right against public authorities or private actors involved in public policy activities (eg delivery of public services, quasi-regulatory bodies, etc.) ?
- ✓ Are there non-judicial procedures available to uphold these rights against private actors (eg employers, landlords, etc.)?
- ✓ Which organs, institutions, or bodies contribute to promoting and enforcing the selected civil right? (eg equalitybody, ombudsperson, governmentalsupervisoryauthorities, etc.)
- ✓ How are procedures before these bodies regulated at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?
- ✓ What is their respective mandate?Were/are they discussions as to expanding, or reducing their mandate?
- ✓ What are their powers? (eg consultation, information-gathering, reporting, adjudication/decision-making, regulatory powers, etc)? Were they/are they discussions as to expanding, reducing their powers?

How independent are they from government, parliament, stakeholders, others?
Please pay particular attention to powers of appointment, and termination of the mandate of actors, as well as the bodies' decision-making procedures?

(The following is based on the report for deliverable D 7.1, p. 26-30)

The following bodies and administrative bodies are institutions where Danish nationals and TCN can take up their cases and seek enforcement of the protection of their family life, thus they can be said to contribute and promote the enforcing of the right to family life.

The Parliamentary Ombudsman (*Folketingets Ombudsmand*)⁸⁸ is elected by the 'Folketing' (i.e. the Parliament) to carry out investigations regarding complaints from citizens about the public administration. Within its powers, the Ombudsman may state criticism and recommend that the authorities reopen a case in view of a possible change of the outcome of the decision. The Ombudsman may also take up cases on his own initiative, if for example a particular issue has been the focus of media attention. The procedures for complaint to the Ombudsmand, the election, the organisation of the staff, etc. are established by statutory law (*Ombudsmandsloven*)⁸⁹.

The Equality of Treatment Board (*Ligebehandlingsnævnet*) is established by law⁹⁰ and treats complaints of discrimination in the labour market on grounds of sex, race, colour, religion or belief, political opinion, sexual orientation, age, disability, national origin, social, and ethnicity. Outside the labour market the board hears the complaints of discrimination based on sex, race, and ethnicity. The board incorporated the Complaint Committee for Ethnic Equality of Treatment (*Klagekomitéen for Etnisk Ligebehandling*), which closed in December 2008. As the legal basis for the decisions of the board is derived by EU directives, the board has a special focus on EU law and its interpretation, and is among other things a member of the European Network of Equality Bodies (Equinet).⁹¹

⁹²

The Immigration Board (*Udlændingenævnet*)⁹³ is an independent, quasi-judicial administrative body that functions as an administrative appeal instance on a variety of cases that fall under the Aliens Consolidation Act. The composition of the court comprises judges and a number of other members appointed by the Judicial Appointments Council (under the Courts of Denmark), the Ministry of Justice, the Council of the Danish Bar and Law Society, and the Ministry of Employment. The Immigration Board deals with complaints on immigration matters, inter alia complaints on decisions on family reunification, permanent residency, and decisions on expulsions, all made by the Immigration Service as first instance. The composition of the board is described in the Aliens' Act, Art. 52a, while the basis for its competences is to be found in the Aliens' Act, Art. 52b. Procedural rules for the complaints to be treated by the Immigration Board are also defined by law, in Aliens' Act Art. 52c. Finally, a series of more detailed procedural rules are set up by administrative order. The meetings of the Immigration Board are not public and the parts cannot be present at the Board's meetings, unless the Board decides otherwise.⁹⁴

⁸⁸ See <<http://www.en.ombudsmanden.dk>>.

⁸⁹ *Bekendtgørelse af lov om Folketingets Ombudsmand*, LBK no 349 of 22/03/2013.

⁹⁰ The current act regulating its work is Act no 905 of 03 September 2012, *Bekendtgørelse af lov om Ligebehandlingsnævnet*. See <<http://ast.dk/naevn/ligebehandlingsnaevnet>>.

⁹¹ See <<http://www.equineteurope.org/>>.

⁹² *Bekendtgørelse om forretningsorden for Udlændingenævnet*, BEK no 207 of 26/02/2015.

⁹³ See <<http://udln.dk/>>.

⁹⁴ *Bekendtgørelse om forretningsorden for Udlændingenævnet*, Art. 30 and 31.

To the best of our knowledge, there are no non-judicial procedures available to uphold the right to family life against private actors.

2.1.7 – Access to Justice

- ✓ Are access to justice rights (fair trial, due process, right to an effective remedy...) respected when it comes to the enforcement of the selected right? Are there particular problems in that respect. Please develop.

- ✓ Does the principle have a broad scope of application, or are there exceptions?

There are no apparent limits or problems in accessing justice rights as regards the protection of family life. A foreigner can apply administratively to the Immigration Service and, if her application is not successful, she can bring her case to the Immigration Appeals Board. The appeal must be filed within 8 weeks of receiving the decision. Further appeal can be brought to the Minister of Justice or the court system.

The informal problems that can arise may be linked to the narrow, literal interpretation of the rules, which give rise to decisions that are difficult to appeal.

The system of legal aid for citizens of moderate means is quite well-developed in Denmark; legal aid is regulated by the Administration of Justice Act and it can be granted by county authorities or the Ministry of Justice. Apart from financial conditions, another condition required to be granted legal aid is that a plaintiff or defendant must have good chances of winning the case. Normally the court fees and the lawyers' fees will be covered by state funds.⁹⁵ If a case is lost, the winning party's cost will also be covered by the legal aid. Copenhagen Legal Aid (*Retshjælp*⁹⁶), among others⁹⁷, can provide pro-bono legal counselling on a series of issues, including family-related matters, for people whose income is below a fixed limit.

⁹⁵ Melchior (2002), p. 116.

⁹⁶ < <http://www.retshjaelpen.dk/#!/how-do-we-help/c4qy>>

⁹⁷ In Copenhagen, where the largest group of foreigners in Denmark live, there is also the volunteering association Rusk, see <<http://www.rusklaw.dk/da/udlndingeret/>>.

2.1.8 – “Support structures”

- ✓ What is the role of NGO or other civil society actors (eg legal entrepreneurs, etc.) in bringing awareness about modes of enforcement of the selected civil right and in supporting actions to uphold the selected right using judicial or non-judicial means? Please give as many details as possible and identify the most relevant actors
- ✓ Does the organization and structure of the legal professions support the selected civil right claims? In particular, are there developed legal aid systems or pro bono schemes, or any other relevant support system which purports to enable public interest litigation aimed at promoting/supporting the development and effective enjoyment of the selected civil rights.
- ✓ Does legal training contribute or undermine the effective protection of the selected civil rights? Please give evidence based on standard law-school and/or bar-exams curricula?
- ✓ What are the relationship between legal elites, political/governmental elites and civil society organizations? Do they contribute or undermine civil rights litigation and enforcement?
- ✓ What is the role played by academic scholars in promoting and supporting the effective enforcement of the selected civil rights?

(The first part of this section is based on the report for deliverable D 7.1, p. 27-28)

The Danish Institute for Human Rights (henceforth: DIHR) has as key areas equal treatment regardless of gender, race, or ethnic origin; promotion of the implementation of the UN convention on rights for people with disabilities in Denmark; human rights education; and counselling in discrimination cases. The DIHR is often involved in the discussion of implementation of the rights stemming from the ECHR in Danish law. In the national context, the DIHR monitors Danish legislation to ensure that it is in accordance with human rights. This is done by contributing to the media debate but also providing expertise during implementation of international conventions and EU legislation. In practice, the DIHR serves as advisor to the government and parliament by writing legal briefs and recommendations (ca. 150 a year) and by being heard e.g. during the adoption of new legal acts or at times intervening in court.⁹⁸ The institute is also designated to ‘conducting independent surveys concerning discrimination and

⁹⁸As it happened in case U.2013.3328H.

publishing reports and making recommendations on any issue relating to such discrimination'.⁹⁹ In the area of family reunification, DIHR published in 2004 a very critical report on the Danish rules in force since 2002.¹⁰⁰

The Danish Refugee Council (*Dansk Flygtningehjælp*, henceforth: DRC)¹⁰¹ carries out work not only for refugees but also for immigrants, EU nationals, and their family members. It provides legal aid for asylum seekers and free legal, social, and psychological counselling for all immigrants. The DRC has a pro-bono department where legal experts and case handlers volunteer and help foreigners in drafting complaints to the administration, or direct them to lawyers who specialize in the administration of the Aliens Act.

The Documentation and Advisory Centre on Race Discrimination (*Dokumentations- og rådgivningscentret om racediskrimination*)¹⁰² is an independent private institution which offers advice and legal counselling to victims of racial discrimination and also helps in formulating individual complaints, also to the ECtHR.¹⁰³

The Marriage Without Borders Association (*ÆgteskabUdenGrænser*)¹⁰⁴ is an association of volunteers that helps people who experience difficulties in navigating the family reunification legal system in Denmark. They provide support and information about the rules in force, and they also write letters and hearings to the Parliament in support of amendments and/or relaxation of the rules on family reunification. Moreover, they provide information on how to (legally) circumvent the strict Danish family reunification rules and take advantage of EU rules. This would be the case when a Danish national cannot obtain family reunification with a TCN spouse, but if she decides to move to Sweden (or another Member State) and work there, the association provides information on which requirement to meet in order to be protected by EU rules on freedom of movement for workers.

There is no specific legal training supporting the expertise in immigration law, which can contribute to the enforcement of the protection of the right to family life. There is an association of lawyers specializing in immigration law that offers courses to lawyers who practice in this area of law (*Forening af udlændingeretlige advokater*¹⁰⁵). The association

⁹⁹ Art. 10 in the Act on Ethnic Equal Treatment, Act no 438 of 16 May 2012 ('Bekendtgørelse af lov om etnisk ligebehandling').

¹⁰⁰ Institut for Menneskerettigheder, *Ægtefællesammenføring i Danmark – udredning nr. 1* (2004).

¹⁰¹ See <<http://www.flygtning.dk> and <http://www.frivillignet.dk/aktiviteter/raadgivning/>> on the free counselling for immigrants.

¹⁰² <<http://www.drcenter.dk>>.

¹⁰³ <<http://www.drcenter.dk/en/drc-forer-sag-om-statsborgerskab-ved-den-europaeiske-menneskerettighedsdomstol/>>.

¹⁰⁴ <<http://www.aegteskabudengraenser.dk/>>.

¹⁰⁵ <<http://fauadv.dk/>>.

also writes responses on hearing requests for new bills and legislation in the area of immigration law.

The Immigration Service (*Udlændingestyrelsen*) has created the Regional Network (*Det Regionale Netværk*¹⁰⁶) where inter alia municipality case handlers, lawyers, volunteers, etc. are welcome to join. The Immigration Service organises information meetings around the entire country (typically twice a year in each of the nine Danish regions involved) that are meant to bring up to date the knowledge-base of everyone involved in the administration of the Aliens Act, including the right to family life. The meetings are also an opportunity to meet with the director and workers of the departments in the Immigration Service.

Immigration law (*udlændingeret*, literally translated as ‘aliens’ law’) is an optional subject in the Master legal education in the major universities in Denmark (Copenhagen, Aarhus, Southern Denmark, and Aalborg). Although (or perhaps in virtue of) being a highly politicized area, with frequent legal amendments, the subject is not prioritized in the curricula of higher legal education and therefore not an obligatory subject in the curricula. A well-known and respected professor in immigration law from the University of Aarhus (Jens Vedsted-Hansen) is one of the few scholarly voices that criticizes in the media the rules on family reunification, characterising them as increasingly difficult to cope with.¹⁰⁷ Associate professor Peter Starup at the University of Southern Denmark has also directed his research to the analysis of issues of protection of the right to family life in Denmark.¹⁰⁸

¹⁰⁶ < https://www.nyidanmark.dk/da-dk/myndigheder/udlaendingestyrelsen/regionale_netvaerk.htm>.

¹⁰⁷ See for example: Law professor finds the Aliens Act too complex (*Juraprofessor finder udlændingeloven alt for kompliceret*), 15 July 2014, <<http://www.politiko.dk/nyheder/juraprofessor-finder-udlaendingelov-alt-for-kompliceret>>.

¹⁰⁸ Starup, P. (2014) Hvilket råderum efterlader EMRK art. 8 og 14 Danmark med på ægtefællesammenføringområdet?, *EU-ret og Menneskeret* (6.2014), p. 359.

2.1.9 – Further practical barriers to the effective enjoyment of the selected civil rights

- ✓ Can you identify further barriers to an effective enjoyment of the selected civil rights in practice?
Please, include here (or repeat) particularly problematic barriers towards the enforcement of the selected civil rights (such as overbearing costs, judicial corruption, unavailability of legal aid in practice, lack of information about the rights, lack of expertise on the part of attorneys or other legal actors, intimidation towards people who want to enforce their rights, etc.)
- ✓ Can you identify linguistic barriers, and/or barriers related to difference between legal and judicial culture and practices which could undermine the effective enforcement of the selected civil rights, in particular for mobile EU citizens/Third Country Nationals?

Please, make sure to point out right-, gender-, or minority-specific differences with regard to an effective enjoyment of the selected civil rights.

A more informal barrier that can impede the realisation of the right to family life in Denmark is the fact that the persons involved are often TCN with few resources, either personal or monetary. For example, refugees, who later naturalised, who cannot get married with a person from their home country because they have not had Danish citizenship status for 28 years. It would be difficult for people falling in this category to move to another Member State, find work and establish a life there in order to be protected by either a less strict legislation or EU rules that protect the family life of migrant workers.

There can also be linguistic barriers to overcome, as the applicants may be people with little knowledge of the Danish language (or English), which may cause difficulty in understanding the complex legislation. The application packets for family reunification can be found in Danish and English.¹⁰⁹ Moreover, the family reunited who joins a TCN in Denmark has to pass a test of proficiency in Danish (A1 level of the Common European Framework of Reference for Languages) at the latest six months after they are granted a permission to stay on the basis of family reunification.

¹⁰⁹<

http://www.nyidanmark.dk/en-us/coming_to_dk/familyreunification/how_to_apply/how_to_apply.htm>.

http://www.nyidanmark.dk/en-us/coming_to_dk/familyreunification/how_to_apply/how_to_apply.htm>.

Minority issues can also arise, since the targeted group of immigrants from non-Western countries are sometimes identified with persons of a Muslim creed. Moreover, the strict rules for family reunification also apply for refugees who marry after they have applied for asylum/fled their country of origin. Therefore, a particularly vulnerable group which is at risk of not integrating for many other personal and societal reasons, is also affected regarding the protection of their right to family life.

2.1.10 – Jurisdictional issues in practice

- ✓ Personal
 - Is there any de jure or de facto difference in the effective enjoyment of the selected civil rights in your country depending on the status of the person? (differences between natural and legal persons; citizens of that state; EU citizens; third country nationals; refugee; long term resident; family members; tourists; etc.)
- ✓ Territorial
 - Are there any de jure or de facto differences in the effective enjoyment of the selected civil rights in different parts, provinces or territories in your member states?
- ✓ Material
 - Are rights enforced differently in different *policy areas* (e.g. security exceptions, foreign policy exclusion, etc.)? Please, make an assessment on the basis of practice, too (eg more deference accorded in the balancing to the executive when it comes to these policy areas, though the legal framework – what you described in the response to the D7.1. questionnaire — is itself not different from other areas).
- ✓ Temporal
 - What is the temporal scope of protection in the enforcement of the selected civil rights? Are there any notorious or systematic deficiencies in how deadlines are determined or related to the length of proceedings in practice? Please, answer this question from the viewpoint of the practical application of the rules on deadlines for both initiating proceedings, reviews, etc., and for the court's duty, if there is any (next to Art 6 ECHR), to complete proceedings.

Please offer details as to how different rights are enforced to different *categories of persons in different location and policy contexts over time?*

The nationality status of the persons involved (reference person in Denmark and applicant abroad) is of uttermost importance in the handling of cases for family reunification. Only TCN or Danish nationals who have not been holding nationality status for 28 years or more are the legal subject that can be affected by the strict regulations on family reunifications. Refugees who are married before they fled their country of origin have a right to family life in Denmark, as they cannot be forced to resume their family life in another country. Refugees who marry after they fled are not equally protected, and can be told that they cannot be family reunited with a national of their country of origin, or other non-EU country. Even after gaining Danish nationality status, they still have to fulfil the attachment requirement and the requirements on integration, self-sufficiency, etc. The attachment requirement will not be applied to those who have had Danish nationality for 28 years, which, for an adult refugee is practically an impossible requirement to be met.

To the best of our knowledge there are no jurisdictional issues of territorial, material, or temporal scope that significantly affect the protection of the right to family life.

2.1.11 – Systematic or notorious lack or deficient enforcement of the selected civil rights in the country under study?

- ✓ Please, discuss here in detail any ‘revealing’ cases of weaknesses in the effective exercise of selected civil rights in your country. Try to identify the reasons (eg political influence, financial hurdles, lack of expertise, etc.). Feel free to either repeat here, or refer back to points elaborated upon in previous replies.

As stated above under 2.1.2, the right to family life counterbalances the values and policies of Danish immigration law, which seeks to limit family-sponsored immigration from non-Western countries to Denmark. A weakness in the Danish legal system that can have an impact on the enforcement of the right to family life is the lack of expertise amongst the law administrators (e.g. administrative case handlers, publicly appointed pro-bono lawyers, NGO volunteers, etc.).

The lack of expertise is not something that has been documented via academic studies or surveys, but the media have highlighted a number of times that the continuous amendments to the Aliens Act (as much as 63 times from 1983 to 2011¹¹⁰) have caused the legislation to be particularly confused and poorly set up.¹¹¹ The unclear legal system

¹¹⁰ Gammeltoft-Hansen, T. and Whyte, Z. (2011), Dansk asylpolitik 1983-2010, in Vitus, K. and Smith Nielsen, S. (eds.) *Asylbørn i Danmark. Et barndomiundtagelsestilstand*. Hans ReitzelsForlag.

¹¹¹ See e.g. on decisions by the Ministry of Justice on expulsion of families on humanitarian residence permits: ‘Experts recommend ransacking cases on expelled children’ [*Ekspertertil have endevendt sager med udvistebørn*], available at <<http://www.dr.dk/Nyheder/Indland/2014/03/23/235344.htm>>.

creates uneven administration and the non-transparency undermines the legal rights of the persons involved.

2.1.12 – Good practices

- ✓ Please highlight legal frameworks, policies, instruments or practical tools which facilitate the effective exercise of the selected civil rights in the country under study.

Unfortunately, we cannot highlight any particular good practice, whether in the form of policy or legal framework, that facilitates the effective exercise of the right to family life for TCN in Denmark. We can only report to the information service given to foreigners about the possibility to make use of their Union citizen rights by moving to work in Sweden. This information is provided by the NGO Marriage without borders on their website¹¹² and by the volunteer counsellors at the Danish Refugee Council, among others.

2.2 Freedom of Religion and the Right to Ethnic Equal Treatment

Denmark is an increasingly multicultural society, where immigration has entailed the presence of religious communities other than the traditional Lutheran one in the country, as well as other ethnicities than the ethnic Danes. Questions related to the protection of freedom of religion intersect with issues of ethnic equal treatment. It is therefore interesting to see how the national legislation keeps up with EU standards of protection, which may also involve Union citizens. During the analysis we found that many of the answers in the questionnaire overlapped, for example as regards judicial enforcement institutions and bodies, access to justice, and support structures. Therefore, in the following we will investigate under the same headings both topics of protection of freedom of religion and right to ethnic equal treatment.

2.2.1 – Source of protection

Freedom of religion is protected at constitutional level by Art. 67:

‘Citizens shall be at liberty to form congregations for the worship of God in a manner which is in accordance with their convictions,

¹¹²<http://www.aegteskabudengraenser.dk/vejledninger/sverigeeu>.

provided that nothing contrary to good morals or public order shall be taught or done.'

Moreover, Art. 68 of the Constitutional Act establish that:

'No one shall be liable to make personal contributions to any denomination other than the one to which he adheres.'

Finally Art. 70 of the Constitutional Act statutes the equality between faiths/creeds:

'No person shall by reason of his creed or descent be deprived of access to the full enjoyment of civic and political rights, nor shall he escape compliance with any common civic duty for such reasons.'

The provisions go back to the 1849 version of the Constitutional Act, and are expressions of the freedom from the religious obligation that was enforced in the King's Act from 1665.¹¹³

The right to ethnic equal treatment is guaranteed by the Act on Ethnic Equal Treatment¹¹⁴, the Act Prohibiting Discrimination on the Labour Market¹¹⁵, and Art. 266b of the Danish Criminal Code¹¹⁶ which states:

'Whoever publicly or with intent to dissemination to a wider circle makes statements or any other communication by which a group of people are threatened, insulted or degraded on account of race, color, national or ethnic origin, religion or sexual orientation is liable to fine or imprisonment up to 2 years.'¹¹⁷

The two Danish acts on Ethnic Equal Treatment implement the EU directives from 2000 on equal treatment between persons irrespective of racial or ethnic origin, and equal treatment in employment and occupation.¹¹⁸ The difference in legal sources means that the freedom of religion enjoys constitutional protection while the right to ethnic equal treatment has to follow an interpretation in line with EU principles of law; difficulties

¹¹³ Zahle, H. (2003) *Menneskerettigheder. Dansk Forfatningsret*, vol 3, Christian Ejlers' Forlag, p. 155.

¹¹⁴ Act no 438 of 16.05.2012 (*Bekendtgørelse af lov om etnisk ligebehandling*).

¹¹⁵ Act no1349 of 16.12.2008 (*Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v. – forskelsbehandlingsloven*).

¹¹⁶ Act no 871 of 04 July 2014 (*Bekendtgørelse af straffeloven*).

¹¹⁷ My translation.

¹¹⁸ European Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. See also Andersen, A. et al. (eds.) (2008), *Ligestillingslovene*. 6. Udgave, Jurist- og Økonomforbundets Forlag, p. 46-47.

from having to deal with different legal sources may therefore arise more often in respect to the right to ethnic equal treatment.

2.2.2 – Scope and limits of the right (including balancing with other rights)

The Danish rules on freedom of religion provide a constitutional protection of the possibility to exercise a religion of one's choice at the same time that they contain a prohibition of discrimination on the basis of religion. The range of the freedom of religion cannot transcend the restrictions stemming from rules on moral conduct or the public order.¹¹⁹ The limits of the freedom of religion in Denmark border other rights such as freedom of expression (as in the infamous 'cartoon crisis' in 2006) and the right to equal treatment in the labour market (e.g. in cases of personnel wearing a veil or a turban on their working place).

As regards ethnic equal treatment, at the time of the introduction of the acts on equal treatment, Denmark had been criticized by the Parliamentary Ombudsman, among others, for not living up to its international obligations on equality of treatment on the labour market.¹²⁰ The Danish law on ethnic equal treatment is set up as a prohibition to discriminate, which makes it illegal to discriminate on various grounds. However, the regulations have a series of concrete exceptions where it is legal to treat similar cases differently or discriminate. In these cases, the discrimination/inequality of treatment has to have an objective purpose and be proportionate, i.e. not go further than what is required by the objective in case. The international legal sources on the prohibition of discrimination that Denmark has ratified oblige it to extend the prohibition to other areas and illegal grounds for discrimination than the Danish law provides for. However, it is typically not easy to rely on international sources, as the courts have traditionally preferred to emphasize the national legal sources and base their rulings on Danish law rather than on international/supranational law.¹²¹

2.2.3 – Interpretation and application

In the matter of protection of freedom of religion, the Danish case law has dealt in recent years with the requirement of bearing a particular uniform during employment. This requirement has been found to affect especially particular ethnic and religious groups.¹²² In one case from 2000, the Supreme Court found that an employer had discriminated and refused to hire a trainee who was bearing a headscarf/veil; the

¹¹⁹ Zahle, H. (2003), p. 156.

¹²⁰ Andersen, A. et al. (2008), p. 27-28.

¹²¹ Information and interpretation provided by the Citizens Service Advice, <<http://diskrimination.kk.dk/Emner/Love%20og%20regler.aspx>>.

¹²² Andersen, A. et al. (2008), p. 86-88.

company had formulated 'loose' rules on headscarves, which could not be objectively justified.¹²³ In another case about the dismissal of a woman wearing a veil, hygienic rules were invoked, and since about 20% of people employed were of other ethnic origin than Danish, the Eastern Appeal Court dismissed the case.¹²⁴ The same conclusion was arrived at by the Supreme Court in 2005 (after a series of similar cases had been presented at the courts), when it dismissed a case involving a big supermarket chain that required all employees in contact with the public not to wear any headscarf, cap, or similar garment, in order to appear politically and religiously neutral.¹²⁵ The protection deriving from Art. 9 in the ECHR was not used as an argument by the Supreme Court, who seemed to reaffirm the protestant standpoint that religion is a private matter; this view was then extended to the labour market requirement of 'neutral' uniforms.¹²⁶

It is debatable whether these cases would have had another result if the plaintiffs had claimed that they had been discriminated against on the grounds of ethnicity or sex, and not religion. If that was the case other legal sources would have been applied that did not require statistic evidence, in line with the European Court of Justice case law on indirect discrimination.¹²⁷ Legal scholars commenting on the various cases could not agree on whether the definition of ethnic and religious discrimination applied by the courts was in line with EU principles of equal treatment.¹²⁸

In 2009, an amendment¹²⁹ to the Administration of Justice Act (Art. 56) introduced a requirement of neutrality in the clothing of judges, which cannot bear any dress, object etc. that may reveal their political or religious beliefs. The objective was to support the trust of the public towards the courts, and legal commentaries to the act specify that judges cannot wear hijabs, Christian crosses or crucifixes, or a Jewish kippa (skullcap). However, the political debates surrounding the adoption of the amendment highlighted that it was especially the Muslim veil (perhaps implicating the presence of the Quran or Sharia as sources of law) that the Act sought to avoid appearing in the Danish courts: the (far right) Danish People's Party had started the debate by printing campaigns depicting a judge wearing a burka.¹³⁰ A direct prohibition of wearing a veil would have been an infringement of the freedom of religion in Art. 70 of the Danish Constitutional Act, and also impinge on the constitutional civil rights protection of

¹²³ U.2000.2350H.

¹²⁴ Ruling of 5.4.2001, case B-0877-00.

¹²⁵ U.2005.1265H.

¹²⁶ Ketscher, K. (2005) *Etnisk ligebehandling, religionsfrihed og ligestilling mellem kvinder og mænd – set i lyset af Føtex-sagen*, U.2005B.235.

¹²⁷ Roseberry, L. (2004), *Tørklædediskrimination på arbejdsmarkedet*, U.2004B.189.

¹²⁸ Ketscher, K. (2005), *ibid.*, Roseberry, L. (2004), *ibid.*

¹²⁹ Bill L 2009 495. The current version of the Administration of Justice Act is LBGK no. 1308 of 09/12/2014.

¹³⁰ *Betænkning over Forslag til lov om ændring af retsplejeloven (Dommeres fremtræden i retsmøder)* Lovforslag nr. L 98, Retsudvalget 7. maj 2009.

access to civil servant position.¹³¹ The amendment then was formulated insisting on the neutrality of the appearance of judges, including all political and religious symbols.

The range of the protection of Art. 21 of the Charter is still not clear in the Danish legal system, although this has attracted the attention of the citizens, the courts, and legal scholars.¹³² Art. 14 of the ECHR is mentioned as well in Danish case law, but it has so far not overruled important political decision made by Danish authorities.¹³³ The Equality of Treatment Board¹³⁴ has been criticized for broadly interpreting the prohibition against discrimination, even deciding upon 'bagatelle' cases (especially in the area of equal treatment of sex, not at focus in this report); the critique points out that almost everything can be presumed to be discriminatory under a general principle of equal treatment that does not provide the deciding elements upon which to settle a case (such as in Art. 21 of the Charter or Art. 14 of the ECHR).¹³⁵

2.2.4. – Case law protecting civil rights

(The following is partly based on the answers above at answers above at 2.1.4)

In the Danish legal system there is not an expressed doctrine of precedent as known in the Anglo-Saxon legal tradition, but rulings by the Appeal Courts and the Supreme Court especially are considered as the correct application of the law, and therefore they can be used to interpret the law in other similar cases. Judge-made principles are not a frequent sight in the Danish legal system either, as the Courts are not expected to create law, but only to apply it (this is also one of the main problems that Danish legal scholars and civil servants see with the 'activism' of the European Court of Justice). The need of reforms is expected to be dealt with by the legislative power, especially when issues of economic redistribution are at stake. Consequently, Danish judges may not bring up of their own motion civil rights violations. However, there is possibility and evidence of a more active role of the Danish Supreme Court in some rulings which have reversed the lower courts' rulings also in application of the ECHR; the area of fundamental rights is

¹³¹Lett, G. (2008), Tørklædelov vil være i strid med Grundloven. *Advokaten*8, 2008.Advokatsamfundet. This commentator also arrives as far as to sustain that with this rule the legislative power had infringed the judiciary's independence, as the only organ to decide on the matter should have been the Court Administration Board.

¹³² Refer to the analysis for question 4 in the report for D 7.1, p. 18-21.

¹³³ See cases U.2005.2086H, U.2008.342H, U.2006.2083H, U.2012.1629H, U.2012.1761H and U.2007.341H, all commented in Fenger, N. (2014), *Erdiskriminationsretten ved at gå for langt? Juristernr. 3-4*, p. 113.

¹³⁴ See a description of the Equality of Treatment Board under 2.2.6.

¹³⁵ Fenger, N. (2014), *ibid.*

one of the areas where this development can more easily be observed.¹³⁶ Also, in private law, which is governed by statute, ‘judge-made law is not uncommon’.¹³⁷

2.2.5 – Judicial enforcement institutions and bodies

(The following is based on the answers above at 2.1.5)

The protection of civil rights via enforcement in Denmark is normally entrusted to the judicial authorities. The Danish judiciary is regulated both at constitutional level (Art. 3 on the separation of powers) and by means of statute (Administration of Justice Act).

A three tier system organizes the Danish Courts¹³⁸ into 24 jurisdictions, each having its own town court (with one or two judges dealing with civil and criminal matters) as first tier; two regional courts of appeal (one in Copenhagen – *ØstreLandsret* – and one in Viborg – *VestreLandsret* – with ca. 100 judges each) as the second tier; and finally the Supreme Court – *Højesteret*– with a President and 18 judges as the third tier (the Supreme Court is an appellate court for judgements rendered by the two regional courts of appeal and by the Maritime and Commercial Court – *Sø- ogHandelsretten*). In 1999 a major structural reform transferred the administration of the courts from the Ministry of Justice to a designated authority, the Court Administration Board (*Domstolsstyrelsen*).

Denmark does not have a Constitutional Court or a specialised court dealing with the protection of civil rights. It is expected that the ordinary courts ensure the compliance with international, European and national civil rights. Constitutional questions are rare, and if they emerge, constitutional control may be exercised by ordinary courts.¹³⁹ There are no administrative courts in Denmark either; disputes between the citizens and public authorities are dealt by ordinary courts or quasi-judicial boards of appeal in an intermediate stadium between public authority and courts (as for example the Immigration Appeals Board).¹⁴⁰

The independence of the Courts is not a matter of concern in Denmark. It is stated in the Constitutional Act at Art. 64, that ‘In the performance of their duties, the judges shall be governed solely by the law. Judges shall not be dismissed except by judgement, nor shall they be transferred against their will, except in cases in which a rearrangement of the courts of justice is made.’ The independence of judges is ensured by a special court (*Den SærligeKlageret*), where the members are a judge from the Supreme Court, one from a

¹³⁶ Melchior, T. (2002), The Danish Judiciary, in Dahl, B. et al. (eds.) *Danish Law in a European Perspective*, 2nd ed., Forlaget Thomson, p. 111-114.

¹³⁷ Melchior, T. (2002), p. 114.

¹³⁸ Melchior, T. (2002), p. 118.

¹³⁹ Melchior, T. (2002), p. 111.

¹⁴⁰ Melchior, T. (2002), p. 115.

court of appeal, one from a town court, a lawyer, and a law professor. The special courts considers cases of removal or transfer against the will of the judge (which can only take place in case of gross misconduct or lasting illness) and cases where disciplinary action is taken against a judge (for example if she shows inability to deal with a case within reasonable time). The lack of interference from the executive and legislative powers in judicial decision is of course the cornerstone of the independence of the judiciary.¹⁴¹

The main judicial procedure to remedy the violation of the freedom of religion and of the right to ethnic equal treatment is judicial review, after reporting the alleged violation to the police or the Equality of Treatment Board.

2.2.6 – Non-judicial enforcement institutions and bodies relevant for the enforcement of the selected civil right

Citizens who claim that they have been discriminated on grounds of their religion or ethnic origin can send a complaint to the Equality of Treatment Board (*Ligebehandlingsnævnet*). The Board is established by law¹⁴² and treats complaints of discrimination on the labour market on grounds of sex, race, colour, religion or belief, political opinion, sexual orientation, age, disability, national origin, social, and ethnic origin. Outside the labour market the Board hears the complaints of discrimination based on sex, race, and ethnicity, but not complaints on discrimination based on religion or belief. If an indirect link with a race or ethnicity based discrimination can be proven, a citizen can complain to the Board.

The Board is an independent appeal body, whose competences and rules of procedure are regulated by statute.¹⁴³ The members are judges in the presidency and lawyers specialised in the areas covered by the Act on Equality of Treatment. The cases are normally decided by one member of the presidency and two of the members of the board. The members of the board are independent from the Ministry that has appointed them and they cannot receive instructions on how to handle cases. The decisions of the Equality of Treatment Board are published online on the Board's website.¹⁴⁴

The Board cannot bring up cases of its own motion. Its decisions are final but since the Board does not have the power to enforce them, a claimant can bring the case to the ordinary courts. The costs of the cases are held by the Board, so it is free to file a complaint. The Board can sanction compensation to the extent that it follows from the

¹⁴¹ Melchior, T. (2002), p. 109-110.

¹⁴² <<http://ast.dk/naevn/ligebehandlingsnaevnet>>.

¹⁴³ Act no 905 of 03/09/2012 (*Bekendtgørelse af Lov om Ligebehandlingsnævnet*) and Executive Order no220 of 01/03/2013 (*Bekendtgørelse om forretningsorden for Ligebehandlingsnævnet*).

¹⁴⁴ <<http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/default.aspx>>.

laws under its competence.¹⁴⁵ The Equality of Treatment Board has expanded its competences to also include discrimination on the basis of ethnicity and religious faith by 1 January 2009, when it incorporated the Complaint Committee for Ethnic Equality of Treatment (*Klagekomitéen for EtniskLibehandling*), whose secretariat was at the Danish Institute for Human Rights (closed in December 2008).

The Copenhagen Municipality has launched a website to monitor discrimination via the Citizens Advice Service (*Borgerrådgiver*).¹⁴⁶ Citizens living in Copenhagen can complain about the municipality's handling of their cases, and get help if they want to file a complaint for discrimination. The Citizens Advice Service cannot handle a complaint if there is another designated body for the matter in question. Therefore, complaints about discrimination by the municipality on ethnic grounds and religious grounds on the labour market will still be handled by the Equality of Treatment Board. The Citizens Advice Service can bring up of his own motion investigation in alleged cases of discrimination, and it has also opened a hotline against discrimination as an easy access to help, information, counselling, and guidance on rights and possibilities for complaining.

2.2.7 – Access to Justice

(The following is based on the answers above at 2.1.7)

There are no apparent limits or problems in accessing justice rights as regards the protection of freedom of religion or the right to ethnic equal treatment. A citizen or foreigner can file a complaint to the Equality of Treatment Board or sue e.g. an employer at the ordinary courts.

The system of legal aid for citizens of moderate means is quite well-developed in Denmark; legal aid is regulated by the Administration of Justice Act and it can be granted by county authorities or the Ministry of Justice. Apart from financial conditions, another condition in order to be granted legal aid is that a plaintiff or defendant must have good chances of winning the case. Normally the court fees and the lawyers' fees will be covered by state funds.¹⁴⁷ If a case is lost, the winning parts' cost will also be covered by the legal aid. Copenhagen Legal Aid (*Retshjælp*¹⁴⁸), among others¹⁴⁹, can

¹⁴⁵ The competences of the Board are listed in Art. 1 and the sanctions in Art.2 in the Act on the Equality of Treatment Board.

¹⁴⁶ <<http://diskrimination.kk.dk/Service/English.aspx>>.

¹⁴⁷ Melchior (2002), p. 116.

¹⁴⁸ <<http://www.retshjaelpen.dk/#!/how-do-we-help/c4qy>>.

¹⁴⁹ In Copenhagen, where most foreigners live, there is also the volunteering association Rusk, see <<http://www.rusklaw.dk/da/udlndingeret/>>.

provide pro-bono legal counselling on a series of issues, including family-related matters, for people whose income is below a fixed limit.

2.2.8 – “Support structures”

(The following is partly based on report for D7.1, p. 26-28)

The Danish Institute for Human Rights (henceforth: DIHR) is often involved in the discussion of implementation of the rights stemming from the ECHR in Danish law. In the national context, the DIHR monitors Danish legislation to ensure that it is in accordance with human rights. The DIHR is also by law the designated institute to provide assistance to victims of discrimination in pursuing their complaints about discrimination; the institute is also designated to ‘conducting independent surveys concerning discrimination and publishing reports and making recommendations on any issue relating to such discrimination’. The key areas for the DIHR’s work in Denmark are equal treatment regardless of sex, race or ethnic origin; promotion of the implementation of the UN convention on rights for people with disabilities in Denmark; human rights education; and counselling in discrimination cases. The DIHR has a designated department for equal treatment that provides counselling on cases of possible discrimination (in the labour market and outside, and when a citizen comes in contact with public authorities) and can also offer aid in order to file a complaint.¹⁵⁰

The Danish Refugee Council carries out work not only for refugees but also for immigrants, EU nationals and their family members, providing legal aid for asylum seekers and free legal, and also counselling on complaints against alleged discrimination.

The Documentation and Advisory Centre on Race Discrimination (*Dokumentations- og rådgivningscentret om racediskrimination*)¹⁵¹ is an independent private institution which offers advice and legal counselling to victims of racial discrimination and also helps in formulating individual complaints, also to the ECtHR.¹⁵²

The Association SOS against Racism (*SOS mod Racisme*)¹⁵³ is an international, nonpartisan organisation that works to unveil and fight against discrimination. They operate locally in various cities and provide information and guidance on how to complain in cases of alleged discrimination.

¹⁵⁰ <<http://menneskeret.dk/raadgivning>>.

¹⁵¹ <<http://www.drcenter.dk>>.

¹⁵² <<http://www.drcenter.dk/en/drc-forer-sag-om-statsborgerskab-ved-den-europaeiske-menneskerettighedsdomstol/>>.

¹⁵³ <http://www.sosmodracisme.dk/?Diskrimination_og_racisme>.

2.2.9 – Further practical barriers to the effective enjoyment of the selected civil rights

The linguistic barriers can be a problem when accessing information on rights and possibilities to complain about discrimination. For example, the information on website as that of the Equality of Treatment Board could though be in other languages than Danish, in order to reach a broader spectrum of citizens. As regards the freedom of religion, the Ministry of Ecclesiastical Affairs informs about the possibility to be tax-exempted for religious communities, but it has remarked in 2006 that Muslim communities are not as frequent in applying for economic support as the Christian communities.¹⁵⁴

2.2.10 – Jurisdictional issues in practice

(The following is partly based on the answers above at 2.1.10)

The provisions on freedom of religion are valid for all persons residing in Denmark, Danish nationals or foreigners, and comprise all creeds. The same is valid for the rules on protection of the right to ethnic equal treatment. To the best of our knowledge there are no jurisdictional issues of territorial, material, or temporal scope that significantly affect the protection of the freedom of religion or the right to equal treatment.

2.2.11 – Systematic or notorious lack or deficient enforcement of the selected civil rights in the country under study?

The debate about the limits of freedom of religion as counterbalancing the freedom of expression is very often present in the political debate in Denmark. It was at the eye of the storm in 2005 in the aftermath of the cartoon crisis and it resurged again at the time of the February 2015 attacks at the synagogue and cultural centre in Copenhagen. This does not automatically imply an ensuing lack of enforcement of the right to equal treatment on grounds of religion or ethnicity, but it can influence the political discussions that surround the adoption of future legislative measures.

2.2.12 – Good practices

Danish public authorities are generally good at informing citizens of their rights and on modes on how to enforce them. The structure of the legal aid is well-functioning and may support the claimants with moderate economic means. The presence of volunteer associations devoted to assisting citizens in presenting discrimination claims is also a good practice worth to highlight.

¹⁵⁴<http://www.km.dk/kirke/love-regler/andre-trossamfund/trossamfundstoette/>.

Annexes

Relevant national provisions

- The Constitutional Act of Denmark of June 5th 1953 (*DanmarksRigesGrundlov af 5. Juni 1953*)
<http://www.thedanishparliament.dk/Publications/The_Constitutional_Act_of_Denmark.aspx>
- Act no 429 of 31/5/2000 on the Processing of Personal Data (*Lov om behandling af personoplysninger – persondataloven*). The act implements Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data
- Act no 1021 of 19/09/2014, Aliens Consolidation Act (*Bekendtgørelse af udlændingeloven*)
- Act no 438 of 16/05/2012 on Ethnic Equality of Treatment (*Bekendtgørelse af lov om etnisk ligebehandling*). The act implements parts of the European Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- Act no 1349 of 16/12/2008 Prohibiting Discrimination on the Labour Market (*Lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v. – forskelsbehandlingsloven*). The act implements parts of the European Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
- Consolidation Act no 871 of 4/7/2014, Criminal Code (*Bekendtgørelse af straffeloven*)
- BEK no 1186 of 06/11/2014 (*Bekendtgørelse om regulering af erstatningsbeløb i henhold til lov om erstatning fra staten til ofre for forbrydelser*)
- *Bekendtgørelse nr. 424 af 8. maj 2007 om visse spørgsmål vedrørende gennemførelse af parallelaftale om Bruxelles I-forordningen*
- CIS no 9028 of 23/01/2006 (*Cirkulæreskrivelse vedrørende politiets relationer til ofre for forbrydelser og ulykker og deres pårørende. Til anklagemyndigheden og politiet (Ofre for forbrydelser)*)

- CIS no 11067 of 25/01/1988 (*Cirkulæreskrivelse til politiet og anklagemyndigheden om ændret forretningsgang vedrørende udbetaling m.v. af erstatning fra staten til ofre for forbrydelser*)
- CIS no 11421 of 28/10/1976 (*Cirkulæreskrivelse om erstatning fra staten til ofre for forbrydelser*)
- CIS no 11195 of 24/04/1987 (*Cirkulæreskrivelse til politiet og anklagemyndigheden om ændret forretningsgang vedrørende udbetaling m.v. af erstatning fra staten til ofre for forbrydelser*)
- *Justitsministeriets vejledning nr. 9498 af 19. december 2003 om behandlingen af anmodninger om udlevering af lovovertrædere på grundlag af en europæisk arrestordre*
- *Supplement til vejledning om behandling af anmodninger om udlevering af lovovertrædere på grundlag af en europæisk arrestordre, cirkulære skrivelse nr. 9678 af 14. december 2004*
- *Vejledning nr. 9012 af 4. januar 2011 om inddrivelse af danske bidragskrav i udlandet*
- *Vejledning nr. 91 af 17. november 2011 om inddrivelse af udenlandske bidragskrav i Danmark efter underholdspligtforordningen*
- *Vejledning nr. 9329 af 28. juni 2013 om inddrivelse af udenlandske bidragskrav i Danmark efter underholdspligtforordningen*
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BEUCITIZEN
BARRIERS TOWARDS EU CITIZENSHIP



REPORT ON FRANCE

DELIVERABLE 7.2 MECHANISMS FOR ENFORCING CIVIL RIGHTS - QUESTIONNAIRE

COUNTRY REPORT – FRANCE

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23 July 2015 (updated version)

PRELIMINARY SECTION

For the sake of clarity, and to avoid undue repetitions, it felt more appropriate to answer Questions 5 to 7 of Part 2 related to domestic judicial and non-judicial mechanisms and access to justice, at the beginning of the national report. Indeed, this information is relevant both to the enforcement of EU provisions which confer civil rights (eg data protection, rights of the defense, etc) or whose implementation may threaten them (eg European Arrest Warrant), and the protection of civil rights which EU citizens derive from national constitutional or legislative sources, or from international human rights instruments, such as the European Convention on Human Rights. Particular problems related to their mobilization to protect specific rights, will be exposed later, in the relevant parts.

When facing restrictions or violations of their civil rights, individuals may resort to judicial and non-judicial mechanisms. Non-judicial avenues include civil resistance, calling upon political bodies to intervene (eg the parliament or president), or bringing matters before

administrative hierarchies, or independent public authorities, such as ombudsman-type bodies or specialised agencies. Judicial action includes proceedings before International and European (quasi) judicial bodies, as well constitutional, administrative or ordinary courts, including emergency and interim mechanisms. The organization and articulation of these different mechanisms is complex, and depends, notably, on the context in which the breach occurred (eg whether it involves public authorities or persons in charge of public services or actors acting in private capacities, criminal actions or civil matters, etc.), the source, nature and content of the contested provisions and protective norms, and the type of measures sought (eg annulment of a measure, recognition of a breach, injunctions to terminate the violations, compensation, etc.),

Remedies exist at EU level, as well as before the European Court of Human Rights (ECtHR) and other international human rights bodies. This report focuses on remedies available at national level for violations of civil rights, whether these are protected (or threatened) by EU or national law (or both).¹ Indeed, the national level is thus the first port of call for addressing civil rights violations, international or European (EU and ECHR) mechanisms intervening only in case national protection systems fail, or are not competent.

Question 5 - Judicial mechanisms

It is impossible given the time and resources constraints, to provide an exhaustive overview of all possible remedies available against violations of any kind of civil rights. We will limit ourselves to identifying and reviewing the most common judicial avenues available to prevent, sanction, redress or compensate for violations of civil rights, irrespective of whether those are granted by international human rights agreement (in particular the ECHR), EU law, constitutional provisions or legislative acts, in order to identify where particular difficulties may arise in terms of enforcement of civil rights.

Constitutional review of legislation

¹The general report of Deliverable D7.2 provides a critical analysis of EU level remedies available for the protection of civil rights.

Over the last 50 years, the French minimalist constitutional review mechanism laid down by the 1958 Constitution has been fleshed out, through both case law and constitutional reform, to provide for a relatively comprehensive and sophisticated system for the review of the compatibility of legislative provisions with constitutionally protected civil rights.

The Conseil Constitutionnel

The 1958 Constitution, in its original version, provided for a constitutional court, the *Conseil Constitutionnel*, whose members were appointed for a nine years non-renewable mandate, with partial renewal every three years (Art. 56.1 Constitution). In addition, former presidents were *ex officio* members (Art. 56.2 Constitution). The nominated members of the *Conseil Constitutionnel* were chosen and appointed by the President of the Republic, the President of the National Assembly and the President of the Senate (three each). The *Conseil Constitutionnel's* president is chosen by the President of the Republic. The nominating authorities have full discretion, as there are no particular requirements (qualification, age, etc). Over the years however, there has been a marked tendency to appoint persons recognised for their legal expertise. The appointment procedure and conditions have not changed, but since the 2008 constitutional reform, competent parliamentary committees may veto appointments to the *Conseil Constitutionnel*.² The mode of nomination as well as composition of the *Conseil Constitutionnel* have been subject to strong criticism, as casting doubt as to the competence and independence of the institution.³

Membership of the *Conseil Constitutionnel* is incompatible with an electoral mandate,⁴ public service employment, and the leadership or management of a political party. Members must respect the secrecy of deliberations.⁵ The *Conseil Constitutionnel's* initial review powers were limited.

A priori abstract review

²Constitutional Law No 2008-724 of 23 July 2008 on the modernization of institutions of the Vth Republic'; Law No 2010-838 du 23 July 2010 relating to the application of Article 13 para 5 of the Constitution.

³Denquin J.-M., 'La jurisprudence du Conseil constitutionnel : grandeur ou décadence du droit constitutionnel', *Jus politicum* No7, March 2012.

⁴Article 4 of Ordinance No 58-1067 of 7 November 1958; Act No 95-63 of 19 January 1995.

⁵ Article 3 of Ordinance No 58-1067 of 7 November 1958.

Originally, the *Conseil Constitutionnel* was only entrusted to control, *in abstracto* and a priori (i.e. before promulgation), the conformity of laws with the Constitution. The objective was to prevent parliamentary encroachment upon the government's prerogatives, a tendency in the previous regimes which had seriously incapacitated governmental action.⁶ The right to refer legislative measures to the *Conseil Constitutionnel* was, consequently, restricted to a limited number of political personalities, namely the President of the Republic, the Prime Minister, and the presidents of the two chambers of parliament, the National Assembly and the Senate; moreover, it merely concerned institutional matters, as the Constitution did not contain any Bill of Rights.

However, in the 1970s, the nature and purpose of the constitutional review system was fundamentally altered, through a combination of case law development and constitutional reform. In a 1971 decision, the *Conseil Constitutionnel*, relying on the preamble of the 1958 Constitution (hereinafter the 1958 Preamble), expanded the range of constitutional norms of force (the so-called *bloc de constitutionalité*) to include fundamental rights protected in previous constitutional instruments, notably, as regards civil rights, the 1789 Declaration of the Rights of the Man and Citizen (hereinafter 1789 Declaration), and 'fundamental principles recognised in the laws adopted under republican regimes' referred to in the Preamble to the 1946 Constitution (hereinafter 1946 Preamble).⁷ Moreover, in 1974, the Constitution was amended to open to members of the parliamentary opposition (i.e. 60 members of the Senate or the General Assembly) the possibility to refer laws to the *Conseil Constitutionnel*.⁸ These two developments, combined with political circumstances (e.g. more frequent political *alternance*) meant that legislative acts became much more routinely checked for compatibility with constitutional norms for the protection of civil rights.⁹

⁶ It was designed as a 'weapon against parliamentary deviance' (M. Debré, 'Discours devant le *Conseil d'Etat*, 27 Aout 1958' in *Document pour servir à l'histoire de l'élaboration de la Constitution du 4 Octobre 1958* (Documentation Française, Volume III, 1991, 260), cited by Gicquel J.-E. 'La dimension constitutionnelle des droits et libertés fondamentales' in R. Cabrillac (ed), *Libertés et Droits Fondamentaux* (20th ed., Dalloz, 2014), 95, 96. See also James E. Beardsley, 'The Constitutional Council and Constitutional Liberties in France' (1972) *American Journal of Comparative Law* 431.

⁷ Decision No 71-44 DC, 16 July 1971 [freedom of association].

⁸ Constitutional Law No 74-904 of 29 October 1974, JORF du 30 October 1974 p. 11035.

⁹ Alec Stone, *The Birth of Judicial Politics in France* (New-York: Oxford University Press, 1992)

A posteriori concrete review

In 2008, the Constitution was again amended to bring the French system of constitutional review closer to some of its European counterparts. A new Article 61-1 of the Constitution introduced, alongside the a priori control system, a new a posteriori review mechanism, the 'Priority Question on Constitutionality' (in French the *Question Prioritaire de Constitutionnalité*, commonly referred to by its acronym QPC).¹⁰

Since 2010, individuals who consider that legislation infringes constitutionally protected rights can therefore ask administrative or judicial courts bring the matter before the *Conseil Constitutionnel*. This constitutional remedy is however not automatic, and subject to a number of conditions: the legislative act must be relevant and applicable to the case; the legislative provision should not have been already declared in conformity with the Constitution (except where constitutional norms of force have changed in the meanwhile, or there have been other relevant changes in fact or law); and the question 'must not be deprived of a serious nature.'¹¹ The two supreme courts (the *Cour de Cassation* and the *Conseil d'Etat*) filter the requests:¹² within three months, they must decide whether the question is novel or serious enough to be referred to the *Conseil Constitutionnel*. In that sense, they act as 'negative' constitutional courts.¹³

Procedure before the Conseil Constitutionnel

The procedure is written, except for the QPC, where there is a public hearing. The *Conseil Constitutionnel* gradually developed an adversarial approach to constitutional proceedings;¹⁴ the adversarial principle must be respected in QPC proceedings¹⁵ The *Conseil*

¹⁰ Constitutional Law No 2008-724 of 23 July 2008, JORF No 171 of 24 July 2008 p.11890; Organic Law No 2009-1523, 10 December 2009 (relating to the application of Article 61-1 of the Constitution), JORF No 0287 of 11 December 2009 p.21379.

¹¹ Article 23-2, Ordinance of 7 November 1958, JORF 9 November 1958 p. 10129.

¹² Article 23-4, of the Ordinance of 7 November 1958, *ibid*.

¹³ Gicquel, J.-E., *op.cit* 13, 108-110. Before deciding to send a QPC, the supreme courts often carry out substantial review of the contested legislation.

¹⁴ Rousseau, D. 'Le procès constitutionnel', *Pouvoirs*, n° 137, 2011; Drago, G 'Quels principes directeurs pour le procès constitutionnel ? ', in *Justices et droit du procès : du légalisme procédural à l'humanisme processuel – Mélanges en l'honneur de Serge Guinchard*, Paris, Dalloz, 2010; Nicot, S. 'Le Conseil constitutionnel face à ses contradictions ', RDLF 2011, chron. n°13 www.revuedlf.com

Constitutionnel deliberates in plenary sessions (quorum of seven members). In case of split votes, that of the President will determine the outcome. Each case is entrusted to a rapporteur, who has wide investigatory powers and who will submit a proposal for a decision. The plenary debates and votes are secret. The final decision is a collegial one, i.e. without dissenting opinions, and must be released within in priori control (eight days in case of emergency) and three months in the QPC.

Organizational aspects

In addition to its members (*conseillers*), the *Conseil Constitutionnel* has a general secretary, who manages the four services of the institution: the Legal Service (which consists of one administrative judge, one ordinary judge, one national assembly administrator, and university professors, and includes the Registry); the Documentation Unit (research work); the Administrative and Financial Unit (management); and the External Relations Unit (publications, relationships with French courts, universities and institutions, as well as international relations). The *Conseil Constitutionnel* is financially autonomous; its President decides on the budget, which is included in the annual finance law under '*Pouvoirs Publics*'.

Although the *Conseil Constitutionnel* significantly contributed to the constitutionalization of fundamental rights protection by integrating historical instruments for the protection of rights into the bloc de constitutionalite, the quality and intensity of his control remain vividly debated. Its reasoning has been criticised as weak, formalistic and deferential to political actors.¹⁶ It has more often than not avoided engagement with important societal issues.¹⁷ What remains to be seen is to what extent the QPC will change the dynamics of constitutional review and contribute to increasing the autonomy and independence of the *Conseil Constitutionnel*, in a way which could produce stronger guarantees for civil rights. There are signs that indeed the *Conseil Constitutionnel* is stepping up its control over the

¹⁵ Article 23-10 of Ordinance No 58-1067 du 7 November 1958 relating to the organic law on the *Conseil constitutionnel*; Article 3 of the internal rules of 4 February 2010 on the procedure before the *Conseil constitutionnel* for QPC.

¹⁶ Baranger D., 'Sur la manière française de rendre la justice constitutionnelle', *Jus Politicum* n° 7, mars 2012

¹⁷ Mathieu B., Verpeaux M., 'Saisine sur saisine ne vaut ou les insuffisances du contrôle de la constitutionnalité des lois à la française', Dalloz, 2001, p

respect of fundamental freedoms by the legislator. Since the coming into force of the new procedure in 2010, the *Conseil Constitutionnel* has decided on more than 400 such QPC requests.¹⁸ It found total or partial incompatibility with the Constitution, or imposed interpretative reservations, in more than one third of them, although it often modulates the effects in time of its decisions.¹⁹

‘Contrôle de conventionnalité’

The French legal system formally distinguishes between the *contrôle de constitutionnalité* (control of legislation’s compatibility with the Constitution) and the *contrôle de conventionnalité* (control of legislation’s compatibility with international agreements). Both may result in the neutralisation of legislative provisions incompatible with fundamental rights and freedoms, but operate within different institutional settings and produce different legal effects.²⁰ Indeed, as exposed above, the *contrôle de constitutionnalité* of legislative provisions falls under the competence of the *Conseil Constitutionnel* (since 2010, in cooperation with the two supreme courts), whilst the *contrôle de conventionnalité* is carried out by ordinary courts, subject to the two supreme courts’ supervision. The *contrôle de constitutionnalité* leads to the invalidation of legislative provisions, whilst the *contrôle de conventionnalité* can only trigger the non-application of incompatible legislative provisions.

In a 1975 Abortion Law Decision, the *Conseil Constitutionnel* declined competence to review legislative acts for conformity with international instruments (*contrôle de constitutionnalité*).²¹ The *Cour de Cassation* responded by acknowledging its corresponding duty under Article 55 of the 1958 Constitution to control that French legislation complied with international agreements, whilst it took fifteen years for the *Conseil d’Etat* to follow suit

¹⁸These had gone unchallenged in the past for either political reasons, the non-anticipation of their impact on protected rights, or simply the fact they had been adopted before the constitutional recognition of the relevant rights.

¹⁹For a list of QPC decisions, see <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-type/les-decisions-qpc.48300.html>.

²⁰On the difference between the two types of fundamental rights control, see Dutheillet de Lamothe, O. ‘Contrôle de constitutionnalité et contrôle de conventionnalité’, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/Conseil/cccc.pdf

²¹Decision No 74-54 DC of 15 January 1975, para 7.

in 1989.²² Ordinary administrative and judicial courts may ignore and 'disapply' (but not invalidate) legislative provisions when these are in conflict with international norms.

The *contrôle de conventionnalité* only applies to legislative or supra-legislative norms. It does not concern constitutional norms, as these prevail over international agreements.²³ Where there are conflicts between constitutional and international norms, courts may try to interpret constitutional norms in a manner which is in line with international or European (ECHR and EU) human rights obligations.

The *Conseil d'Etat* will simply setting aside the application of legislation which it considered as disproportionately interfering with civil right such as the right to property (in a case concerning the right of hunting association to hunt on private land).²⁴ However, the *Conseil d'Etat* will not redress a violation of the ECHR by a legislative act which would result from the evolution of factual circumstances.²⁵ Ordinary courts were more hesitate to set aside legislative provisions to give effect to ECHR rights,²⁶ despite a important decision of the Paris appeal courts which prohibited certain publications to protect private life and person's physical integrity, because of the lack of predictability of the legislative provisions, contrary to Article 6, 7 and 10 ECHR.²⁷ However, over the years, ordinary courts have more vigorously enforce the ECHR rights against legislative provisions.²⁸

To the extent that the ECHR and the *bloc de constitutionnalité* protect similar rights, the *contrôle de conventionnalité* for long acted as a 'substitute' to a posteriori concrete constitutional review. Indeed, prior to 2010, the *contrôle de conventionnalité* (on the basis of ECHR and EU law) was the main avenue available to individuals to neutralise legislative

²²Ass., Mixt., 24 May 1975, *Société des Cafés Jacques Vabre*, D., 1975, p. 497; CE, 20 October 1989, *Nicolo*, No 108243.

²³CE, ass., 3 July 1996, Koné, Rec. p. 255; CE, 30 October 1998 *Sarran et Levacher*, No. 200286, Cass. ass. , 2 June 2000, *Melle Fraisse*, *Gaz Pal.* No 359-363. DC No 2004-496 of 10 June 2004, JCP 2004 p. 1332; DC No 2004-498 of 20 July 2004, D. 2005 p. 921. See slight inflection in Cass, ass. 15 April 2011, *Mme X.*, No. 10-30316.

²⁴CE, sect., 27 October 2000, *Vignon*.

²⁵CE, sect., 2 June 1999 *Meyet*.

²⁶Wachsman, P., *Libertés publiques*, (7th ed., Dalloz, 2013), p. 218

²⁷CA Paris, 18 September 1997.

²⁸Ass., 23 Jan 2004 (publication of opinion polls during the week preceding elections); Ass., 15 April 2011 No 592 10-30.316 (rights of the defense of persons placed in custody).

provisions which undermined civil rights. In the 2000s, 40% of the *Conseil d'Etat* decisions dealt with issues concerning the compatibility of French norms with the ECHR.²⁹

Note that the constitutional reform which introduced the QPC requires that, in case parties are bringing claims related to the violation of both the ECHR and constitutional provisions, the court first send the case to the *Conseil d'Etat* or *Cour de Cassation* for referral to the *Conseil Constitutionnel* under the QPC procedure.³⁰ The *Cour de Cassation* however did not follow these instructions. In a case which concerned undocumented Algerian nationals who had been arrested along the French- Belgian border, and who argued that their arrest violated their rights under both the Schengen agreement (EU law) and the French Constitution, the judge sent the case to the *Cour de Cassation*, which instead of referring the question to the *Conseil constitutionnel*, asked for an expedited ruling from the CJEU.³¹ The CJEU however endorsed the interpretations of the QPC mechanism quickly brought forth by both *Conseil constitutionnel* and the *Conseil d'État*.³² It found the QPC procedure compatible with EU law under three conditions suggested by the *Conseil constitutionnel* and the *Conseil d'État*: French courts must be able to refer matters to the CJEU whenever they deem necessary, even where a QPC has been issued; French courts can take power to take any measure necessary to ensure the provisional protection of rights conferred by EU law; French courts retain the power to disapply any national laws they find to be incompatible with EU law after a QPC.³³

Whilst mechanisms to check the compatibility of legislative provisions with the constitutional, European or international (human rights) instruments are important features of civil rights protection system, one should nonetheless bear in mind that interference with civil rights often result not from legislative acts themselves, but executive or administrative measures, actions or omissions, as well as private actors' activities and acts (ie contracts, criminal acts, etc), for which a range of judicial remedies exist before ordinary or

²⁹ 20% if we remove cases dealing with foreigners' rights. See Dutheillet de Lamothe, above n 20, p. 8.

³⁰ Ordinance for the organic law on the *Conseil Constitutionnel*, Article 23-2.

³¹ Cass., QPC 16 avr. 2010, *M. Abdeli et Melki*, n° 10-40002,

³² Decision No 2010-605 DC, 12 May 2010; CE 14 May 2010, *M. Senad Rujovic*

³³ Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* ECLI:EU:C:2010:363.

administrative courts. For violations of civil rights which originate in the activities of executive or administrative authorities, remedies are normally provided through the administrative court system.³⁴

Administrative justice

France has an extensive and developed system of administrative courts. From a system originally designed to support administrative activities, the administrative justice system has gradually turned into a more sophisticated and effective apparatus for the protection of fundamental rights of citizens, against abuse by public authorities or private persons in charge of public services.

The administrative justice system

The administrative court system is not mentioned in the Constitution. However, the new Article 61-1 on the QPC acknowledges the *Conseil d'Etat* as the supreme administrative court.

Administrative courts deal with disputes related to the relationship between public authorities, or between natural and legal persons and public authorities,³⁵ whilst ordinary courts are competent over the private management of public services (eg private law contracts), as well as over public service of industrial and commercial nature. In case of disagreement as to whether administrative or judicial courts are competent to hear a particular case, one can refer the matter to a special jurisdiction, the *Tribunal des Conflits*, which will make the determination. Cases handled by administrative courts concerns mainly foreigners rights, public service, tax matters, urban development, and housing. Administrative courts can annul illegal measures, order the administration to adopt certain acts (injunctions, mandatory orders), impose particular measures, condemn the administration to pay damages, or impose fines.

³⁴ This section is based on Fombeur, P., 'Les magistrats et les juges : le juge administratif,' *Revue de Droit Henri Capitant*, No 4, 30 June 2012, available at <http://www.henricapitantlawreview.fr/article.php?id=349>.

³⁵ They do not interfere with the organisation of the ordinary court system (ie preparatory acts of judicial courts, execution of judgments), but are competent over the creation and structures of courts, and magistrates status, for example.

There are forty-two first instances administrative courts (*tribunaux administratifs*) and eight administrative appeal courts (*cours administratives d'appel*), supplemented by specialised administrative courts, dealing with disciplinary actions for certain professions, social and economic matters, or asylum claims (eg *Cour nationale du droit d'asile*).³⁶ At the apex lies the *Conseil d'Etat*, acting as supreme administrative court. Note that in addition to its judicial functions, the *Conseil d'Etat* also performs an important governmental advisory role. The two functions are nonetheless organizationally separated, with a specialised litigation section (*section du contentieux*). In any given year, the first instance administrative courts hear close to 190000 cases, appeal courts around 28 000 and the *Conseil d'Etat* 10 000.³⁷

Administrative judges sitting in first instance and appeal administrative courts are recruited amongst the graduates of the prestigious National Administration School, the famous ENA (*Ecole Nationale d'Administration*), or in the more recent years, through a special competition. They may also come from the '*tour exterieur*' (i.e. civil servants with relevant work experience) or can be 'detached' from another administration (e.g. university professors, ordinary magistrates, etc.). The majority of administrative judges spend part of their professional career outside administrative courts (e.g. in state administration, EU or UN institutions, other courts, etc.).

Since 2012, administrative judges are considered as 'magistrates',³⁸ although not in the sense of Article 64 of the Constitution. Their status is regulated not by an organic law, but by legislative provisions codified in the Code of Administrative Justice and those regulating the public service. The legislation nonetheless guarantees the independence of administrative judges. They cannot be removed, or be requested for other public services. A number of incompatibilities aim at preserving their neutrality. Decisions on appointment and promotion are taken following advice from the High Council of Administrative Courts

³⁶The CNDA deals with more than 30000 asylum claims every year. http://english.conseil-etat.fr/content/download/32949/285568/version/1/file/bilan-JA-2013_GB.pdf

³⁷ See 'Judging', at <http://english.conseil-etat.fr/Judging>.

³⁸ Article L. 231-1 of the Code of Administrative Justice, as resulting from Law No 2012-347 of 12 March 2012 relating to the access to titularized employment and the improvement of employment conditions of contractual agents in the public service, the fight against discrimination and including various provisions relating to the public function.

(*Conseil supérieur des tribunaux administratifs et des cours administratives d'appel*), presided by the vice-president of the *Conseil d'Etat*, and which includes the administrative court chief inspector, the general secretary of the *Conseil d'Etat*, two high civil servants, five elected representative of administrative judges, and three qualified persons nominated by the *President de la République*, the President of the National Assembly, and the President of the Senate. There is a permanent inspection, which control administrative courts activities, and whose head is a member of the *Conseil d'Etat*.

As for the members of the *Conseil d'Etat*, their statutory status is close to that of ordinary civil servants (although they are not 'graded', they do not follow established career paths, and they have a *devoir de reserve*). Formally-speaking, they are not 'magistrates'. In practice however, they are never removed and their promotion is based on *ancienneté* (service years). Furthermore, the *Conseil d'Etat* is managed autonomously and internally, without external interference. All these factors contribute to its independence from political actors, which could be questioned based on its close functional connection to the government in its advisory capacity.

The procedure before administrative courts and relevant organizational aspects

For a long time, the procedure before the *Conseil d'Etat* was problematic from the point of view of the respect of adversarial principle.³⁹ Indeed, for historical reasons, the administration, which was to pursue the general interest, was in a privileged position, as it needed to be protected against individual interests. Like the Advocate General before the CJEU, the *commissaire du gouvernement* presented conclusions as to how the case should be decided, without the parties having the opportunity to comment on them. The ECtHR however did not criticize this feature, considering that the fact that lawyers for the parties could ask the *commissaire du gouvernement* for the general directions of his conclusions and that the parties could respond to it in a note to the deliberation, offered sufficient

³⁹See Letteron, R., *Libertés Publiques* (9th ed., Dalloz, 2012), 152-155

guarantees. However, it found issues with the participation of the *commissaire du gouvernement* in the deliberations (even if he or she does not vote).⁴⁰

These concerns led to a reform of the procedure before administrative courts. By a decree of 7 January 2009, the *rapporteur public* replaced the *commissaire du gouvernement*. At the hearing, the *rapporteur public* present all the questions raised by the case, and formulates, 'in all independence, his or her conclusions, which must be impartial, as to the factual circumstances of the case and applicable legal rules, as well as his or her opinion on the suitable solution, according to his or her own conscience'.⁴¹ Parties do not have access to all the conclusions of the *rapporteur public*, but must be informed of the direction of its conclusions and the grounds. Lawyers for the parties can present brief observations at the hearing which follows the conclusions of the *rapporteur*. It however took some time, and another condemnation by the ECtHR,⁴² for the *rapporteur* not to take part in deliberations. Since 2009, the *rapporteur* is excluded from the deliberations in all administrative courts, including the *Conseil d'Etat*. The ECtHR endorsed the reform.⁴³

The procedure is usually written, meaning that the parties must send written submissions and argumentation. However, with the development of emergency proceedings (*référé*), oral hearings are more frequent, and it is possible to bring new elements at the hearing.

Presidents preside the first instance administrative courts or one of its chambers, organise the work, chair the hearings and take charge of certain cases. The *conseillers* act as *rapporteurs*: they investigate cases allocated to them, and draft a proposal for a ruling. Cases are normally heard by three-member chambers, although an increasing number of cases are nowadays handled by a single judge, sometimes without an opinion from the *rapporteur public*, depending on the importance and urgency of the case, or through an order, issued without a hearing, (e.g. in similar cases).

⁴⁰ECtHR, 7 June 2001, *Kress v France*, Appl. 39594/98.

⁴¹CE, 29 July 1998, *Mme Esclatine*, No 179635.

⁴²ECtHR, GC, 12 April 2006 *Martinie v France*, App. 58675/00.

⁴³ECtHR 15 July 2009 *Union fédérale Que Choisir de Cote d'Or*, App. 39699/3.

The appeal administrative courts hear appeals against first instance administrative courts, except for minor disputes for which no appeal exist, and which can only be challenged in *cassation* (review of points of law). Their operation is similar to first instance administrative courts, expect that more decisions are taken in a collegial manner, under closer supervision from the chamber president. Logically, they deal with few emergency proceedings.

The *Conseil d'Etat* act as a cassation court for administrative litigation, and handles in first and last resort important cases, in particular challenges against decrees, ministerial regulatory acts, the decisions of national agencies (AAI), and regional and European elections. Indeed, the right to appeal is not a constitutional principle, neither a general principle of law.⁴⁴

Auditeurs and *maîtres des requêtes* act as *rapporteur* or *rapporteur public* in the litigation section, whilst *conseillers d'Etat* may preside a sub-section or act as *assesseur*, examining the dossier (triple scrutiny system: *rapporteur*, *assesseur*, *rapporteur public*). Cases are normally heard by three or nine- members chambers, according to their difficulty (save for *référés* and cases which can be handled through simple order). Very important cases are judged in a 'plenary' which can include up to seventeen members. In its 2013 report, available in English, the *Conseil d'Etat* highlights a number of decisions which concerns the protection of civil rights.

In addition to their judicial functions, administrative courts may also give opinions on legal issues which are submitted to them by the *préfets* (i.e local state representatives), but only in matters unrelated to pending cases. The *Conseil d'Etat* performs an important advisory role. Indeed, the Constitution provides that its delivers an opinion on all legislative proposals, as well as proposed ordinances, before adoption in the Council of Ministers. Since 2009, the Presidents of the parliamentary chambers may also request its opinion on legislative proposals which emanate from the parliament.⁴⁵ Legislative acts often require its consultation for the adoption of regulatory measures (decrees).

⁴⁴CE, 17 December 2003, *Meyet*.

⁴⁵ Constitutional Law N° 2008-724 du 23 July 2008, above n2.

This advisory function is exercised by *maîtres des requêtes* and *conseillers d'Etat* who are allocated to one of the subject-specific sections. They analyse the planned measure, identifies legal problems, and prepare corrections. The opinion consists in an 'alternative proposal, which is debated by the section's members in front of representatives from the administration. More than a thousand measures are subject to this scrutiny every year (130 bills, 800 decrees and 300 non-statutory texts).⁴⁶ Members who contributed to an opinion cannot sit on a case involving the same measure.

With regard to civil rights, in 2013, the *Conseil d'Etat* was asked by the President of the Senate to examine a bill on euthanasia or/and assisted suicide. It advised the government to clarify some of its provisions, in order to comply with constitutional provisions and Articles 2 and 8 ECHR which require that offenses and penalties must be defined by law. Upon the Rights Defender's request, it also critically examined the existing legal framework (including international, ECHR and EU law) regarding religious neutrality in public services and found it adequate (see below, 2.2). It also suggested a number of amendment to a housing bill, to prevent it from interfering unduly with freedom of enterprise, and the right to protection of privacy. When reviewing the gender equality bill, it asked for the removal of a sanction against offenders, for it felt it would interfere disproportionately with freedom of enterprise and contractual freedom.⁴⁷

Members of the *Conseil d'Etat* may also contribute to studies commissioned by the government on the *Conseil d'Etat* itself. Finally, members of administrative courts and the *Conseil d'Etat* may participate in special administrative committees. They sometimes teach in universities. They may also provide legal advice, or chair reflection or drafting committees.

The *Conseil d'Etat* also ensures the management of all first instance and appeal administrative courts, as well as certain specialized ones, such as the National Court of Asylum. It is assisted by an independent consultative body, the High Council of Administrative Tribunals and Administrative Courts of Appeal. This body, chaired by the

⁴⁶ See *Conseil d'Etat* website, at <http://english.conseil-etat.fr/>

⁴⁷ See *Conseil d'Etat* annual report, http://english.conseil-etat.fr/content/download/32949/285568/version/1/file/bilan-JA-2013_GB.pdf

Vice-President of the Council of State and made up of members of the *Conseil d'État*, senior directors of the central administration, elected representatives of administrative judges and three qualified persons, decides on the career management of administrative judges, as well as draft statutes or decrees that fall within the jurisdiction of the *Conseil d'État*. This is considered to be a 'guarantee for the independence of administrative judges who already have security of tenure'.⁴⁸ The *Conseil d'État* also oversees the budget of the administrative tribunals and courts of appeal (eg expenditure for real estate investment purposes, IT, etc).

At first sight, the combination of advisory and judicial function within a single organ, and the professional mobility between administrative courts and state administration, could appear problematic, from the point of view of judicial independence. However, the internal functional separation and visible independence of the positions adopted by the *Conseil d'État* have pacified concerns, including those of the Strasbourg court.⁴⁹ Moreover, the *Conseil d'État's* participation in governmental and administrative action gives it a unique understanding of the functioning of public authorities, an insight which may turn useful in reconciling the general interest and fundamental rights guarantees.⁵⁰ In fact, in its advisory function, the *Conseil d'État* not only check the compatibility of planned measures with higher-ranking legal norms, but also their 'applicability' (clarity, accessibility, resource considerations, etc.).⁵¹

We now turn the main judicial actions available in administrative courts for the protection of civil rights.

(Administrative) judicial review – the recours pour excès de pouvoir

Natural and legal persons may seek the annulment of acts adopted by public authorities or private persons operating a public services which unduly interfere with fundamental rights, including civil rights, through a judicial review mechanism, the *recours pour excès de pouvoir* (literally 'ultra vires suit'). Common referred to by its acronym (REP), it goes beyond a review

⁴⁸ See *Conseil d'État* website, 'Managing' <http://english.conseil-etat.fr/Managing>

⁴⁹ ECtHR 15 July 2009 *Union fédérale Que Choisir de Cote d'Or*, App. 39699/3.

⁵⁰ See Fombeur above n 34.

⁵¹ http://english.conseil-etat.fr/content/download/32949/285568/version/1/file/bilan-JA-2013_GB.pdf

of competence, and extends to a review of the overall legality of an administrative act. This remedy is not based on any constitutional or legislative provisions, but results from the case law of the *Conseil d'Etat*.⁵² Its existence was nonetheless 'constitutionalised' by the *Conseil Constitutionnel*, with the consequence that it cannot be excluded through legislative provisions.⁵³

It is subject to a number of admissibility conditions (*conditions de recevabilité*). First, the applicant must have legal capacity. However, this is understood liberally. For example, non-recognized associations or mentally incapacitated persons may bring a REP to ensure the administration's respect of the law and fundamental freedoms. There are no nationality conditions.⁵⁴ Second, the applicant must show an interest to act (*intérêt à agir*), which the *Conseil d'Etat* interprets in a liberal manner. This interest may be direct but also in some cases indirect, material or moral, individual or collective. For example, tax-payers have an interest in challenging local authorities decision which have implications for its budget,⁵⁵ and users of public services have an interest in contesting measures adopted by those in charge of the service. Moreover, natural persons of private law, such as NGOs (*associations*), have the right to challenge regulatory acts which undermines the material or moral collective interests which they defend or represent.⁵⁶ For example, users organizations have a interest to act against decisions related to the organization of a public service,⁵⁷ trade unions may challenge measures which concern only some of their members (eg nomination, or promotion) if these undermine the interests which the trade union defends, environmental associations can challenge urban planning decisions, etc. This approach enables civil society organizations to challenge in court administrative action, which impinges on civil liberties, even when the (potential) victims do not wish or have the resources to bring legal actions.

⁵² CE, 17 February 1950, *Dame Lamotte* .

⁵³ Decision No 86- 224 DC of 23 January 1987.

⁵⁴ CE, Ass., 15 October 1993, *Royaume-Uni*.

⁵⁵ CE, 29 March 1901, *Casanova*.

⁵⁶ CE, 28 December 1906, *Syndicat des patrons-coiffeurs de Limoges*.

⁵⁷ CE, 21 December 1906, *Syndicat des propriétaires et contribuables du quartier de Croix de Seguey-Tivoli*.

Third, the action must be brought against an adverse binding decision (*décision faisant grief*). If no such decision exists, one must bring administrative proceedings (*recours administratif*) in order to obtain such decision. Until recently, the silence of the administration for more than two months amounted to a refusal of the request (ie negative decision).⁵⁸ However, a recent law adopted in 2013 reverses this principle, and provides that save for a few exceptions, silence of the administration means approval of the request.⁵⁹ The notion of decision excludes, in principle, internal measures (eg school, prison or army internal regulations). This exception was quite problematic in the light of Article 6 ECHR, as these can have serious repercussions on the rights and freedoms of individuals. For example, the placement of a detainee in a high security section was considered an internal measure which could not be challenged.⁶⁰ Eventually, the *Conseil d'Etat*, under the influence of the case law of the ECHR, started to admit that internal measures which seriously undermine fundamental freedoms could be challenged through a REP.⁶¹ Circulars are also, in principle, not considered as *decision faisant grief* and thus not reviewable through a REP. In the past, the *Conseil d'Etat* sought to distinguish between interpretative circulars and regulatory ones, considering only the latest as reviewable, to the extent that they added to existing norms rather than only interpreting them.⁶² However, this case law was confusing and to some extent illogical, which led the *Conseil d'Etat* to change its approach and to focus on the effect, rather than the nature, of circulars. It now accepts challenges against circulars which impose obligations (*imperatives*).⁶³ As for *directives* (French instruments guiding administrative discretion), they do not formally impose obligations and thus cannot be challenged through a REP (but they can be contested through a plea of illegality mechanism). Contracts cannot be challenged through a REP, except in the case of acts can be detached from a contract (such as the decision to sign a contract, acts related to the execution or

⁵⁸ Law No 2000-312 of 12 April 2000 DCRA.

⁵⁹ Law No 2013/1005 of 12 November 2013 enabling the government to facilitate the relations between the administration and citizens.

⁶⁰ CE, 27 January 1984, *Caillol*.

⁶¹ CE, 17 February 1995, *Marie*; CE 17 February 1995, *Hardouin* » 17 février 1995); CE 14 December 2007 *Garde des sceaux c/ Boussovar*, CE 14 December 2007 *Planchenault*; CE 14 December 2007 *Payet*.

⁶² CE, 29 January 1954, *Institution Notre Dame du Kreisker*.

⁶³ CE, 18 December 2002, *Mme Duvignères*.

termination of the contract, etc).⁶⁴ Finally, a REP cannot be brought against *actes de government*. These are measures related to the relationship between constitutional powers⁶⁵ or external relation measures.⁶⁶ However, under the influence of the ECHR, the scope of these acts of government which are immune to judicial review is increasingly reducing, as the *Conseil d'Etat* relies on the technique of *actes détachables du gouvernement* in order to subject such measures to judicial control.⁶⁷ It will, for example, now control extradition or expulsion decisions.⁶⁸

The REP is a default procedure, which can only be used in case there is no other remedy that can achieve the same result. It must be brought within two months from the notification (for individual measure) or publication (for regulatory measures). In some case, one must bring an administrative review request against the decision, before being able to challenge it in court.⁶⁹ The legal action does not have suspensive effects.

Like the action for annulment under EU law, for which it served as a model, the REP can be activated based on four grounds. Two of them relate to 'external legality' (lack of

⁶⁴ CE, 4 August 1905, *Martin*.

⁶⁵ Such as the action or refusal to propose a bill to parliament (CE, sect., 18 July 1930, *Rouché*, CE ass., 19 January 1934, *Compagnie marseillaise de navigation à vapeur Fraissinet*); the refusal by the President to promulgate a law (CE, 29 November 1968, *Tallagrand*); the decision to promulgate a law (CE sect., 3 November 1933, *Desreumeaux*); the refusal to make a proposal for a constitutional amendment (CE, 26 February 1992, *Allain*); the decision to submit a bill to *référéndum* (CE ass., 19 October 1962, *Brocas*, but the *Conseil Constitutionnel* admitted its competence to control it, Decision 2000/2 REF, 25 July 2000, *Hauchemaille*); the decision to dissolve the national assembly (CE, 20 février 1989, *Allain*); the refusal to defer a law to the *Conseil Constitutionnel*, (CE ord., 7 November 2001, *Tabaka*,) etc

⁶⁶ Such as the protection of French persons and goods abroad (CE, 2 mars 1966, *Dame Cramence*); the refusal to submit a dispute to the International Court of Justice (CE, 9 June 1952, *Gény*); the order to disrupt a foreign radio broadcasting (TC, 2 February 1950, *Radiodiffusion française*); the creation of a safety zone in international waters during nuclear tests (CE, Ass., 11 July 1975, *Paris de Bollardière*); the decision to restart nuclear testing before the conclusions of an international agreement prohibiting such testing (CE, ass., 29 September 1995, *Association Greenpeace France*), the decision to send soldiers in former Yugoslavia (CE, 5 July 2000, *Mégré et Mekhantar*), the decision not to publish a treaty (CE, 4 November 1970, *de Malglaive*); the vote of a French minister in the Council of the EU (CE, Ass., 23 November 1984, *Association 'Les Verts'*); the decision to suspend the implementation of a treaty (CE, Ass., 18 December 1992, *Préfet de la Gironde c. Mahmedi*); the decision of the President to authorize English and US plan to fly over France to attack Irak (CE, 10 April 2003, *Comité contre la guerre en Irak*); the proposal of a candidate for the position of judge at the International Criminal Court (CE, Sect., 28 March 2014, *Groupe français de la Cour permanente d'arbitrage*)

⁶⁷ CE, 5 February 1926, *Dame Caraco*, CE sect., 22 December 1978, *Vo Thanh Nghia*.

⁶⁸ CE ass., 28 May 1937, *Decerf*; CE ass., 15 October 1993, *Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et gouverneur de la colonie royale de Hong Kong*.

⁶⁹ Eg civil servants must always first bring administrative review proceedings.

competence, violation of formal or procedural requirements), the other two to 'internal legality' (violation of a legal rule, which include legislative and constitutional norms and international agreements provisions and covers factual or legal mistakes; and abuse of power). Certain grounds are considered '*d'ordre public*', meaning that they should be raised by the judge, even if not invoked by the parties.

The degree of scrutiny (*intensité du contrôle*) exercised by the judge varies. It ranges from infra-minimum control, which examines only the material exactitude of the facts, to minimum control, which sanctions only manifest error, to normal control, which checks the legal qualification of the facts, and maximum control, which engages with proportionality review (*adequation en act et but*).

The effect of annulment is retroactive; the act is considered as having never existed.⁷⁰ The REP is a cheap and accessible remedy. It can be triggered by a simple letter, indicating the name of the applicants, his or her contact details, the contested act and the reasons for which annulment is requested. Besides, one does not need to be assisted by a lawyer, except in appeal courts and before the *Conseil d'Etat*.

The *Conseil d'Etat* has ruled on a number of measures which interfered with fundamental rights; however, it often found these measures justified. For example, it considered that the practice of following athletes in and around in order to detect doping, although it undermined the right to privacy and family life, was nonetheless sufficiently justified by public interests, in particular the health of athletes, and to ensure the fairness in competitive sports.⁷¹ It found that the anonymity of gamete donors did not violate the right to respect for private and family life.⁷²

Recours de pleine juridiction

The *recours de pleine juridiction* concerns administrative litigation in which the administrative judge powers go well beyond the invalidation of an administrative act. In such

⁷⁰The administrative judge can nonetheless modulate the effect in time of its decision, eg Conseil d'État, 11 May 2004, *Association AC !*; CE, 11 July 2008, No 298779.

⁷¹ CE, 18 December 2013, Mrs. L., No 364839

⁷² CE, opinion, 13 June 2013, M. M., No 362981.

proceedings, the administrative judge can modify the act or impose a particular measure, or even condemn administrative authorities to pay compensation for damages. The administrative judge tends to impose stricter admissibility requirements in such proceedings, and applicants are normally expected to have legal representation.

The scope of such proceedings is expanding, under the influence of the ECHR. For example, the *Conseil d'État* considered that when deciding on a sanction imposed by the administration on an individual, the administrative judge should always act as a '*juge du plein contentieux*'.⁷³

Courts may condemn the administration to pay damages for violation of civil rights. For example, the *Conseil d'État* considered the government could be held liable for conditions of detention which constitute an offence to human dignity (for example, where the cell in which a disabled person is kept is not suitably equipped).⁷⁴

However, too often, decisions by administrative judges finding that public administrations or private actors in charge of public services violate fundamental rights come too late to be effective (usually more than a year after the start of the proceedings); harm has been done which may not easily be undone or compensated.⁷⁵ Until 2000, temporary relief procedures could not effectively prevent the administration from interfering in an irreversible and grave manner with fundamental rights of citizens.

Interim and emergency procedures

Prior to 2000, when faced with serious administrative interference with individuals' fundamental rights which demanded urgent action, the administrative judge had limited means.

In the 1970s-1980s, new emergency and interim relief procedures were established to improve the effectiveness of judicial control by administrative courts, notably the *déféré-*

⁷³ CE, 16 February 2009, *Société Atom*.

⁷⁴ CE, Sec., 6 December 2013, M. T., No 363290

⁷⁵ Rivero, J. 'Le Huron au Palais Royal, ou réflexions naïves sur le recours pour excès de pouvoir' D. 1962, chron., pp.37-40; 38-39.

liberté, special procedures in the context of foreigners' rights, and interim reliefs procedures.

The *déféré liberté*, created by the Law of 2 March 1982, enabled the *préfet* (local State representative) to challenge decisions by local authorities which were 'capable of undermining the exercise of a public or individual freedom'. The case should be heard within 48 hours by the President of the administrative court, and could be appealed before the president of the litigation section.⁷⁶The main problem was that it could not be initiated by individuals themselves.

There were also special procedures available to foreigners seeking to challenge deportation orders. When subject to an order to leave the territory, individuals could bring a suspensive action before the administrative courts, which had to decide within three months, and 72 hours if the foreigners was detained.

The *sursis à execution* (now called *référé-suspension*)⁷⁷ was an interim relief procedure which enabled the administrative judge to suspend the enforcement of a measure, whilst a decision was taken on the merits. However, it could only be used against 'positive decisions' and only when there were serious doubts as to the legality of the measure and the consequences were not easily reparable (the burden of proof was placed on the applicant). The decision could be reviewed by the *Conseil d'Etat*. The procedure was however long and cumbersome (more than six months).⁷⁸

The alternative, the regular *référé* (now called *référé-conservatoire*)⁷⁹ allowed the administrative judge to take any 'useful measures' (*mesures utiles*) prior to a judicial decision, using a simplified procedure. However, because it should be without prejudice on the merits, and should not interfere with the enforcement of any administration decisions, it

⁷⁶ See for example, the cases concerning the children's curfew, imposed by local authorities (CE, 2 August 2001, *préfet de Vaucluse* et 10 août 2001, *commune d'Yerres*).

⁷⁷ Article L 521-1 Code de la Justice Administrative .

⁷⁸ Le Bot, O. *La protection des libertés fondamentales par la protection du référé-liberté – Etudes de l'Article L. 521-2 du Code de la Justice Administrative* (LGDJ, 2007), 12-13.

⁷⁹ Article L.521-3 Code de la Justice Administrative .

did not allow the administrative judge to issue injunctions to protect individual against administrative acts or actions which seriously undermined fundamental freedoms.⁸⁰

In case of grave interference with property or fundamental freedoms, however, individuals could turn to judicial courts, through the *voie de fait* doctrine (see below, section on actions before ordinary courts). Indeed, these could act faster and take a broader range of measures against public authorities. Civil courts accepted many such requests, even in situations which did not justify it,⁸¹ which led to their jurisdiction being challenged before the *Tribunal des Conflits*, which adopted a strict approach and, in most cases, found against the attribution of competence to the judicial courts.⁸²

In the late 1990s a controversial decision by a judicial court assuming jurisdiction over an administrative order requiring illegal migrants to remain on board a cargo ship in a French port,⁸³ contested by a *Tribunal des Conflits* ruling on competence,⁸⁴ triggered a reform process, guided by the *Conseil d'Etat*, which led to the creation of a new exceptional emergency procedure before the administrative judge for the protection of fundamental freedoms, the *référé-liberté* (also called *référé-injonction*).⁸⁵ Following a request in that sense justified by *urgency*, the administrative judge, acting as the 'emergency judge' (*juge des référés*) can order *any measure* necessary to the *safeguard of a fundamental freedom* undermined by acts taken by public persons or private persons managing a public service in the course of their functions, in a *serious and manifestly illegal* manner. The administrative judge has forty-eight hours to decide. The *Conseil d'Etat* handles more than 280 *référé* cases

⁸⁰Le Bot, above n 78, 13-14.

⁸¹For a critical assessment, see Chapus, R. *Droit administrative général*, (t.1, 14th ed., Montchrestien, 2000) No1087; Plouvin, J.-Y. 'Au secours, le juge civil des référés arrive! (ou de la réduction du juge administrative par le juge judiciaire des référés)', GP 4 March 1989, 1, 105.

⁸²Le Bot, above n 78, 17-18.

⁸³TGI Paris, ord. 9 Aug 1996, GP 1997, 2, pp. 395-396.

⁸⁴TC, 12 May 1997, *Préfet de Police de Paris c/ Tribunal de Grande Instance de Paris* (the Honfleur Moroccans case).

⁸⁵Article L-521-2, as resulting from Law No 2000-597 of 30 June 2000 relating to the 'référé' (extraordinary and urgent proceedings) before administrative courts, JO 1 July 2000, p. 9948.

per year,⁸⁶ whilst administrative courts of first instance are dealing with well above a thousand such requests every year.⁸⁷

In addition to the emergency situation, which renders safeguard measures necessary, the other important condition for triggering this procedure is that the interference with a fundamental freedom must be serious and manifestly illegal. The notion of 'fundamental freedom' is however not defined and does not correspond to any established category in French law. It has thus been up to the administrative judge to define it.⁸⁸ In an information note aimed at citizens, the *Conseil d'Etat* defines 'fundamental freedoms' as being 'freedoms which are *essential and particularly protected by the Constitution or the law*'. It then cites 'freedom of movement, freedom of conscience and religion, freedom of the press, freedom of assembly (reunion), freedom of association, trade union freedom, the constitutional right of asylum, the right to seek refugee status'.⁸⁹ Although the qualification of fundamental freedom for the purpose of initiating a *référé-liberté* is largely made by reference to constitutional norms,⁹⁰ it can also be based on legislative measures,⁹¹ the ECHR⁹² and also, as recently established, EU law.⁹³ The *Conseil d'Etat* specifies that a serious and manifestly illegal interference may result from a material fact by administrative authorities (e.g. works), as well as administrative silence and inaction.⁹⁴ The illegal nature of the act should be manifest, that is, obvious. It is worth noting that the procedure does not require legal assistance, although it is advisable to seek help from a specialised lawyer.

⁸⁶See annual report 2014, p. 33. <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/154000184.pdf>.

⁸⁷Le Bot, above n 78, 622.

⁸⁸Le Bot, above n 78, 84.

⁸⁹See *Conseil d'Etat*, 'Une Définition du référé-liberté', available at file:///C:/Documents%20and%20Settings/Administrator/Local%20Settings/Temp/_liberte.shtml

⁹⁰Le Bot, above n 78.

⁹¹CE, 10 February 2012, *Karamoko F.*

⁹²CE, 22 December 2012, *Section française de l'Observatoire international des prisons et autres*.

⁹³See CE, ord., 9 December 2014, Mme A., No 386029. In this case, the fundamental freedom was that of EU citizen freedom of movement under the EU Treaty and the 2004 Citizens Directive. The CE however made no reference to the Charter.

⁹⁴See *Conseil d'Etat*, above n 89.

The administrative judge, acting in *référé-liberté* proceedings, can make use of a large range of power. She can establish the violation, order its termination and issue injunction to the administration.

The performance of administrative courts in matters of fundamental freedom protection has thus improved with the introduction of the *référé-liberté* procedure, which can be used to enforce EU derived fundamental freedoms, as well as those included in international, ECHR or domestic norms. It has been particularly useful to improve the conditions of detentions of prisoners,⁹⁵ with the *Conseil d'Etat* instructing the administration to proceed to cleaning, rat-killing and other types of hygienic measures,⁹⁶ or administrative courts ordering prison administrators to stop carrying out systematic full body searches for access to the parlor without taking into account the personality, behaviour or number of visits of the detainee.⁹⁷ However, there has been cause for concern regarding the procedure's capacity to help vulnerable migrants (ie introduction of airport transit visa to prevent the exile of Syrian refugees,⁹⁸ or the reduction of the right to material conditions of reception for asylum-seekers)⁹⁹ or other populations in vulnerable situation (for example, by refusing to consider the right to health as a fundamental freedom for the purpose of these proceedings).¹⁰⁰

Remedies before ordinary courts ('juridictions judiciaires')

⁹⁵Slama, S. 'Constat d'insalubrité des Baumettes : de la justiciabilité à l'effectivité du contrôle sur les conditions de détention par le juge des référés-liberté' in *Lettre 'Actualités Droits-Libertés' du CREDOF*, 27 December 2012.

⁹⁶CE, réf., 22 December 2012, *Section française de l'observatoire international des prisons et autres*, N° 364584, 364620, 364621, 364647.

⁹⁷CE, réf., 6 June 2013, *French section of the International Prisons Observatory*, No 368816 and No 368875; TA Marseille, réf., 3 November 2011, No 116682; TA Strasbourg, 15 December 2011, No 1105247; TA Rennes, 14 December 2011, No 1104539; TA Strasbourg, 12 January 2012, No 1105247 ; TA Poitiers, 24 January 2012, No 1102847 ; TA Marseille, 13 March 2012, No 1106683; TA Lyon, 14 March 2012, No 1201254 ; TA Lyon, 2 May 2012, No 1202500; TA Nancy, 25 October 2012, No 1202132 ; TA de Dijon, 12 November 2012, No 1202213 ; TA Rennes, 17 October 2012, No 1104538 ; TA de Rennes, 21 November 2012, No 1204172 ; TA Dijon, 2 December 2012, No 1202748 ; TA Grenoble, 3 May 2013, *M. Adrien K. c/ Ministre de la Justice*, No 1302140 ; TA Lyon, 2 May 2013, *M. Pierre T. c/ Ministère de la Justice*, No 1202500 . For a commentary, see Serge Slama, 'Encadrement jurisprudentiel du rapport d'humiliation intégral des fouilles à nu systématiques' in *Lettre 'Actualités Droits-Libertés' du CREDOF*, 20 June 2013.

⁹⁸CE, réf., 15 February 2013, *ANAFE et Gisti*, Req. n° 365709

⁹⁹CE, ord., 19 November 2010, *Ministre de l'intérieur, de l'outre-mer, des collectivités territoriales et de l'immigration c/ Panokheel*, No 344286.

¹⁰⁰CE, ord., 8 September 2005, *Garde des Sceaux c/ M. Bunel*, No 284803.

France has a developed multi-tiered ordinary court system (*juridictions judiciaires*), with civil and criminal divisions, as well as number of specialized courts.¹⁰¹ Ordinary courts are made up of professional judges (*magistrats*). Those of the *magistrature du siege* or *assise* decide on cases, whilst those of the *Parquet*, or *magistrature debout* (public prosecution) represent the general interests and bring and intervene in cases.

At first instance, there are general regional courts, called *Tribunaux de Grande Instance* (TGI),¹⁰² as well as general district courts, called *Tribunaux d'instance*, and a range of specialized tribunals.

Regional first instance courts

The ancestor of the *Tribunal de Grande Instance* was created just after the 1789 revolution, by the Law of 16 and 24 August 1790. French judicial organization was reformed in 1958, 1983, 1994 and 2009.

The *Tribunal de Grande Instance* can have a number of chambers, and should have at least one civil one (*chambre civile*) and one criminal one (called the *tribunal correctionnel*). These may be further divided into sections. Moreover, in addition to the chambers, there are specialized judges such as the children judge (*juge des affaires juveniles*),¹⁰³ the judge for the enforcement of sentences (*juge de l'application des peines*, known as JAP),¹⁰⁴ the investigating judge (*juge d'instruction*),¹⁰⁵ the judge for family affairs (*juge aux affaires*

¹⁰¹For an overview, see https://e-justice.europa.eu/content_ordinary_courts-18-fr-en.do?member=1

¹⁰²Until 2009, TGI were competent in first instance, as well as in some cases in second instance, before all cases were transferred to dedicated appeal courts.

¹⁰³He or she can take measures to protect minors who are under threat, as well as decide in cases in which minors are accused of minor and intermediate criminal offences (*contraventions, délits*). In the second capacity, he or she acts together with two assessors (*assesseurs*) who are not professional judges.

¹⁰⁴He or she decide on the implementation of a sentence involving a deprivation of liberty. For example, he or she can order measures such as outside placement, conditional release, or release under electronic surveillance. He or she also supervises compliance with a sentence, such as suspended sentence on probation (*emprisonnement avec sursis et mise à l'épreuve*), community services (*travail d'intérêt général*), or social and judicial supervision (*suivi socio-judiciaire*).

¹⁰⁵In a criminal investigation, he or she must take all steps likely to lead to the truth, by gathering evidence. When he or she considers the investigation complete, he or she can either issue a discharge order (*ordonnance de non-lieu*), or refer the suspect for trial by the criminal court or the assize court. Cases are referred to them for investigation by State Prosecutor, or by an injured party who lodges a complaint alleging a criminal offence and requesting to be considered as a civil party to the criminal proceedings (*constitution de partie civile*). They cannot take a case of their own initiative.

familiales), the expropriation judge (*juge de l'expropriation*), the executing judge (*juge de l'exécution*), in charge of the implementation of judicial decisions, the 'ordering' judge (*juge de la mise en état*), assisting in restoring a situation as it existed prior to an illegal act, the judge for freedom and detention (*juge des libertés et de la détention*) created in 2000, and the delegate judge for the victims (*juge délégué aux victimes*) created in 2008.

The TGI members are the president, the vice-presidents, the ordinary judges, the State Prosecutor (*procureur de la République*), the Deputy State Prosecutors (*vice-procureurs*) and Assistant State Prosecutors (*substituts du Procureur*). The president has administrative as well as judicial functions. In particular, he or she can take emergency temporary measures for the protection of fundamental freedoms (*ordonnances de référé*), issue order upon request, without an adversarial procedure (e.g. to correct a mistake on civil status documents), or can act as a single executing judge. In addition to magistrates, the TGI personnel include registrars (*greffiers*), who draft and certify the authenticity of judicial decisions. They are assisted by judicial assistants (*assistants de justice*), social workers, and policy forces.

Civil decisions are made by three member-chambers, or by a single judge, usually in a public hearing. The same goes for the criminal chamber, except when it decides in *huis-clos* (non-public).

There are 173 *Tribunal de Grande Instance*. Their civil chamber(s) act as the default common law court. They have general competence over disputes in which the claim is above 10 000 EUR (those whose claim are below 10 000 EUR are handled by the *Tribunal d'Instance*, see below) or those which do not have financial value. Moreover, it has exclusive jurisdiction over certain matters, irrespective of the value, such as well as those related to nationality; family law; civil status; successions; real estate; intellectual property; certain tort claims; debt protection, court supervised recovery and judicial liquidation; accidents and occupational illnesses; various taxes and fees (ie registration fees, land registry notice fees, stamp duties, etc); exequatur, commercial property leases; personal insurance; disciplinary actions against ministerial and civil officers; falsification claims; defamation or insult. One

must be represented by a lawyer, except, notably, in case of *référé*. Their criminal section, called *Tribunal Correctionnel*, deal with felonies or indictable offences (*délits*),¹⁰⁶ offences that carry a sentence of no more than ten years' imprisonment or a fine of no less than €3 750.

District first instance courts

There are 297 district court (*tribunaux d'instance*), which hear disputes in first instance between private parties where the claim is between 4 000 et 10 000 EUR, and irrespective of the value of the claim, disputes related to residential lease, consumer credit, debt, some political and professional election disputes, the nomination of personal representatives. These courts also have administrative competences (eg issuance of nationality certificates). Their criminal section, called the *tribunal de police*, handles minor offences and misdemeanors (*contraventions de la cinquième classe*). One of its judge decides on guardianship matters (*Juge des Tutelles*). Cases are decided by single judge. The procedure is oral, and does not require to be represented by a lawyer. The judge should encourage conciliation, and even appoint a mediator.

Local first instance courts

The *juge de proximité* (local judge) handles small claims (civil disputes between private parties where the claim is below 4000 EUR), as well as minor offences and petty misdemeanors (contravention 1-4 classes). The State Prosecution may be represented by a police superintendent (*commissaire de police*).

Special first instance courts

The *cour d'assises* tries the most serious crimes, subject to at least ten year jail sentence. There is one in each *département*, but it is not necessary permanent. It comprises three career judges — a president and two assessors who are ordinary judges at the court of appeal or judges at the regional court for the *département* — and a jury of six citizens chosen by lot. When it deals with serious crimes committed by minors, it is called the

¹⁰⁶The Paris TGI has a special section on financial and economic crime (*pole financier*).

juvenile assize court (*cour d'assises des mineurs*). In that case the two assessors are judges of the juvenile courts. Some crimes under terrorism legislation or military law, or related to drug trafficking, are tried by an assize court composed of judges only.

The *tribunaux de commerce* (commercial courts) deal with matters related to contracts between traders, or between credit institutions, or between them, and disputes regarding companies or commercial transactions between. The commercial court also deals with bankruptcy and other similar types of proceedings. The judges of the commercial courts are not career judges but traders who have been elected for mandates of two or four years by an electoral college made up of current and former judges of the commercial courts and special delegates (*délégués consulaires*). There are 134 commercial courts.

Employment tribunals, called *conseils de prud'hommes*, decide on individual disputes between employers and employees in connection with an employment or apprenticeship contract. They are made up of elected judges, half representing employers and half representing employees. There are one or more employment tribunals in each *département*, and at least one in the area of jurisdiction of each regional court. There are 210 employment tribunals.

Social security tribunals, the *tribunaux des affaires de la sécurité sociales*, rule on disputes between social security funds and users (eg payment of benefits). There are 115 social security tribunals.

Disability tribunals, the *tribunaux du contentieux de l'incapacité*, decide on disputes regarding invalidity or incapacity to work of a person covered by social insurance.

Agricultural land tribunals (*tribunaux paritaires des baux ruraux*) deal with matters concerning between landlords and tenants of agricultural land nominations by a committee for the preparation of electoral lists.

Second instance (appeal) courts

The courts of appeal (*cours d'appel*) hear appeals on points of facts and law against judgments already given by the courts of first instance. They are composed of professional

judges only. Each court has specialised divisions for civil, social, commercial or criminal cases, each composed of three professional judges. Appeals against judgments of an assize court are heard by the *cours d'assise d'appel*. Appeals against judgments in disability cases are heard by the National Court for Disability and Rates of Occupational Accident Insurance.

The Supreme court

The *Cour de cassation* is the supreme court in the ordinary court structure. It can only address points of law, not facts. It ensures the uniformity and consistency of the of case-law and checks legal compliance.

A judgment of the Court of Cassation on a review request (*pourvoi en cassation*) brought by a party who is the subject of a court judgment, or by the State Counsel's Office.

The *Cour de Cassation* either quashes the lower court ruling, and usually sends it back for retrial or more exceptionally decide the case itself, or dismisses the appeal.

The Court of Cassation is divided into divisions (*chambres*): three civil divisions, one commercial division, one social division and one criminal division. It may also sit as a joint bench (*chambre mixte*) or as a full court (*assemblée plénière*).

Role and competence of civil courts in protecting fundamental freedoms.

Civil courts are competent to protect general freedoms in *relations between private persons*, subject to private law. They may also hear cases against *public servants*, who have committed a personal fault which is without connection with their function, and deal with cases related to the private management of public service, or public services of industrial and commercial character. Moreover, under Article 66 of the Constitution and Article 136 of the Penal Code, they are competent to protect *individual freedom and property*, including *against public authorities*. Civil courts gave an extensive interpretation to the notion of individual freedom, to incorporate a number of other freedoms.¹⁰⁷ This extension of the scope of control of the judicial courts has been confirmed by decisions of the *Conseil*

¹⁰⁷ See French report for D7.1.

Constitutionnel.¹⁰⁸ However, over time, these other freedoms previously covered under the concept of individual freedoms have become autonomous,¹⁰⁹ with the consequence that, nowadays, the competence of judicial courts in the protection of individual freedom against public authority mainly covers *the right not to be arbitrarily detained*.¹¹⁰

As already noted in the section on administrative justice, until recently, individuals would seek urgent assistance from judicial courts against administrative acts which interfered with their fundamental freedoms, instead of bringing actions before administrative courts. They could do so based on a XIXth century doctrine called the *voie de fait*, introduced by the *Conseil d'Etat* itself, at a time where there were no emergency and interim proceedings before administrative courts.¹¹¹ The idea behind was that certain actions were so abnormal that they lost their administrative character and should thus be handled by judicial courts.¹¹² The *voie de fait* is an exception to the principle of separation of judicial and administrative jurisdiction, in that it grants competence to judicial courts in matters normally falling under the jurisdiction of administrative court.

It could be activated in case of serious administrative interference with the right to property¹¹³ and individual freedom (understood broadly).¹¹⁴ The advantage was that the proceedings were faster, and the ordinary courts could use their judicial powers. They could establish the existence of the *voie de fait*, review the legality of contested administrative measures,¹¹⁵ prevent administrative actions or measure, order them to cease, impose fines¹¹⁶ or compensation.

In the mid-1990s, following a controversial decision already expose, which let individuals argue a *voie de fait* in circumstance which did not seem to justify it, the *Tribunal des*

¹⁰⁸ Decision No 94-343/344 DC of 27 July 1994.

¹⁰⁹ Decision No 2004/492 DC of 2 March 2002.

¹¹⁰ Decision 85-189 DC of 17 July 1985; Decision 89-256 DC of 25 July 1989.

¹¹¹ CE, 21 September 1827, *Rousseau*.

¹¹² TC, 2 December 1902, *Société immobilière de Saint-Just*, No 0543.

¹¹³ CE, sect., 10 October 1969, *Cts Muselier*, No 73326 ; CE 20 November 1974, *Dame Manrot Le Goarnic*, No 89980.

¹¹⁴ CE, 18 October 1989, *Mme B.*, No 75096 .

¹¹⁵ TC, 30 October 1947, *Epx Barinstein c/ Lemonnier*.

¹¹⁶ TC, 17 June 1948, *Manufacture de velours et peluches et Sté Velvetia c/ État*.

Conflicts reacted by redefining the *voie de fait*.¹¹⁷ A *voie de fait*, which would 'justify the full intervention of the judicial judge, as an exception to the principle of separation of administrative and judicial authorities,' could only be established when 'the administration, interfered in a serious manner with the right to property or a fundamental freedom, either by forcibly enforcing in illegal conditions, a decision which may have been legal' (*voie de fait par manque de procedure*, Hauriou) or 'adopting a decision which was *manifestly incapable of being linked to any power conferred to the administrative authority*' (*voie de fait par manque de droit*) . A typical example of what constitutes a *voie de fait* is the refusal to celebrate a marriage.¹¹⁸

In a recent decision, the *Tribunal des Conflicts*, responding to the *Conseil d'Etat*,¹¹⁹ further restricted the scope of application of the *voie de fait*.¹²⁰ The *Tribunal des Conflicts* however only referred to two types of powers which the judicial courts can use in a *voie de fait*, namely ordering termination or reparation, although the doctrine agrees that the judicial judge retains full power in such proceedings.¹²¹ It also removed the 'seriousness' condition, which would suggest an extension of the reach of the *voie de fait*, although the doctrine is skeptical.¹²² Finally, it limited the scope of application to interference with property and individual freedom (*stricto sensu*), and the right not to be arbitrarily detained (Article 66 of the Constitution). This must be contrasted with the inclusive notion of fundamental freedoms endorsed by the *Conseil d'Etat* in the context of the *référé-liberté*.

Individuals, when faced with restrictions or violations of their civil rights by public authorities, may thus turn to either the administrative judge under a *référé-liberté* or the ordinary judge through *voie de fait*. Sometimes, problems are addressed through both

¹¹⁷TC, 23 October 2000, *Boussadar*, No 3227.

¹¹⁸Cass, 1^{er} civ., 6 February 2007, *Mme de Panafieu*, No 06-10403; CE 27 February 2004, *Bruno A.*, No 257067, but see Slama, S. 'Le refus illégal de célébration d'un mariage constitue-t-il toujours une voie de fait?' , CPDH 28 August 2013.

¹¹⁹CE, ord., 23 January 2013 *Commune de Chirongui*.

¹²⁰TC 17 June 2013, *M. Bergoend c/ Société ERDF Annecy Léman*.

¹²¹ See Slama, S. 'Le tribunal des conflits déshabille la "folle du logis" ' [PDF] in *Lettre 'Actualités Droits-Libertés' du CREDOF*, 17 August 2013.

¹²² See Slama, above n 121.

systems. For example, the first *référé-liberté* order issued by the Conseil d'Etat in 2001¹²³ concerned the withdrawal of a passport, which had also triggered *voie de fait* proceedings.¹²⁴ Since the introduction of the *référé-liberté*, and the gradual limitations of circumstances in which the *voie de fait* apply, administrative courts are becoming the first port of call to seek redress against public authorities for violation of civil rights by public authorities.

Ordinary procedure before 'civil' courts

In order to bring a civil law suit, the applicant must serve through a bailiff, a convocation to a defendant. This document must contain information related to the identities of the parties, the designated court, the object of the dispute and the factual and legal grounds (*moyens*) invoked against the defendant. Once the assignation has been delivered, it must be filed with the court within four months. In less important cases (eg family matters), it is possible to make only a request and a declaration with the registrar. Finally, in some case, it is possible for the parties to present themselves to the court, without further formalities.

The competent court checks that the parties have exchanged their written arguments and requests, as well as relevant documents. The investigative judge can order necessary measures such as expert reports; she may also sanction the parties in they proceed too slowly and do not respect the adversarial principle. After the last exchange, the judge issues a closing order (*ordonnance de cloture de l'instruction*), and the case is moved to the hearing stage. The procedure before the TGI is written and requires legal representation. In simple cases, the lawyers will simply hand-over their conclusions; in other cases, the lawyers of the parties will be heard, starting with that of the applicant, then that of the defender, and where needed, the opinion of the Minister Public. Hearings are public (save for some exceptions provided by law, like in family matters). After the deliberations, which may last for months in complex cases, the court issues a judgment which sums up the facts and the arguments of the parties, and provides a reasoned solution. The ruling is binding, but can

¹²³CE, réf., 9 January 2001 *Desperthes*, No 228928.

¹²⁴CE, Ass., 8 April 1987, *Peltier*, No55895; CE, 15 April 1988, *Michelix*, No 69498 ; CE, 4 May 1988, *Plante*, n°60590.

usually be appealed.

Special procedures before civil courts.

There are a number of special procedures before the civil courts. For example, divorce proceedings can be initiated by 'joint request', which is based on the agreement on the parties. In urgent matters, a 'fixed day assignation' procedure may be used, in which the applicant is authorized by the judge to assign the defendant on a fixed date. There is also a 'procedure on request' which allows the judge to make a decision, without assigning the defendant (In such cases, which make an exception to the adversarial principle, the judge can order instructions measures (eg statement of adultery), or the seizure of documents. Finally, there is a non-litigious (gracieuse) procedure, in which the judge decides in the absence of a dispute, without an adversarial procedure, following fast investigation and no debates. The hearing, if there is one, is not public, but the Minister Public must attend and give an opinion.

Civil référé (emergency procedure)

The law provides for a special procedure for cases requiring urgent judicial intervention. It is entrusted in a single judge, usually the president of the court. The procedure starts with a subpoena, and the judge instructs the case in an adversarial manner, through a public hearing. He or she releases an order, which is however provisory, pending on a final decision on the merits. The judge can decide on any measure. He or she can impose conservatory orders to prevent a damage or inssue an injunction to stop a manifestly illegal action (eg publication interfering seriously with the right to private life). He or she can also order expertise.

Question 6 - Non-judicial mechanisms

Citizens may take it into their own hands to take action to protect themselves or others against civil rights abuses by public or private authorities. The 1789 Declaration, in its article 2, recognises the right to resist against oppression.¹²⁵ It has been conferred constitutional

¹²⁵Wachsmann above n 26, 254.

value by the *Conseil Constitutionnel*.¹²⁶ Its modalities of application are however not defined. In fact, 'rebellion' constitutes a criminal offence,¹²⁷ irrespective of whether the public authority act that triggered it is legal or not.¹²⁸ Moreover, public servants can only refuse to obey orders from their hierarchy in case of 'an order which is manifestly illegal and likely to seriously compromise a public interest'.¹²⁹ The weak legal articulation and protection of the right of resistance is also visible in the context of extradition, as the *Conseil d'Etat*, in a case which concerned a person whose acts were politically motivated, confirmed his extradition invoking the seriousness of his crime.¹³⁰ The 'spirit' of civil resistance does however, at times, play its part (eg petition in the late 1990s against a law on immigration and the requirement of accommodation certificate), in which signatories stated that they would not comply with it, and retains an important symbolic value.¹³¹ Events such as the wiretapping of a critical news paper, the 'Canard Enchaîné',¹³² did not provoke any reaction and was not followed by political consequences (such as resignation). Moreover, mobilization may also call for restrictions on fundamental rights (eg demonstration against gay marriage law in 2013). Citizens, supported or organized through civil society mobilization, can also sanction private actors by mobilizing against those who abuse civil rights and freedoms, in France or abroad. For example, the terrorist attacks on the 'Charlie Hebdo' editorial team in January 2015 triggered unprecedented mass demonstration in support of freedom of expression. Consumers may also boycott the products or shops of firms which have poor human rights records. Citizen monitoring of respect for civil rights nonetheless requires that people are educated and informed, which presupposes civic education programs as well as pluralist and independent media,¹³³ and the support of an active civil society.

¹²⁶ Decision No 81-132 DC of 16 January 1982 [Nationalisation].

¹²⁷ Article 433-6 of the New Code of Civil Procedure.

¹²⁸ *Crim.*, 5 January 1821, S. 1821.1. 358.

¹²⁹ Law of 23 July 1983 on the rights and obligation of public servants, Article 28.

¹³⁰ CE, ass., 7 July 1978, *Croissant*.

¹³¹ Wachsmann above n 26, 257 and 261.

¹³² Wachsmann above n 26, 164.

¹³³ Wachsmann above n 26, 252.

Furthermore, citizens may seek to ensure greater protection of certain civil rights by participating in elections and bring into power representatives who have campaigned along those lines. However, observers note that electoral campaigns rarely engage with civil liberties.¹³⁴ Since 2008, citizens may also request the adoption of more protective legislation by means of referendum, although the mobilization threshold is a demanding.¹³⁵

In the French tradition, it is for the parliament to protect civil liberties. However, party politics and majoritarian dynamics often prevent any meaningful debate and contestation around civil liberties, including through a motion of censure.¹³⁶ Parliamentarians may however check on the respect by the executive of civil rights through committees of enquiry.¹³⁷ However, here again, the setting up of such committees may be blocked by majoritarian dynamics in the National Assembly (less in the Senate, in particular where its political majority is not aligned with that of the National Assembly). There have been a number of enquiry committees which looked into civil rights protection (eg 1995, 2006, and 2013 committees on sects, 1998 committee on the rights of children, 2000 committee on the situation in French prisons, 2006 committee on the malfunctioning of the justice system following the Outreau affair, etc.). They, however, cannot interfere with judicial proceedings. For long, they also faced limits in accessing certain information, in particular secret information, and information related to national defense, internal and external security, or judicial matters (eg 1973 committee on telephone tapping could not hear testimonies relevant personal, etc.). However, since a law of 19 July 1977, their investigatory powers are aligned with those of judges.¹³⁸ Their hearings are normally public. Still, they have so far not played an important role in the protection civil liberties, and their impartiality has been contested. For example, a commission set up following students' demonstrations which led to police violence and the death of a student failed to examine the police responsibility (as

¹³⁴Wachsmann above n 26, 265.

¹³⁵Constitutional Law 23 July 2008, Article 11. The initiative requires a strong mobilization: 1/5 of the members of parliament supported by 1/10 of the electorate,

¹³⁶However, it did happen that parties did not give voting instructions to MPs, on subject such as abortion, death penalty or bio-ethics. See Wachsmann above n 26, 265-269.

¹³⁷Ordinance of 17 May 1958, Article 51-2, as it results from Constitutional Law of 23 July 2008.

¹³⁸Law of 20 July 1991, which sanctions lack of cooperation with such committees.

highlighted in 1997 (counter) report from a committee set up by the *Ligue des Droits de L'homme*). An alternative to committees of enquiry are information missions, a tool introduced by an amendment of the Parliament's internal rules, and which led to the preparation of reports (eg 2008 report on civil status, legal aid or the protection of fundamental rights, 2013 report on the priority question of constitutionality (No 842)).

The President of the Republic's mission is, amongst others, to check that the Constitution is respected (Article 5 of the Constitution). This power has been used to undermine governmental action, in times of cohabitation, where the President and the government and its parliamentary majority belonged to different political family, but not to ensure protection of civil liberties.¹³⁹

The mission to protect civil rights is, like in other member states, increasingly entrusted in *autorites administratives independantes* (AAI), which are independent agencies. According to the strict French system of separation of power, they are considered as part of the executive.¹⁴⁰ As such, their decisions are subject to review by the *Conseil d'Etat*.¹⁴¹ Their creation, composition, mandate, and powers are defined by the legislator; only the Rights Defender, created by the constitutional law of 23 July 2008, is constitutionally protected, and still only against the curtailment of its prerogatives. The *Conseil Constitutionnel* does not sanction legislative measures which terminate such independent administrative authorities, or replace them.¹⁴² In France, the general independent administrative authority active in the field of civil rights is the Rights Defender (*Défenseur des Droits*), a new body set up by the constitutional law of 23 July 2008, and which brings together four pre-existing bodies: the former *ombudsman* (*Mediateur de la Republique*), the equality body (*Haute autorite de lutte contre les discriminations et pour l'egalite* (HALDE)), the security ethics committee

¹³⁹Wachsmann above n 26, 275-278.

¹⁴⁰CE, ass., 10 July 1981 *Retail RD*, in relation to the *Mediateur de la Republique*; DC 29 March 2011 organic law related to the Rights Defender.

¹⁴¹CE, 28 July 2000, *Troyon* (CNIL); CE, 28 July 2000, *Dakar* (CNCIS); CE, 13 July 2007, *Ste Editions Tissot* (HALDE).

¹⁴² It did not object to the replacement of the *Haute Autorité de la Communication Audiovisuelle* by the *Commission nationale de la communication et des libertés* before the expiry of its members' mandate, without even checking the equivalence of independence guarantees between the two bodies. Decision No 86-217 DC of 18 September 1986.

(*Commission nationale de deontologie de la securite* (CNDS)); and the Children Defender (*Defenseur des enfants*). The Rights Defender, as a descendant of the *Mediateur de la Republic*, is a classic ombudsman body, more focused on redressing mal-administration than fundamental rights protection.¹⁴³ He 'shall ensure the due respect of rights and freedoms by state administrations, territorial communities, public legal entities, as well as by all bodies carrying out a public service mission or by those that the Institutional Act decides fall within his remit' (Article 71-1 Constitution).

His independence is however cast into doubt by the mode of nomination. He or she is appointed by decree of the President of the Republic (whilst almost all his/her foreign counterpart emanate from the parliament). Since 2008, the appointment is made following an opinion from the competent parliamentary committees; however, it can only be blocked by a qualified majority (3/5). The six year non-renewable mandate, incompatibilities with public service functions and elective mandates, and the lack of criminal responsibilities, as well as the fact that his or her mandate can only be terminated by a unanimous decision of a special college composed of the Vice-President of the *Conseil d'Etat*, the first President of the *Cour de Cassation*, the first President of the *Cour des Comptes*, nonetheless offer certain guarantees of independence.¹⁴⁴

He or she can be seized by 'every person who considers his or her rights to have been infringed by [such] ... public service or of a body. Complainants must however show that they have first tried to solve the matter with the administration concerned (need for a prior decision, like before the administrative court). The referral of a matter to the Rights Defender does not have suspensive effects.¹⁴⁵ The Rights Defender may also act on his or her own initiative.

Article 71-1 of the Constitution provides that he or she may be assisted by a college, which

¹⁴³Wachsmann above n 26, 281.

¹⁴⁴Note however that these guarantees against removal are only provided by a decree (Decree No 2011-905 of 29 July 2011)

¹⁴⁵Prior to the 2008 reform, complaints had to be referred to his predecessor the Mediator, through the intermediary of a member of parliament. Since 2008, natural and legal persons can refer cases to him or her directly.

basically opened the way for the absorption of the former AAI, exposed above. The merger was viewed with suspicion by observers, who feared a dilution of the powers of the relevant institutions.¹⁴⁶ The institutional unity hides differentiated modes of operation between the different fields of action, inherited from the previous autonomous bodies. In addition to the mission and conditions of access set out above, the Rights Defender is in charge of 'defending and promoting the superior interest and rights of the child recognized by law and international commitment' and can be seized by any child, parents, legal representatives, social and medical services or specialized NGOs (*ex-Defenseur des Enfant*). He should also 'fight against direct and indirect discrimination prohibited by law or international agreements', upon referral from any victim of discrimination or any specialized organization (provided the victim has given her consent (from the former HALDE). Finally, he must also check the respect of ethical rules by personnel which carry out security activities, acting following complaints by victims or witnesses (*ex-CNDS*). The legacy of the pre-existing institution is also visible in the appointment of deputies for each of these domains, and respective expert colleges. Moreover the staff was carried on from the previous institutions. The Rights Defender decides whether to consult the colleagues, except where it is mandated by law (ie for new questions); he is not bound by their opinions.¹⁴⁷

The Rights Defender has significant powers. First, he has important investigatory powers; he can ask questions from any legal and natural persons complained about, hear any person whose testimony may be useful, requires by means of a motivated request, any useful information or documentation (with the only exception of documents and information covered by national defense secret, state security or external policy). He may issue formal notice in case his requests are not met, and seized the emergency administrative judge (*juge des s*) who may order necessary interim and emergency measures. It can proceed to on-site checks in administrative buildings, which can only be opposed on reasoned objections establishing 'serious and imperious motives related to national defense or public security'. In such case, the Rights Defender may call for the intervention of the emergency administrative

¹⁴⁶ See positions presented by Wachsmann above n 26, 279, 283-284.

¹⁴⁷ Decision No 2011/626 DC of 29 March 2011.

court (*juge des referes*), which must decide within 48h under the ‘*refere-mesure utile*’ procedures, to authorize such checks. Visits in private buildings must be preceded by information on the right of the person to oppose it; in case of opposition, the matter will be fall under the control of ordinary court (*juge des libertes et de la detention*). He has discretion to determine whether to intervene or not on matters submitted to him but should motivate decisions which reject intervention.¹⁴⁸ He can make any recommendation aimed at ‘guaranteeing the respect of the rights and freedom of the victim and solving the difficulties brought to his attention, and preventing their future occurrence’. Importantly, and in contrast to administrative courts, he can decide in equity, and impose a just and fair solution. He may also act as a mediator.¹⁴⁹ He can propose legislative or regulatory amendments.¹⁵⁰ He must be kept informed of the measures adopted following his recommendations, and in case of failure to response or to adopt necessary measures, may issue injunctions.¹⁵¹ If these are not followed up, he writes report, which is made public. He can also seize the relevant disciplinary body. He also published an annual report.

Despite these extensive powers, the Rights Defender has not provided an effective mechanism against serious civil rights violations, although its interventions have improved the daily operations of public administration and services.¹⁵² He took position in matters such as ID checks, use of flashballs by police forces, the treatment of foreign minors, bodily searches, the situation of detained persons, etc. For example, following consultations with a range of actors, as well as comparative studies, he published a report on the modalities of ID checks.¹⁵³ In 2013, it published an important report in relation to people in detentions and

¹⁴⁸Article 24 of the organic law of 29 March 2011.

¹⁴⁹Article 25 of the organic law of 29 March 2011.

¹⁵⁰Article 32 of the organic law of 29 March 2011. This power was used to bring French law in line with the ECHR.

¹⁵¹Article 25.4 of the organic law of 29 March 2011.

¹⁵²Wachsmann above n 26, 287.

¹⁵³Report on the police-citizens relations and ID checks’ [Rapport relative aux relations police-citoyen et aux controles d’identite], available at http://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd_r_20140515_police_citoyen_controle_identite.pdf

issued recommendations to the government.¹⁵⁴ It also released a report on the interest of the child and its right to keep relationship with both parents in decisions concerning parental responsibility. It included comparative examples, and made reference to national legislation as well as international and European instruments provisions on children and family rights, including the ECHR and the Charter, but it made not mention of Brussels 2 bis regulation.¹⁵⁵

Alongside the Rights Defender, other AAI monitor the respect of civil rights in specific policy fields. The oldest such institution is the *Commission Nationale Informatique et Libertés*(CNIL) created in 1978. We find also the *Conseil supérieur de l'audiovisuel* (CSA) or High Council for the Audio-Visual sector,¹⁵⁶ the *Commission d'accès aux documents administratifs*(CADA) or the Committee on Access to Administrative Documents,¹⁵⁷ the *Comite national consultative pour les sciences de la vie et de la santé* (CNCSVS) or National Committee for Life and Health Sciences,¹⁵⁸ the *Commission nationale de contrôles des interceptions de sécurité*(CNCIS) or National Committee for the Control of Security Interception,¹⁵⁹ the *Commission Nationale de Déontologie de la Sécurité* (CNDS) or National Commission for Security Ethics,¹⁶⁰ the *Commission Consultative du secret de la defense nationale* (CCSDN) or Consultative Committee on National Defense Secret,¹⁶¹ the *Contrôleur général des lieux de privation de liberté*(CLPL) or the General Controller for freedom depriving places,¹⁶² and the *Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet* (HADOPI), *Conseil Supérieur de la Magistrature*, or High Authority for the Broadcasting of Works and Protection of Rights on the Internet.¹⁶³

¹⁵⁴ See report 'L'action du Défenseur des Droits auprès des personnes détenues', http://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd_r_20131001_bilan_detenus.pdf .

¹⁵⁵ See report at http://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd_r_20120522_interet_enfant.pdf

¹⁵⁶ Created by the law of 17 January 1989, In the past, the sector was also covered by other regulatory bodies such as the *Haute Autorite de la Communication Audiovisuelle* (Law of 29 July 1982), the *Commission nationale de la communication audiovisuelle* (Law of 30 Sept 1986), which have not survived.

¹⁵⁷ Law of 17 July 1978.

¹⁵⁸ Law of 15 January 1990.

¹⁵⁹ Law of 10 July 1991.

¹⁶⁰ Law of 6 June 2000.

¹⁶¹ Law of 8 July 1998.

¹⁶² Law of 30 Oct 2007.

¹⁶³ Law of 12 June 2009.

Their modes of appointment vary greatly, but usually give important nomination powers to the president of the republic with little input from members of the parliament. However, once appointed, they cannot be removed, and are not subject to any hierarchical power. Their powers range from mere consultative functions to investigatory, adjudicatory and rule making powers. Their decision-making powers (eg authorization, sanctions, etc) must respect the right to a fair trial (Art. 6 ECHR),¹⁶⁴ the rights of the defense, the principle of proportionality of penalties, the principle of non-retroactivity of the most severe law.¹⁶⁵ They cannot curtail constitutional freedoms in any significant manner.¹⁶⁶ Their record in terms of civil rights protection is mixed, with many difficulties resulting from political nomination (see, in particular in the audiovisual sector).¹⁶⁷

The president of the CNCIS is appointed for six years by the President of the Republic, on the basis of a list of four names prepared by the Vice-President of the *Conseil d'Etat*, the first President of the *Cour de Cassation* and two other members of parliament (which traditionally includes a representative of the opposition). It has only consultative powers; it can however inform the State prosecutor of any violation of the law to the secrecy of communications.

The CNIL has the discretionary power to alert the public prosecutor of violations which have come to its knowledge. It also gives an opinion, made public, on proposal for regulatory measures. It can also adopt general norms applicable to the most common categories of data processing, which are not likely to undermine privacy or freedoms, in order to simplify the declaration of obligation concerned and type-regulations in order to ensure system security.¹⁶⁸

The CCSDN has only consultative powers. It gives opinions on the declassification and

¹⁶⁴CE, 20 July 2003, *Banque d'escompte et Wormser frères réunis*.

¹⁶⁵ Decision No 88-248 DC of 17 January 1989, law modifying the law of 30 September 1986 relating to the freedom of communication GDCC and 28 July 1989 law relating to the security and transparency of financial market).

¹⁶⁶ Decision No 2009-580 DC of 10 June 2009 [HADOPI].

¹⁶⁷ On this see Wachsmann above n 26, 301-302.

¹⁶⁸ Law of 6 January 1978 relating to informatics, files and freedoms, Art 11 (as modified y Law 6 August 2004).

communication of classified information¹⁶⁹It is seized by administrative authorities, itself seized by a court in the context of proceedings before it.

The CSA can adopt technical regulations (ie digital TV).¹⁷⁰ The CGLPL can, at any time visit a place where a person is detained by a decision of a public authority, as well as patients hospitalized without their consent, and can ask and should be given any information or document useful in the exercise of its mission.¹⁷¹ He or she releases opinions, formulate recommendation to public authorities and make proposal to the government for legislative and regulatory amendments. He has used these limited powers to raise awareness in the public opinion about the conditions of detention in certain prisons or the forced stay of patients in special units.

The CADA only has consultative powers. It should however be seized before bringing proceedings before the administrative court. Only persistent refusal to release a document can be submitted to the judge.¹⁷²

The HADOPI was granted significant sanction powers. However, the *Conseil Constitutionnel* considered that the legislator could not confer such extensive powers to an administrative authority.¹⁷³

Question 7 – Access to Justice Rights

The right to a judge

As noted earlier, the scope of judicial control is gradually expanding. The caselaw of the *Cour de Cassation* confirmed that the effective exercise of the rights of the defense requires that 'everyone should have access to a judge who can decided on his or her claim'.¹⁷⁴ The right to an effective judicial remedy is recognised by the *Conseil Constitutionnel*, *Cour de Cassation*

¹⁶⁹Law 8 July 1998, Article 1.

¹⁷⁰CE, 27 March 2003, CSA.

¹⁷¹Article 8 of Law of 30 October 2007.

¹⁷²CE, sect., 19 February 1982.

¹⁷³ Decision No 2009-580 DC of 10 June 2009 [HADOPI].

¹⁷⁴ CE, Ass., 30 June 1995.

and *Conseil d'Etat*.¹⁷⁵ Although there may be admissibility conditions (eg delays, standing, etc), these should not affect the substance of the right.¹⁷⁶ Both the ECtHR and the *Cour de Cassation* condemned the system set up to compensate victims who had been contaminated with HIV following blood transfusion, in that it prevented those victims from bringing tort actions in court.¹⁷⁷ The lodging of a claim should not be subject to excessive fees.¹⁷⁸ Proceedings can only be made conditional to the execution of a contested measure to the extent that it does not undermine in a disproportionate manner the right of access to a judge. The right to an effective remedy also requires the establishment of a legal aid system allowing access to a lawyer.¹⁷⁹ The right to a lawyer¹⁸⁰ or to legal aid¹⁸¹ are however not guaranteed in all circumstances.¹⁸²

Judicial independence and impartiality

The independence of both ordinary and administrative courts are guaranteed.¹⁸³ Although not mentioned in the Constitution, the *Conseil Constitutionnel* has recognised the independence of administrative courts as a 'fundamental principle recognised by the laws of the republic' and acknowledged their specificities, thus conferring them constitutional status.¹⁸⁴ Judicial impartiality is guaranteed through recusal or referral.¹⁸⁵ The guarantee of judicial impartiality has evolved under the influence of the ECtHR case law which includes both objective and subjective considerations.¹⁸⁶ There are complex rules related to the ability

¹⁷⁵ Decision No 86-224 DC of 23 January 1987; crim., 17 May 1984; CE Ass., 7 February 1947.

¹⁷⁶ ECtHR 15 Jan 2009 *Ligue du monde islamique et organization Islamique mondiale du secours islamique*, App. 36497/05 and 37172/05.

¹⁷⁷ ECtHR 4 December 1995 *Pellet c France* app A333B, Civ., 6 June 2000.

¹⁷⁸ ECtHR 28 October 1998 *Ait-Mouhoud v France* App. 22924/93.

¹⁷⁹ ECtHR 14 November 2006 *ONG v France*, App 348/03; ECtHR 31 March 2011 *Chatellier v France*, App. 34658, 2e civ. 13 December 2005.

¹⁸⁰ ECtHR 14 sept 2000 *Kroliczek v France*, App. 43969/98.

¹⁸¹ ECtHR 26 Feb 2002 *Del Sol v France*, App. 46800/99.

¹⁸² See for further explanation, Piwnica, E. 'Les droits de la défense' in Thierry Renoux (ed) *Protection des libertés et droits fondamentaux* (La documentation française, 2011) 279-290, 281.

¹⁸³ Article 64 of the 1958 Constitution, Article 16 of the 1789 Declaration, Decision No 80-119 DC of 22 July 1980, DC No 70/40 of 9 July 1970.

¹⁸⁴ Decision No 80-119 DC of 22 July 1980; Decision No 86-224 DC of 23 January 1987.

¹⁸⁵ Article 341 ss and 356 ss of the Code of Civil Procedure; Article L721.1 of the Code of Administrative Justice

¹⁸⁶ See Piwnica, above n 182, 281.

of judges to examine the same sets of facts in different capacity.¹⁸⁷ In the case of independent authorities or professional organization which enjoy sanctioning powers, the impartiality rule prevents the rapporteur from participating in the deliberations.¹⁸⁸

The right to a judicial decision

French law recognises the principle of publicity of the hearing,¹⁸⁹ which may nonetheless be set aside when public or private interests are at stake (eg family proceedings, cases involving minors, etc).. It also recognises the principle of equality of arms which includes the respect of the adversarial principle¹⁹⁰ and right to have equal defense opportunities (including participation in the gathering of evidence and expertise, access to documents submitted to the court, etc).¹⁹¹ Particularly problematic in that regard in the right of the administration in judicial review proceedings to change the grounds of its decision to substitute one more conform with the law in force.¹⁹² Judicial decisions must be motivated, except to reject appeals which are manifestly unfounded or not serious.¹⁹³ *Cour d'Assise* decisions did not need to be motivated, a situation which had not been sanctioned by either the ECtHR or the *Conseil Constitutionnel*,¹⁹⁴ but it has now been made subject to motivation requirement.¹⁹⁵ Individuals only have a guaranteed right to appeal in criminal matters,¹⁹⁶ although appeal or review procedure are available across a whole range of proceedings. The failure to execute rapidly of judicial decisions can be sanctioned by the award of damages.¹⁹⁷

Like other legal system, French law recognizes a *droit a la surete*, which consists in the right not to be arrested or detained, and freedom of movement. It is enshrined in Articles 2 and 7

¹⁸⁷ For a detailed explanation, see Piwnica, above n 182, 281-282.

¹⁸⁸ CE, Ass., 3 December 1999, *Didier*; 1ere civ 5 October 1999.

¹⁸⁹ Art L6 of the Code of Administrative Justice, Article 22 of the Code of Civil Procedure, Article 5 of the Code of Administrative Justice.

¹⁹⁰ Article 16 of the Code of Civil Procedure, and the preliminary article of the Code of Criminal Procedure.

¹⁹¹ For details see Piwnica, above n 182, 283.

¹⁹² CE, 6 February 2004, Mme Hallal.

¹⁹³ ECtHR 23 January 2003 *Burg v France*, App. 34763/02; Article L.822-1 of Code of Administrative Justice, Article 1014 Civil Procedure Code.

¹⁹⁴ ECtHR 6 November 2010 *Papon v France*, App 54210/00; Decision 2011-113/115 QPC 1 April 2011

¹⁹⁵ Article 365-1 f the Code of Criminal Procedure.

¹⁹⁶ Article 2 Protocol 7 ECHR.

¹⁹⁷ 1ere, civ., 4 November 2010; CE, 6 March 2009, *M et Mme Le Heloco* No 312625

of the 1789 Declaration of the Rights of the Man, which has constitutional value,¹⁹⁸ and imposes a number of guarantees in matters of criminal law (ie the principle of *nulla poena sine lege*,¹⁹⁹ the proportionality of criminal penalties,²⁰⁰ predictability, intelligibility and accessibility²⁰¹ as well as non-retroactivity²⁰² of criminal laws, the presumption of innocence,²⁰³ the right not to incriminate oneself,²⁰⁴ the independence and impartiality of judges and criminal procedure (see above), the rights of the defense,²⁰⁵ etc.

Legislation nevertheless allows arrest and detention *without a judicial decision*, for example in case of placement in custody (*garde a vue*), detention pending trial (*detention provisoire*), detention of foreigners, forced hospitalization of mentally sick people, security detention (detention of dangerous criminals after they have completed their jail term to prevent them to commit further crimes). The ECtHR has condemned France many times in relation to measures which limit individual freedoms. For example, the legislator provides for extension of custody periods for a broad range of crimes.²⁰⁶ In case terrorist threats, for example, the custody period extends to six days (as opposed to the regular 24h period).²⁰⁷ This long delay was judged acceptable by the *Conseil Constitutionnel* in light of its security objective.²⁰⁸ The law also allows for extension of custody; however, following an ECtHR ruling,²⁰⁹ the procedure was amended to offer better guarantees to the accused,²¹⁰ notably the intervention of both the public prosecutor, and a special independent freedom and detention judge. For long, French law did not ensure sufficient protection to the rights of the

¹⁹⁸ Decision No 93-325 DC of 13 August 1993.

¹⁹⁹ Article 8 of the 1789 Declaration, and Article L.111-3 of the Criminal Code.

²⁰⁰ Article 8 of the 1789 Declaration.

²⁰¹ Decision No 99/421 DC of 16 December 1999.

²⁰² Article 8 of the 1789 Declaration.

²⁰³ Article 9 of the 1789 Declaration.

²⁰⁴ Article 63-1 and 116 of the Code of Criminal Procedure.

²⁰⁵ CE 5 May 1944 *Trompier Gravier*, CE 26 October 1945 *Aramu*; Decision No 80-127 DC of 20 January 1981 (fundamental principle recognized by the laws of the republic) DC No 2006-535 DC of 30 March 2006 (article 16 of the 1789 Declaration).

²⁰⁶ 'Perben II' Law No 2004-204 of 9 March 2004 relating to the adaptation of justice to the evolution of criminality.

²⁰⁷ Code of Criminal Procedure, Article 706-88.

²⁰⁸ Decision No 2010-31 QPC of 22 September 2010 *Mme A.B. et a.*

²⁰⁹ ECtHR, *Moulin v France* 23 November 2010, App. 37104/06.; see also Cass., crim., 15 December 2010, No 10-83.674.

²¹⁰ Act No 2011-392 of 14 April 2011 relating to custody.

persons in custody, by depriving them of access to a lawyer, which the ECtHR condemned.²¹¹ Lawyers challenged French legislative provision through QPCs, arguing violations of Articles 9 and 16 of the 1789 Declaration; the *Conseil Constitutionnel* agreed with them, but gave time to the legislator to adopt new rules.²¹² A new law was passed on 14 April 2011, which organizes access to a lawyer during custody. Although it was only due to come into force on 1 June 2010, the *Cour de Cassation* instructed courts to apply it immediately, relying on the executing force of ECtHR rulings.

Out of 65000 prisoners, 17000 are in detention pending trial.²¹³ France was, here again repeatedly condemned because of the excessive length of pre-trial detention.²¹⁴ The French legislator tried to reduce the length of pre-trial detention by introducing the notion of 'reasonable delay'²¹⁵ and maximum delays, according to a complex methodology.²¹⁶ However, these have had little effect in practice, given the prevailing 'culture of pre-trial detention amongst prosecutors'.²¹⁷ With regard to the forced institutionalization of mentally sick persons, the regulation of which goes back 150 years, the *Conseil Constitutionnel* exercised a strong influence in the adoption of the legislative reform, by declaring incompatible with the Constitution the fact that hospitalization without consent could be extended for more than two weeks by a simple administrative decision, without judicial decision. The draft was adjusted to include the intervention of the special judge for liberty and detention.²¹⁸ The system of security detention as organized in France,²¹⁹ although without retroactive effect following a *Conseil Constitutionnel* decision on the matter,²²⁰ may be incompatible with the ECHR, considering the 2011 decision against Germany.²²¹

²¹¹ ECtHR, 14 October 2010, *Brusco v France*, App. 1466/07.

²¹² Decision No 2010-14/22 QPC of 30 July 2010.

²¹³ Letteron, above n 39, 213 (2011 figures)

²¹⁴ ECtHR, 26 June 1991, *Lettelier v France*, App. 12369/86; ECtHR 10 July 2008, *Garriguenc v France* App. 21148/02 (4 years, six months and 18 days in pre-trial detention).

²¹⁵ Article 144-1 of the Code of Criminal Procedure, resulting from the Law of 30 Dec 1996.

²¹⁶ Law No 2000/597 of 20 June 2000; Law No 209-1436 of 24 November 2009.

²¹⁷ Letteron, above n 39, 218.

²¹⁸ Law No 2011-803 of 5 July 2011.

²¹⁹ Law No 2008-174 of 25 Feb 2008.

²²⁰ Decision No 2008-562 DC of 21 February 2008.

²²¹ ECtHR 24 November 2011, *OH v Germany*, App. 4646/08.

Despite improvements in reaction to condemnations by the ECtHR and the increased vigilance of the *Conseil Constitutionnel* and ordinary courts on the matter, the current French legal framework as well as criminal law culture fail to secure the full enjoyment of the rights of accused and detained persons. The NGO Fair Trial International reports on persisting problems in relation to the protection of the right to fair trial in France,²²² in particular the excessive use pre-trial detention.²²³ The Open Society Justice Initiative is particularly concerned about the lack of effective supervision over police investigations, as prosecutors or investigating judges only check for paper compliance with formalities. They also denounce a legal culture in which prosecutors and judges, who share the same training, look down on lawyers and prevent them from putting up strong legal defense, and undermining the principle of equality of arms.²²⁴ These weaknesses in national criminal procedure systems, which do not affect only France, render mutual recognition mechanism, such as the EAW, particularly problematic from the point of view of ensuring EU citizens' civil right to individual freedom and a fair trial. This background must be kept in mind when analyzing the implementation of EU criminal law measures.

1.1 EU legislation affording protection or potentially undermining civil rights in judicial proceedings

1.1.1 Protection of rights in civil proceedings (mutual recognition instruments)

As a matter of principle, French law, in theory since 1806, recognizes the enforceability of foreign judicial decisions and officials acts.²²⁵ However, case law has imposed certain conditions. EU law however introduced simplified procedure, which co-exist alongside

²²² See a summary here: <http://www.fairtrials.org/campaigns/eu-defence-rights/justice-in-europe/#france>

²²³ Fair Trial International, report 'Detained without trial – Fair Trials International's response to the European Commission's Green Paper on detention' (2011)

<http://www.fairtrials.org/documents/DetentionWithoutTrialFullReport.pdf>

²²⁴ Cape, E. Namoradge, Z., Smith, R and Sprongen, T. 'Effective Criminal Defense in Europe, Executive Summary and recommendation' (2010) <http://www.opensocietyfoundations.org/sites/default/files/criminal-defence-europe-summary.pdf>

²²⁵ Article 509 Code of Civil Procedure.

existing domestic rules on private international law.

- *Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Regulation') – in particular articles 1, 2, 3, 4, 5, 6, 7, 31, 32-56 ; 57-58, 61*

The aim of this section is not to assess the overall application of the Regulation in France, a task which has been already carried out on the Commission's initiative in 2009,²²⁶ but rather evaluate its positive or negative impact on the protection of the civil rights of EU citizens.

As noted by reporters in the context of the study commission in view of a reform of Brussels I, data on the application and enforcement of Brussels 1 are not available in a synthetic format.²²⁷

Transposition and implementation

Like EU Regulations, the Brussels I Regulation is directly applicable and does not need to be transposed into French law. Brussels I and I a Regulations nonetheless provide that, save for matters regulated in the Regulation or relevant international instruments, the procedure is governed by the law of the member states in which the recognition and enforcement is sought. The Code of Civil Procedure was amended to support the application of the Regulation.²²⁸ Materials produced by the Commission, and aimed at practitioners, describe these modalities.²²⁹

Judicial applications

Preliminary references

²²⁶Report from the Commission to the European Parliament, the Council and THE European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM/2009/0174 final.

²²⁷See http://ec.europa.eu/justice/civil/files/brussels_i_appendix_d_17_12_10_en.pdf, 191; see also Impact assessment accompanying the proposal for the Brussels I Recast Regulation SEC (2010) 1547 final, at http://ec.europa.eu/justice/policies/civil/docs/sec_2010_1547_en.pdf

²²⁸Article 509-1 of the Code of Civil Procedure was amended in 2008, 2010 2011, 2014, in application of the Brussels regulation and other relevant EU instruments; Article 509-2 was modified in 2005, 2005, 2010, 2011, 2014; Article 1382 was modified in 2008 and 2014; Article 1424.1 was modified in 2008 and 2014;

²²⁹ France, 'Executer une decision de justice en application du Reglement 44/2001 CE', at http://www.europe-eje.eu/sites/default/files/pj/dossiers/mep_france_fr_0.pdf.

A search in the CURIA database reveals that French courts make only eight requests for preliminary rulings to the CJEU regarding the Brussels I Regulation. Two of them were considered inadmissible, as the referring courts were not eligible to refer under the limited preliminary reference jurisdiction.²³⁰

In the recent *Cartier* case, they sought clarification about the interpretation of Article 27 of the Regulation on *lis pendens*. The CJEU adopted an interpretation which appears to strike a balance between the rights and interests of both parties, in that it established a right to contest the jurisdiction of the Court seized by the other parties before making submissions on the merits.²³¹ Furthermore, French courts, which were divided over the territorial effect of injunctions against further infringement of a Community Trademark,²³² took the question to the CJEU, which confirmed its pan-European effect, whilst conceding it could be restricted. For that, plaintiffs must bring some evidence that infringement is taking place in countries other than France and defendants should try to offer evidence that the functions of the CTM are not affected in some countries.

In another case raised by French courts, the CJEU decided that where coercive measures are imposed, they should be enforced in other member states using equivalent measures.²³³ The *Cour de Cassation* followed the CJEU.²³⁴ This could be considered as a positive development from the point of view of Community trademark owners: it enables them to obtain pan-European injunction in the court of one member state and avoid bringing multiple litigation in different countries. It could also lead to cost reduction, by encouraging litigation in countries in which IP litigation is cheaper, such as France or Germany, and then seek cross-border enforcement. The courts of countries in which IP litigation is costly (eg UK) could become mere enforcers of decisions issued by courts in cheaper member states. French

²³⁰ C-241/02 *Marseille Fret* [2002] ; C-278/09 *Martinez* ECLI:EU:C:2009:725

²³¹ C-1/13 *Cartier* ECLI:EU:C:2014:109

²³² Paris First Instance Court, 15 April 2010, *Epson France*, No. 09/817; Paris First Instance Court, 16 December 2008, *Nike International*, No 07/4046 ; Paris First Instance Court, 10 September 2008, *Louis Vuitton Malletier*, Case No 07/03120; Paris CA, 22 October 2010, *SARL GMBH*, No 09/10515; Paris Court of Appeal, 24 September 2008, *Sanrio Co. Ltd*, No 07/03078.

²³³ C-235/09 *Express France* ECLI:EU:C:2011:238

²³⁴ Com., 29 November 2011, *DHL Express France*, No 08-13729.

courts have thus contributed to clarifying the aspects of Brussels 1 in a way which improves the parties positions (if not that of the City lawyers).

Finally, the CJEU, interrogated by the Cour de Cassation on the application of Article 5(3) of the Regulation, in a case which involved damage caused to a French music label by an alleged infringement of its copyright by an Austrian CD manufacturer, whose products were sold by a British companies through an internet site also accessible within France. The CJEU interpretation suggested that the French court had jurisdiction but only to determine the damage caused in France.²³⁵ The Cour de Cassation, following the CJEU, thus established access to a foreign website as a criteria conferring competence to French court in damage claims.²³⁶ This decision in the context of copyright should be transferable to other IP disputes. This enlargement of the scope of competence of French courts is likely to increase internet IP litigation in France.

National courts applications

According to a keyword search in the Legifrance database, we find reference to the Brussels I Regulation in 237 Decisions of the *Cour de Cassation*, 97 reported decisions of the *Court of Appeal* and 4 reported decisions of the TGI. There has been no reference to the Brussels IA Regulation so far. Unfortunately, it was not possible, for the purpose of this report, to carry out a comprehensive qualitative analysis of all reported judicial decisions concerning the impact of the application of the Brussels I Regulation on the protection civil rights in French courts. However, older reports give a sense of the extent to which French courts are concerned about the protection of due process rights when enforcing foreign judicial decision under the Regulation. A report produced back in 1995, in the context of an early study into the application of the Regulation, cast some light on the matter.²³⁷

Jurisdictional matters

²³⁵ C-170/12 *Pinckney v KDG Mediatech* AGECLI:EU:C:2013:635.

²³⁶ Cass., 1ere Civ., 22 January 2014, No 10-15890 - ECLI:FR:CCASS:2014:C100033

²³⁷ Hess, Pfeiffer and Schlosserm (eds), *Rapport français en vue de l'Etude relative à l'application du Règlement CE 44/2001 à la demande de la Commission européenne*, Study JLS/C4/2005/03, available at http://ec.europa.eu/civiljustice/news/docs/study_bx11_france.pdf.

The determination on the competence of the court may be problematic, and may significantly add to the time it takes to obtain a declaration. In most cases, decision on the competence and the actual recognition are determined in same proceedings, although not always.²³⁸ It is important to examine applicable rules under French law outside the scope of application of the Regulation, to assess to what extent the Regulation 'fit' with the French legal landscape.

The gradual fading of the nationality rule

In matters of jurisdiction, the original French rule under Article 14 and 15 of the Civil Code was that French court were only competent where the applicant or the defendant were French citizens. Increasingly, however, the determination of the competent court followed domestic rules of attribution of competence.²³⁹ Eventually, in a decision of 1985, the *Cour de Cassation* ruled that the nationality rule of Article 14 (and by extension Article 15) was only applicable where no other rule of attribution of competence applied, with the consequence that the nationality-based competence now only has a residual character.²⁴⁰ Parties may also renounce expressly, directly or indirectly, to the nationality rule, by reference to another rule of attribution of competence.²⁴¹ Given the optional nature of the nationality rule, the national court cannot invoke it of their own motion.²⁴² There have been questions as to the compatibility of Article 14 and 15 of the Civil Code with the right to a fair trial, as it places French plaintiffs in a favourable position. However, the *Cour de Cassation* did not find any incompatibility with Article 6 ECHR.²⁴³

The domicile/residence rule

Currently, the basic rule is thus that the competent court is the one having jurisdiction over the defendant's domicile (article 42 of the Code of Civil Procedure), or its residence, providing he/she does not have a domicile elsewhere (Article 43 of the NCCP). Where the

²³⁸ Hess, Pfeiffer and Schollser (above n 237, 13-15.) report a case in which it took 4 years for a French court to eventually be declared incompetent.

²³⁹ Cass, 19 Oct 1959, Pelassa; Cass, 30 October 1967, Schefferl.

²⁴⁰ Cass., 19 November 1985, *Societe Cognac & Brandies from France*

²⁴¹ Cass, 25 Nov 1986, *Sacchi*.

²⁴² Cass., 1ere civ., 26 May 1999.

²⁴³ Cass, 1ere civ, 30 March 2004.

defendant does not reside in France, the plaintiff may choose the court of his own domicile, or any court of his/her choice.²⁴⁴ This adjustment brings French law closer to the EU Regulations, even in matters which fall outside of its scope.

Special rules

In cases concerning contracts, the plaintiff may bring proceedings either before the court of the defendant's domicile, or the court of the place where actual delivery is to be made or where service is to be provided (Article 46, al. 1 of the NCCP). In tort cases, the plaintiff may choose between the courts of the domicile of the defendant; those where the event causing the damage occurred; or those where the said damage was suffered (Article 46, al. 2 of the NCCP). A plaintiff may also bring proceedings before a French court if he or she can prove that it is impossible for him/her to bring his claim before a foreign court; and that the dispute has some link with France. This solution is inspired by Article 6 ECHR's right to a fair trial.²⁴⁵ French court may also become competent in emergency situations.²⁴⁶ Finally, competence may also be based on public power prerogatives (eg only French courts are competent to decide on nationality, or in cases involving French public services, like in the case of the issuance of civil status documents).

Moreover, competence may also be attributed through arbitration clauses, and choice-of-court agreements (or clauses attributive of jurisdiction). The latter are commonly used in international business contracts. French law imposes strict conditions for determining the validity of such clauses (Art. 48 of the Code of Civil Procedure); however, *the Cour de Cassation*, following doctrinal advice and taking into account international business practice, defined different rules (for international disputes, and provided that it does not go against the mandatory territorial competence of a French court).²⁴⁷ After some reluctance, French courts aligned with the CJEU case law and accepted that exclusive choice-of-court clauses prevailed over the special domiciliation rules.²⁴⁸

²⁴⁴ Decree 12 May 1981, amending Article 42 of the Code of Civil Procedure.

²⁴⁵ Cass., 1^{ere} Civ, 1 Feb 2005. The court made a reference to Article 6 ECHR.

²⁴⁶ Cass, 20 March 1989, (interim conservatory measures).

²⁴⁷ 17 December 2005, *Cie des signaux et entreprises electriques*.

²⁴⁸ 1^{ere} civ., 20 June 2006, No 03-14.553

Forced execution/enforcement measures can only be sought and ordered in the country in which they must be executed.²⁴⁹ For some time, in matters of seizures, the *Cour de Cassation* considered that it was for the plaintiff to bring a case on the merits directly in the court competent to order the seizure (forum arresti);²⁵⁰ however this approach was later abandoned.²⁵¹

These are the basic rules applicable to the determination of the competent court in cases which have an international dimension. However, the *Cour de cassation* made it clear that these rules do not apply to dispute which fall under the scope of the Brussels I Regulation, where the rules set out in the Brussels I Regulation prevail.²⁵² Note however that the Regulation does not apply to French over-sea territories, where the 1968 Brussels Convention applies.

Save in the case of fraudulent action, and those subject to preliminary reference presented earlier, French courts overall complied with the Regulation's *lis pendens* rule and its interpretation by the CJEU.²⁵³

Recognition and enforceability of judicial decisions

In order to seek enforcement of a foreign judicial decision issued in another member states, one must obtain its exequature. The conditions were defined in the case law of the *Cour de Cassation* (competence of the foreign court; application of the correct law according to French conflicts of law rules; compliance with international public order; and lack of fraud).

²⁵⁴ Brussels I Regulation provides for a simplified mechanism to obtain this. In France, the procedure for the recognition and enforceability of foreign decision under the Regulation goes as follow.

²⁴⁹ Cass, 12 Mai 1931, Cyrien Fabre.

²⁵⁰ Cass., 6 November 1979, Nassibian.

²⁵¹ Cass, 17 January 1995.

²⁵² Cass., Mix., 11 March 2005.

²⁵³ Cass., com., 3 June 2014, App No 12-18; Cass, 1ère civ., 6 December 2005; Cass., 1ere civ., 17 January 2006, App. No 02-20636.

²⁵⁴ Cass., 7 Jan 1964, Munzer; Cass, 4 October 1967, Bachir.

The person seeking enforcement of the decision must make a request addressed to the competent authority, which is the Chief Registry of the regional court (TGI). In order to identify the territorially competent court, parties and their lawyers may use the European Judicial Atlas, set up and operated by EU institutions.²⁵⁵ The request for a declaration of enforceability must be submitted in double exemplaries. It must include a copy²⁵⁶ of the judgment which satisfies the conditions necessary to establish its authenticity and a standard form (European) certificate issued by the court of origin. The request does not need to be reasoned. The request can be made by the interested person, or any allowed representative, as a lawyer is not required. However, to the extent that one needs to have an address for service in the area of jurisdiction of the court, and requires expertise in proceeding with the request, in practice, persons seeking enforcement will hire the service of a lawyer.²⁵⁷ This costs about 500-1000 EUR²⁵⁸ in first instance, plus an additional 500-1000 EUR in case of appeal. Legal fees cannot be reimbursed, and it is not clear to what extent legal aid is available for such request. The Chief Registrar does not hear counter-claim from the party against whom enforcement is sought.

Although it is not imposed by the regulation, registrars tend to require certified translations of the full decision (c. 5000 EUR for a 70 page judgment), and in case of decision in absentia, that of the document instituting proceedings, and the notification of the decision.

The recognition of the enforceability of the decision is handed over to the applicant against signature or acknowledgment of receipt, or will be notified to him by registered delivery with acknowledgement of receipt. There were concerns amongst French practitioners that the right to information of debtors (via registered letter with acknowledgement of receipt) was not sufficient. Copies of the request and of the decision are kept by the court registry.

²⁵⁵ Accessible at http://ec.europa.eu/justice_home/judicialatlascivil/html/index_fr.htm

²⁵⁶ In the early days at least, some registries requested the original of the judgment.

²⁵⁷ As French law did not specify at which point in time the address for service of process must be established, the *Cour de Cassation* gave a relaxed interpretation and accepted it could be done at the time of notifying the order authorizing the execution of the decision, Cass, 1ere civ. 18 April 1989.

²⁵⁸ On the costs of civil proceedings in general, see http://ec.europa.eu/civiljustice/publications/docs/costs_civil_proceedings/france_en.pdf

The declaration of enforceability can be challenged before the Appeal Court by the party against whom the enforcement of the decision is sought, in accordance with the Court of Appeal's rules of procedure. There, parties must be represented by a lawyer (c.1000 EUR). The competent appeal court is the one in which the seat of the TGI to which the Chief registry who has issued the decision is attached.

Recognition procedures are successful in 99.7%.²⁵⁹ The refusal to recognize the enforceability of a decision can be challenged before the President of the TGI. The party against whom the enforcement of the decision is sought is convoked by means of a summons delivered by the bailiffs on the initiative of the applicant whose request has been rejected. These judicial decisions can only be challenged before the *Cour de Cassation*.

In the case of decisions issued by French court of which someone seeks execution in another member state, the 'expedition' of the decision consists in a copy of the decision certified in conformity by the chief registry of the TGI. The chief registry will also deliver the required certificate.²⁶⁰ The certificate request must include two copies, and contain a precise indication of the material required. It does not have to be reasoned, and the applicant does not have to be represented by a lawyer (although in practice, they do). The certificate will be handed over to the applicant against signature or acknowledgment of receipt, or will be notified to him by registered delivery with acknowledgement of receipt. The copy of the request and certificate are kept by the registry. The refusal to deliver such certificate can be challenged before the president of the TGI, who will decide in last resort after having heard the applicant and the required authority.

According to the 1995 report on the application in France of the Regulation, the average timeframe for obtaining a declaration of enforceability was relatively short (ie 10-15 days), where the request was complete. A more recent report suggests that the frequent and systematic returning of incomplete files tend to delay proceedings; once complete files are submitted, it takes usually 10 days to get a decision. The longest time for a decision in France

²⁵⁹ http://ec.europa.eu/justice/civil/files/brussels_i_appendix_d_17_12_10_en.pdf, 193.

²⁶⁰ Article 509.1 of the Code of Civil Procedure.

was 54 days. There is, on average, a period of one month between filing an application for court action and this action first taking place.²⁶¹

French courts have confirmed that no additional documentation than the one specified in the Regulation should be required in order to obtain the declaration.²⁶² In France, the surprise effect of the declaration is protected by the fact that it is the applicant that decides on the notification of party against whom forced enforcement is sought. Interestingly, parties and documents do not necessarily refer to the Brussels I Regulation, or they refer to it alongside domestic provisions (Civil Code) or international conventions (eg Brussels Convention).

Overall, despite a commitment to mutual recognition, French courts display certain concerns regarding the guarantees afforded to the rights of the defence in the enforcement of foreign decisions in general, and under the Regulation, in particular. They may, consequently, refuse to declare judicial decisions enforceable, where they consider that it would undermine human rights.

This concern goes back long before the introduction of the Regulation, and was visible in earlier international exequature decisions.²⁶³ French courts can refuse exequature in case of incompatibility with substantive and procedural public order.

The respect of the rights of the defense is a component of the procedural international public order.²⁶⁴ French courts thus verify that the parties have been placed in a position to defend themselves, that evidence that led to the judicial decision was admissible, or that the foreign court was impartial. They check that documents instituting proceedings have been notified to the defendant in time to enable him or her to organize his or her defense and that the defendant has had effective knowledge of such document, and was afforded sufficient time to defend him/herself.²⁶⁵ The *Cour de Cassation*, in a case falling under

²⁶¹ See http://ec.europa.eu/justice/civil/files/brussels_i_appendix_d_17_12_10_en.pdf, 192.

²⁶² Cass., 1ere civ., 28 March 2006, App. No 03- 17.045; CA Chambéry, com., 8 November 2005, RG 04/02041.

²⁶³ Niboyet, Hess, Pfeiffer and Schlosserm ' L'exequatur des jugements étrangers en France, Etude de 1390 décisions inédites – (1999-2001) ' *Gaz. Pal.* 16 17 juin 2004

²⁶⁴ Cass, 1ere civ., 7 January 1964 Munzer; Cass, 1ere civ., 4 October 1967, Bachir.

²⁶⁵ Niboyet, Hess, Pfeiffer and Schlosserm above n 263.

Brussels I, sanctioned the Appeal Court for not having verified that the modalities of notification of the decision of which the enforcement was sought (registered letter with acknowledgement with receipt) was compatible with French notification requirements, and that appropriate information as to the possibility to challenge the decision had been provided.²⁶⁶ Moreover, it considered that an Italian decision issued following a unilateral procedure, enforceable in Italy following notification to the debtor by registered letter with acknowledgment of receipt, could not be declared enforceable in France without first checking that this decision had been notified according to modalities and within a time-frame which enabled him/her to challenge it.²⁶⁷

French courts also pay attention to the characteristics of the court which issued the decision the enforcement of which is sought. In a decision of 1996, the *Cour de Cassation* considered that the lack of impartiality of a court infringed procedural public order requirement and prevented the enforceability of its decision.²⁶⁸ The conditions of access to court may also be examined. The *Cour de Cassation* refused enforceability to a judicial decision which had been issued without the defendant being able to defend himself, because of the prohibitive costs of proceedings.²⁶⁹

In a 2004 decision, the *Cour de Cassation* had to determine whether to declare the enforceability of a 'Mareva injunction', a common law procedure which prevents a defendant from dissipating their assets from beyond the jurisdiction of a court so as to frustrate a potential judgment, was contrary to public policy. It examined its impact on the procedural rights of the defense and on the substantive rights of the debtors and borrowers, as well as judicial competence, and found such procedure compatible with public policy, and declared it enforceable. It however refused such effect to anti-suits injunctions, because that would affect domestic judicial competence.²⁷⁰

²⁶⁶ Cass. Civ, 19 November 2009, App. 08-12134.

²⁶⁷ Cass., civ 1ere., 12 April 2012. No 10-23023.

²⁶⁸ Cass., 1ere civ. 1ere , 7 December 1996, *Tordjeman*.

²⁶⁹ Cass., 1ere civ., 16 March 1999, *Pordea*.

²⁷⁰ Cass. , 1ere civ., 30 June 2004, *Stolzenberg c/ Société Daimler Chrysler Canada Inc et autre* No 01-03.248.

In case parties reside abroad, delays are expanded by two months (Art 643 New Code of Civil Procedure)'

- *Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ('Brussels IIa Regulation'). All provisions.*

The general rules applicable in France to divorce and separation, as well as parental responsibility, are set out by the French Civil Code, and procedures provided under the Code of Civil Procedure.²⁷¹ Brussels II bis does not apply to French overseas territories.

Transposition and implementation

The regulation is directly applicable. In application of the Regulation, France has designated two authorities to assist with the application of the regulation, the *bureau de l'entraide civile et commerciale internationale* (D3) de la *Direction des affaires civiles et du Sceau* (in matters related to parental responsibility) et la *Direction de la protection judiciaire de la jeunesse* (in matters related to children placement). French law-makers made adjustments to existing rules of civil procedure to support the application of the Regulation, in a similar way as it did for Brussels I. The procedure for the recognition and enforcement of judicial decisions in matrimonial and parental responsibility matters are largely similar to the ones provided for the application of Brussels I. The main difference between the application of the Brussels I and II concerns the rules attributing judicial competence.

Judicial applications

A search in Legifrance with the Regulation number as a keyword identifies 80 reported decisions, 43 for the *Cour de Cassation* and 46 for appeal courts.²⁷² None are related to the 'safeguard clauses' (Article 22 and 23). *Jurisdictional matters*

²⁷¹ For an overview, see the documentation available on the EU Civil Justice website, http://ec.europa.eu/civiljustice/divorce/divorce_gen_en.htm and http://ec.europa.eu/civiljustice/parental_resp/parental_resp_fra_en.htm.

²⁷² Search engine available at <http://www.legifrance.gouv.fr/rechJuriJudi.do?reprise=true&page=1>

Brussels II and II bis applies to matrimonial matters, but the subject matter is not defined in the Regulation. In France, nullity of the marriage is considered as falling under the scope of the regulation.²⁷³ Brussels II bis also applies to matters of parental responsibility, which is given a broad definition in Article 2.7 of the Regulation. However, in French law, parental responsibility belongs only to the parents, and third parties have only limited powers, except 1) where the parents have committed crimes and had parental authority over their children removed, as these are entrusted to ascendants (Art. 378 al 2 Civil Code), or 2) where parental authority has been delegated to social services either on a voluntary basis or forcefully (art. 377 Civil Code). The Regulation leaves it to national law to determine until what age a child is a child. In France, children are individuals who are under 18 years of age, except if they have been emancipated. The decision on child status is made based on the law of the child's nationality. French legislative provisions recognize that both the mother and father parents must maintain relationship with the child and respect the links of the child with the other parent.²⁷⁴

With Brussels II bis, 'habitual residence' becomes the main criteria for determining the competent court. The objective of this jurisdictional rule is the protection of children, as it is assumed that the court of the country of residence of the child is better able to assess the social and family environment of the children and decide on suitable measures. However, the EU legislator did not define it or provide indications as to how it should be determined. The risk for divergence between national approaches and thus competing jurisdiction and proceedings was significant, which could trigger a race for divorce/custody. In other contexts, the CJEU had defined residence, or domicile, as 'the place where the person has established, with the character of wanted stability, the permanent or stable centre of usual interests.'²⁷⁵ In 2004, the Aix-en-Provence Appeal Court used that definition in the context of the application of Brussels II a;²⁷⁶ a year later, the *Cour de Cassation* considered that the

²⁷³ Legros, S. 'L'application du Règlement Bruxelles II a en droit français et en droit allemand, A propos du commentaire du Prf. Dr Gruber', <http://m2bde.u-paris10.fr/content/l'application-du-règlement-bruxelles-ii-bis-en-droit-français-et-en-droit-allemand-propos-du?destination=node%2F1223>

²⁷⁴ Article 373-2, al. 2, of the Civil Code.

²⁷⁵ C-492/93 *Magdalena Pedro Fernandez* ECLI:EU:C:1994:332.

²⁷⁶ CA Aix-en-Provence, 18 November 2004, *Gaz. Pal.*, 2005, 1.

notion of habitual residence was an autonomous concept of EU law, and endorsed the above EU definition, although without making a preliminary reference to the CJEU.²⁷⁷ The French approach was also followed by other national court (eg British, Luxembourg) but was criticised by others, in particular German lawyers and scholars, who had a different understanding of that notion in the context of matrimonial and custody proceedings. In 2004, the CJEU, finally interrogated on the matter by a Finnish court, considered that this EU judicial definition, developed another context, could not be transposed to matters covered by Brussels II bis. It considered that habitual residence should be determined taking into account all particular circumstances of the case. It identified a series of factors which national courts must apply in determining a child's habitual residence, which include objective, as well as subjective, elements.²⁷⁸ The *Cour de Cassation* has now aligned its position on that of the CJEU, considering that a residence which lasts in time and reveals a certain integration in a social and family environment constitute habitual residence for the purpose of application of Brussels I.²⁷⁹ In a recent case, it overturned an appeal court decision which had not sufficiently investigated all relevant factors to determine that French court was not competent, based on the children's residence in Germany, when the children, who had been residing in France until then, had only moved to Germany a few days before the French court was seized.²⁸⁰

²⁷⁷ Cass, 1^{ere} civ., 14 December 2005 *Moore c/McLean*.

²⁷⁸ 'In addition to the physical presence of the child in a Member State other factors must be chosen which are capable of showing that that presence is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment. In particular, the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration....the parents' intention to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or lease of a residence in the host Member State, may constitute an indicator of the transfer of the habitual residence. Another indicator may be constituted by lodging an application for social housing with the relevant services of that State.... the fact that the children are staying in a Member State where, for a short period, they carry on a peripatetic life, is liable to constitute an indicator that they do not habitually reside in that State.' (para 38-41, C-523/07 A.ECLI:EU:C:2009:225. The Court recently confirmed this position, further specifying that 'one should take account of the integration of the child in its social and family environment (C-497/10 PPU *Barbara Mercredi* ECLI:EU:C:2010:829). Finally, in a recent case concerning a French proceedings, the Court added that procedural considerations may also matter in determining habitual residence (C-376/14 C. v. M. ECLI:EU:C:2014:2268).

²⁷⁹ See Cass. 1^{ere} civ., X. and Y., 4 March 2015, No 14-19015.

²⁸⁰ Cass. civ. 1, 25 mars 2015, n° 13-25.225.

A recent case involving proceedings before French court was referred by the Irish Supreme Court to the CJEU, which led to further clarification on the determination of the child's habitual residence.²⁸¹ In April 2012, a French Court issued a divorce decision, in which it decided that parental responsibility should be exercised jointly and determined that the habitual residence of the child was with her British mother. It provided for access and accommodation rights for the French father, in the event of disagreement between the parties. It allowed the mother to take residence in Ireland and stated that the judgment was 'enforceable as of right on a provisional basis as regards the provisions concerning the child'. In July 2012, the mother travelled to Ireland with the daughter, in breach of the arrangements relating to the father's access and accommodations rights. In March 2013, the Appeal Court of Bordeaux overruled the April decision. It judged that the child should reside with the father and arranged for the mother to have access and accommodation rights. The mother denied the daughter's return to France, and the father applied for a return order before the French Court, for exclusive parental responsibility and for a prohibition on the child leaving France without his authorization. The French Court upheld the request. Later, he sought the enforcement of that decision in Ireland under Article 28 of Brussels II *bis*. The application was successful, but the mother appealed it. In May 2013, the father brought proceedings before the High Court of Ireland seeking a return order to France under Article 12 of the 1980 Hague Convention and Articles 10 and 11 of Brussels II *bis*, asking for a declaration of the child's wrongful retention by the mother in Ireland. The High Court dismissed the action considering that the child's habitual residence had changed since the mother took him to Ireland with the intention of settling there. The father appealed the case to the Supreme Court, which stayed proceedings and referred three questions to the CJEU. It asked whether the French proceedings relating to child custody precluded the establishment of the child's habitual residence in Ireland and whether the child has acquired a new habitual residence in Ireland, since her removal, in July 2012, was lawful. With regard to the concept of 'habitual residence under Article 11 of the Regulation, the CJEU refers to its *A and Mercredi* case law, and insists that the notion must be determined in the light of the best

²⁸¹C-376/14 *C. v. ME*CLI:EU:C:2014:2268.

interest of the child and on the principle of proximity. In addition to the factors already highlighted in its previous case law, the Court adds that, in order to examine the reasons for the child's stay in the Member State to which the child was removed and the intention of the parent who took the child there, 'it is important ... to take into account the fact that the court judgment authorising the removal could be provisionally enforced and that an appeal had been brought against it'. Those factors, in the Court's opinion, 'are not conducive to a finding that the child's habitual residence was transferred, since that judgment was provisional and the parent concerned could not be certain, at the time of the removal, that the stay in that Member State would not be temporary'. The Court also establishes that, in determining the change of the child's habitual residence, the time which has passed since the judgment which set aside the judgment of first instance and fixed the residence of the child at the father's home, in the Member State of origin 'should not in any circumstances be taken into consideration'.

The Court was, finally, asked to clarify whether the French courts retained jurisdiction in order to render wrongful the retention of the child in Ireland. The Court considers that the failure to return a child to France, the Member State of origin, following a French court judgment fixing the residence of the child at the home of the parent living in that Member State constitutes a violation of custody rights. Therefore, the possibility that a child's habitual residence may have changed following a judgment at first instance, in the course of appeal proceedings, 'cannot constitute a factor on which a parent who retains a child in breach of rights of custody can rely in order to prolong the factual situation created by his or her wrongful conduct and in order to oppose the enforcement of the judgment given in the Member State of origin on the exercise of parental responsibility which is enforceable in that Member State and which has been served'. The interaction between French and English courts, as well as the CJEU have therefore contributed to defining the factors which must be taken into account in determining the child's habitual residence, thereby reducing the risk of competing proceedings, although this risk is not annihilated, given the margin of appreciation left to national judges. This could, in some circumstances (such as those of the case highlighted above) led to serious disruption of family life, as well as interference with

one's right to a fair trial.

Recognition

There are also issues related to the right of the child to be heard in matters pertaining to parental responsibility. Brussels two does not impose the hearing of children, although its preamble and application guides strongly encourage member states to provide for the hearing of children. Article 388-1 of the French civil code recognizes the right of the minor capable of discernment to be heard by the judge or, as is more often the case, any one appointed to that effect. Since 2007, and the revision of Article 388-1 of the Civil Code,²⁸² when a minor requests to be heard, he or she must be heard.²⁸³ The only circumstances in which a judge can refuse to hear a child are a) where he or she lacks discernment, and b) where the proceedings do not concern him or her (art. 338.4 Civil Procedure Code).

The legal provisions do not specify any age requirement; the discernment capacity of a child must be assessed on a case by case basis by the judge.²⁸⁴ In a recent case, the *Cour de Cassation* overturned a Court of Appeal decision which had refused to hear a 9 year-old child, solely on the basis of her age, without further examination of her discernment capacity.²⁸⁵ As there are not legal instructions as to how to assess discernment capacities, courts often rely on age to make that determination. In this decision, the *Cour de Cassation* is thereby condemning the blind and systematic use of age as determinant factor, insisting on the reasoning requirement.²⁸⁶

The judge must ensure that the minor has been informed about his or her right to be heard and assisted by a lawyer. This information requirement may however be difficult to execute, as there is no guarantee that parents will transmit the information or a letter to the child. A 2009 decree, which modifies Article 338-1, provides for specific modalities regarding the information of the minor and his or her hearing. The information is given to the parents or

²⁸² By the Law No 2007-308 of 5 March 2007 (Art.2).

²⁸³ Before that, the judge could reject this request, by an especially reasoned order" Cass. civ. 1re, 18 May 2005, *Dr. famille*.

²⁸⁴ J. Hauser, 'Rôle de l'enfant mineur dans les procédures', RTD civ. 1993. 341

²⁸⁵ Cass, 1ere civ., 18 March 2015, No 14-11392

²⁸⁶ On this, see Civ. 1re, 18 May 2005, No 02-20.613.

those invested with parental authority, or the guardian or social services in which trust the child has been placed. The judge must verify that the information has been transmitted to the child, and make a mention of it in his or her decision, for failing to do so may prevent enforcement in other member states (eg in Germany, where judges are constitutionally obligated to hear children in such proceedings). The Ministry of Justice provides a special form to that effect. This information must be provided in all proceedings related to the exercise of parental responsibility, the determination of the residence of the child, visit/access and accommodation rights.²⁸⁷

The minor is invited to the hearing by simple letter. The child can be heard alone, or with a lawyer or a person of his or her choice. Where this choice appears against the minor's interest, the judge may designate another person. The right to a hearing is a right of the child. Where the hearing of the child is requested by another person, the judge may decide to refuse it if it is not necessary to the resolution of the disputes or if it is contrary to the interest of the child (art. 338-4 al2 of the Code of Civil Procedure). The child may be heard by the formation of judgement, one of its members or a third person designated by the court (social worker, specialized psychologist or psychiatrist). The registry does not have to attend, although it may be desirable. The hearing is subject to reporting, and must respect adversarial principles (Art. 338-12 Code of Civil Procedure). However, local courts have adopted varied practices in relation to the mode (oral, written) and scope (detailed or not) of this reporting. The child may be assisted by a lawyer (Art. 338-7 of the Code of Civil Procedure) who can help him or her prepare for the hearing. The lawyer should however not be the one who reports the child's words. In a 2005 decision, the *Cour de Cassation* considered that in all decisions concerning children, 'the superior interest of the child must be a primordial consideration, that where a minor capable of discernment ask to be heard, even if for the first time in appeal, his or her hearing could only be rejected by a reasoned opinion'; it overturned a decision of an appeal court which had not given due consideration to a child's request to be heard.²⁸⁸ The words of the child must be taken into account by the

²⁸⁷ And also procedures related to filiation, adoption, and maintenance subsidies.

²⁸⁸ Cass., civ. 1ere, 18 May 2005, No 0220613.

judge; it however does not mean that the judge is bound by the child's wished. French law adjustments, which move towards a more systematic hearing of children in civil proceedings, comply with the spirit of the Brussels II bis expectations, and facilitate the cross-border enforcement of custodial decisions.

The *Cour de Cassation* considered inapplicable Article 495 of the Code of Civil Procedure which provide for the modalities of enforcement of the adversarial principle (the serving of documents to the other parties), to a request in enforceability a divorce decision, since the matter was covered by Article 509-2 as it results from Brussels II bis Regulation, which does not provide or impose the sending of a copy of the request and the order to the party against whom enforcement is sought. It did not address the argument based on Article 47 of the Charter made by the applicant.²⁸⁹

The Cour de Cassation sanctioned lower courts decisions which had imposed additional conditions, based on French law, to the recognition and enforceability of access order.²⁹⁰

- *Regulation No 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters.*

Transposition and implementation

The Regulation is directly applicable to matters which fall under its cope. The Code of Civil Procedure was amended to enable the application of the regulation.²⁹¹ It concerns in particular protective measures for victims of violence provided for and regulated under Article 515-9 ss of the Civil Code.²⁹²

²⁸⁹Cass., Civ. 30 January 2014, No 12-27821.

²⁹⁰Ass., crim., 17 Feb 2010, No 09-83993.

²⁹¹Eg Articles 509.1, 509.6, 509.8.

²⁹²Where violence against a former spouse, partner or child threaten the victim, the family affair judge can issue in emergency a protection order (Article 515-9). The judge may be seized by the victim or the *Ministère Public*, if the victim agrees. Once seized, the judge must convoke and hears, using all means, both parties as well as the *Ministère Public*. If needs be separately (Art. 515.10). The protective order is issued in the shortest delay by the family affairs judge, if the documents and testimonies, adversarially debated, suggests that there exists serious reasons to consider as likely the commission of alleged violent acts and the danger to which the victim or children may be exposed. It can impose a number of protective measures (interdiction to meet,

A circular of 12 January 2015 presents the modalities of Regulation 606/2013 applicable to protection measures ordered after 11 Jan 2015.²⁹³ Individuals must submit a request for the certificate required to seek the enforcement abroad of protective measure to the family affairs judge who ordered the measure (Art. 509.1). The request must be submitted in two copies and specify the documentation required. Applicants do not need to be represented by a lawyer. The judge should issue it, using the multilingual form annexed to the circular, but filling it in French. The circular calls for particular attention to paid to the need to limit the needs for translation costs for the parties by minimising text in the open section of on the certificate. It also encourage the competent authority to bring the applicant's attention to useful EU website (European Judicial Atlas, etc.) The certificate once issued is notified by the registry to the person who is at the origin of the threat by registered letter with acknowledgement of receipt or , where not available, 'signification' (Article 509.6). Mistakes may be rectified at the request of the parties or by the judge himself following domestic procedures. It may be withdrawn, in case it has been delivered in violation of the defendant due process rights (Art 6 Regulation), or when delivered whilst not falling under the scope of application of the regulation. The refusal to deliver it can be challenged before the president of the TGI (Art 509-7), without the need to be represented by a lawyer.

Individuals who seek enforceability of protective measures must produce the original of the judgment and the certificate issued by the foreign court which issued the protective order to the police or gendarmerie forces. It must be translated in French and the cost of translation are born by the applicant, as legal aid is not available in such case. Adjustment to facilitate enforcement in France may be requested from the President of the TGI (article 509-8 du Code of Civil Procedure).

interdiction to wear a weapon, decide on separate accommodation, decide on the exercise of parental authority, the dissimulation of the victim's address, decide on legal aid, etc) (Art 515-11). The measures are taken for a period of maximum 6 months, and can be prolonged in case divorce or legal separation proceedings have been brought or the family affairs judge has been seized on parental responsibility matters (Art. 515-12). A protective order may also be issued in urgency in case of threat of forced marriage; the judge may order a temporary prohibition to leave the country (Article 515-13).

²⁹³Circular of 12 January 2015 presenting the provisions of regulation No 606/2013 [Circulaire de présentation des dispositions du règlement (UE) n°606/2013 du Parlement européen et du Conseil du 12 juin 2013 relatif à la reconnaissance mutuelle des mesures de protection en matière civile] NOR : JUSC1500779C; http://www.textes.justice.gouv.fr/art_pix/JUSC1500779C.pdf

The circular specifies that only the person at the origin of the threat can raise a ground for the non-recognition of the order (the competent authority cannot, even if it would be contrary to public order, except

The request for a refusal of recognition or execution must be submitted to the President of the Tribunal de grande instance (regional court) ou his/her delegate (preferably the judge for family affairs, acting in référé (emergency) (Article 509-8 code of civil procedure). The decision refusing to recognise or enforce a protective measure must be notified to the person causing the risk by means of 'signification'.

Judicial application

There is no reported case law related to the application of this regulation.

1.1.2 Protection of rights in criminal proceedings (due process, right to a fair trial, etc.)

1.1.2.1. *Mutual recognition instruments in criminal matters*

- *Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between member state: all provisions potentially relevant.*

Before examining the domestic implementation of the EAW, it is worth exposing in brief the traditional extradition procedure, which pre-existing and continues to exist alongside the EAW. The extradition procedure is a politico-judicial procedure. Requests are addressed to the Foreign Affairs Minister, who transmits the file to the competent *Procureur de la République* (public prosecutor). The wanted person must be presented to the *chambre d'instruction* (investigating chamber), which delivers a reasoned opinion. It can only refuse extradition if the legal conditions are not fulfilled or in case of manifest error. In such case, the government is bound by the chamber's decision. In case of favourable opinion, the government may still, on a discretionary basis, refuse extradition. When extradition has

been accepted, the Justice Ministry submits a decree authorizing it to the prime minister's signature. For long this decree was considered an *acte de government*, and thus non-reviewable; however, since 1993, the *Conseil d'Etat* admits judicial review proceedings against such measures.²⁹⁴ The EAW replaces this procedure by a much simpler and systematic procedure.

Transposition

The transposition of the EAW Framework Decision required a constitutional revision, as it conflicted with a 'principle recognized by the laws of the republic' (constitutional norm) that France should refuse extradition when sought for a political purpose. A 2003 constitutional law added a second paragraph to Article 88, which provided that the law determines the rules related to the EAW in application of acts adopted on the basis of the Treaty on the European Union.²⁹⁵ The EAW Framework Decision was transposed in France by the Perben II Law No 2004-204 of 9 March 2004 adapting justice to the evolution of criminality. It introduced a new Chapter IV in Title X of Book IV of the Code of Criminal Procedure dealing with the EAW procedure. The EAW provisions of the Code were further amended to add and modify provisions concerning *condemnation in absentia* by Law No 2013/711 of 5 August 2013 (adjustments in the field of justice in application of EU law and international obligations of France), in application of another EU instrument, the 2009/299/JHA Framework Decision (see below).²⁹⁶ The French transposition measures added mandatory grounds for refusal to execute an EAW to the ones required by the Framework Decision (non bis in idem, amnesty, age limit). French authorities cannot surrender a person for facts which do not qualify as criminal offences under French law, except for the crimes listed according to the relevant provision of the Framework Decision (double criminality); they must also refuse to surrender in case the crimes are statute-barred under French law (prescription) or where the warrant has been issued to prosecute or sentence someone by reason of his or her race, religion, sex, ethnicity, nationality, gender, language or political

²⁹⁴ CE, 15 October 1993, *Royaume-Uni de Grande-Bretagne et d'Irlande du Nord*,

²⁹⁵ Constitutional Law No 2003-267 of 25 March 2003 related to the European Arrest Warrant.

²⁹⁶ Article 7 and 8 of the 2013 Law added Article 695-22-1 (V) and modified Article 695-17(V), 695-27 (V) and Article 713-20 of the Code of Criminal Procedure.

opinion or orientation, or sexual identity (discrimination). French law also added optional grounds for refusal to execute an EAW. French authorities may (optionally) refuse to surrender if a person is being prosecuted in France or has been prosecuted and charges dropped, or in case the wanted person is French or has been regularly residing in France for at least five years, if the facts have been committed on French territory or where French law does not allow for the prosecution of this criminal offence abroad.

The government issued a circular which details the conditions and modalities of surrender under the EAW.²⁹⁷

The competent authority for the execution of a EAW are the *Parquet general* (prosecuting authority) or the *chambre d'instruction* (three-judges investigative chamber). The *Parquet* received the request and takes the necessary measure to execute it, whilst the *chambre d'instruction* takes the final decision. The decision may be subject to review (*cassation*) before the *Cour de Cassation*; there are however rare, and usually brought by the prosecution against refusal to surrender.²⁹⁸

Judicial applications

Time and object

France limited the application in time of the EAW. Provisions related to the EAW apply to acts committed from 1 November 1993, although it is sufficient that at least one of the facts occurred after that date.²⁹⁹ French authorities will surrender a person requested under a EAW for acts for which an extradition procedure had been engaged before 12 March 2004, date at which the EAW transposition measures came into force.³⁰⁰

French authorities will surrender a person who has been sentenced in absentia in order to

²⁹⁷ Circular CRIM 04-2 of 11 March 2004 presenting the provisions of Law of 9 March 2004 related to the adaptation of justice to the evolutions of criminality concerning the European Arrest Warrant and extradition (BOMJ 2004, No 93 p. 48).

²⁹⁸ Achaintre, C. 'La France face au mandat d'arrêt européen' (2007)

<http://books.openedition.org/pufr/2303#ftn26>

²⁹⁹ Crim., 5 August 2004; Ass., Crim. 21 Sept 2004.

³⁰⁰ Crim., 15 March, 2005.

face trial.³⁰¹ They would also surrender a person for her to be detained in a psychiatric hospital for violent acts, as long as the detention period is more than four months.³⁰²

Respect of forms

French authorities are not too concerned with formalities related to the mode and form of transmission of the warrant. The reporting in the Schengen information system, accompanied by necessary information and notification to the person concerned is considered as 'constituting' a EAW.³⁰³ The warrant may be sent by fax, as long as a communication from the minister certifies its conformity to the original.³⁰⁴ French authorities will execute EAW even if the warrant does not mention the sentence envisaged, as long as this information can be derived from the Schengen system and further information submitted at a later stage.³⁰⁵ The necessary information, such as information related to the date and authority which issued a decision, as well as information concerning the date, place and circumstances of the crime, may be provided in an annexed document, rather than the actual warrant.³⁰⁶ Further information which had been omitted in the warrant may be transmitted by e-mail.³⁰⁷ The proof of the executing force of the judicial decision may be transmitted by fax.³⁰⁸

The *Cour de Cassation* however ruled that the non-respect of formalities related to obtaining the person's consent to surrender to set aside the principle of specialty (which limits the scope of a EAW) renders the procedure substantially invalid, as it adversely affects the interests of the person concerned.³⁰⁹ It also quashed the decision of an investigative chamber which had not carried out a new interrogation of the wanted person, following a change in the composition of the investigating chamber, in breach of the rules which guarantees that the same judges should be present at the interrogation and make the final

³⁰¹ Crim., 15 March, 2004.

³⁰² Crim., 25 May, 2005.

³⁰³ Crim., 1 February, 2005.

³⁰⁴ Crim., 25 Jan, 2006.

³⁰⁵ Crim., 19 October 2009, No 09-85.171.

³⁰⁶ Crim., 30 March 2004; Crim., 31 March 2005.

³⁰⁷ Crim., 25 June 2013.

³⁰⁸ Crim., 24 November 2005.

³⁰⁹ Crim., 3 November 2011.

decision as to whether to execute the EAW.³¹⁰

Grounds to refuse surrender

The *Cour de Cassation* recalled that French authorities can only refuse to surrender based on the mandatory and optional grounds listed in Articles 695-22 to 24 of the Criminal Procedure Code.³¹¹

- Ne bis in idem

To refuse the execution of the warrant, the national authorities must clearly indicate that the facts for which the person was condemned in France were the same.³¹² A French court surrendered a person accused of participation in terrorist organization which, according to the Spanish authorities, had occurred in Spain, even though a French court had condemned the same person for similar acts been committed in France.³¹³

- Double criminality

The instructing chamber must check all the offences covered by the EAW constitute also criminal offences under French law.³¹⁴ However, they cannot assess the evidence on which the charges covered by the EAW are based,³¹⁵ or the basis of the qualification of the offense, except in case of manifest error.³¹⁶ When the facts covered by the warrant are those to which the double criminality test does not apply, the instructing chamber does not need to check double criminality. For example, the *Cour de Cassation* sanctioned a lower court for refusing to surrender a person requested for illegal trafficking of hashish, on the grounds that it was not subject to a severe enough penalty.³¹⁷

- Prescription (statute-barred)

French authorities can only refuse execution based on prescription in cases where French

³¹⁰Crim., 15 October 2014 (14-86.215) ECLI:FR:CCASS:2014:CR05878.

³¹¹ Crim., 27 May 2009.

³¹² Crim., 26 April 2006.

³¹³ Crim., 18 Dec 2013.

³¹⁴ Crim., 14 Sept 2005.

³¹⁵ Crim. 19 April 2005.

³¹⁶ Crim., 21 November 2007.

³¹⁷ Crim., 26 April 2006.

courts were competent.³¹⁸ When refusing to surrender a person because of prescription, French authorities must verify that the crime is indeed subject to prescription under French law.³¹⁹ The surrender of a French person charged with or condemned for criminal activities abroad, over which French law is applicable, is conditioned upon French courts verifying the absence of prescription.³²⁰

- Optional grounds

The *Cour de Cassation* approved the refusal of the instructing chamber not to surrender a person who was prosecuted in France.³²¹

Surrender of person sentenced in absentia

The investigative chamber must verify that the person sentenced in absentia can oppose the decision, or that he or she had been notified of the date and place of the hearing. They however do not need to receive a copy of the sentencing decision.³²² The investigative chamber must establish clearly whether the decision for the execution of which the EAW has been issued in final or not.³²³ It is enough, in order to proceed to surrender under the EAW, that the applicant may request the judge of the requesting state for a reopening of the delay which would enable him or her to challenge de decision issued in absentia.

Conditional surrender

The *Cour de Cassation* sanctioned the instructing chamber for having subjected the surrender of a wanted person to Italy on the conditions that he later be transferred to the German authorities, which has also issued a EAW against that person, once his presence in Italy would not longer be required. It found it does not have this power.³²⁴

Delays in the procedure

³¹⁸ Crim., 27 May 2009.

³¹⁹ Crim., 26 April 2006.

³²⁰ Crim., 8 Aug 2012.

³²¹ Crim., 8 July 2004.

³²² Crim., 8 February 2011.

³²³ Crim., 26 Oct 2005.

³²⁴ Crim., 24 August 2012.

French courts have a relaxed attitude in relation to the respect of delays. Failure to respect the six working days delay for the reception of the certified copy of the EAW from the date of the person's arrest will not result in its invalidity.³²⁵ An argument based on the non-respect of the 48h delay within which the arrested person must be presented to the prosecutor cannot be brought up first at the level of cassation.³²⁶ The minimum common law delay of five days between the date of the convocation and that of the hearing is not applicable in the context of the EAW.³²⁷ The *Cour de Cassation* considered that a delay of less than four days between the surrender of a person by the executing state authorities and its presentation in front of the competent French authorities was compatible with Article 5 para 3 ECHR, as it was justified by the distance between the two authorities and difficulties related to the transfer.³²⁸ French law also allows for extended delays for the execution of a EAW, although it is used to enable review of the decision (90 instead of 60 days). In any case, the non-respect of such delays is not sanctioned.³²⁹

Although French authorities may have agreed to surrender, the actual surrender may be delayed in case there are several EAW issued against one individual, as it qualifies as force majeure.³³⁰ Moreover, surrender may also be delayed for humanitarian reasons,³³¹ in which case the instructing chamber is the one competent to fix the delays within which the surrender will eventually take place,³³² or to decide, based on medical examination, that the surrender may proceed.³³³ They may also decide, at their discretion, to delay the surrender of a person who is also prosecuted in France, or sentenced there for other acts.³³⁴

The respect of fundamental rights

The *Cour de Cassation* confirmed that the fundamental rights of the wanted person and legal

³²⁵ Crim., 1 September 2004.

³²⁶ Crim., 19 August 2004.

³²⁷ Crim., 14 September 2005.

³²⁸ Crim., 10 May 2012.

³²⁹ Crim., 14 September 2005.

³³⁰ Crim., 20 March 2012.

³³¹ Crim., 25 November 2009.

³³² Crim., 29 November 2006.

³³³ Crim., 28 November 2006.

³³⁴ Crim., 19 April 2005.

principles recognized by Article 6 TEU and Article 1 par 3 of the Framework Decision must be respected.³³⁵

- Respect of the right to a fair trial and rights of the defense

The *Cour de Cassation* requires the instructing chamber to check that procedures before the courts of the requesting state have been respected, in particular with regard to the qualification of the facts,³³⁶ or that the reasoning enables the determination of whether the decision is definitive or not.³³⁷ The *Cour de Cassation* however considered that French authorities should not examine claims contesting the conditions under which elements of proof were gathered.³³⁸

The *Cour de Cassation* ruled that retention of persons requested under a EAW was different to custody,³³⁹ and as such subject to a different regime, even if many of the same safeguards apply.³⁴⁰ Individuals challenged judicial interpretation of rules related to the addition of custody period with retention subsequent to the execution of a EAW, invoking Article 6 ECHR and the rights of the defense, in that they allow the retention for 48 h of a person who had already been placed for some time in custody for another motive, before being presented to the prosecutor. The *Cour de Cassation* however did not consider it necessary to refer the matter to the *Conseil Constitutionnel*, as it related to judicial interpretation of the relevant legislative provision.³⁴¹

The *Cour de Cassation* guarantees the rights of the defense before the instructing chamber. Interpreting national transposition measures in light of Article 6 ECHR, it ruled that a person requested under a EAW must have the time and facilities necessary to the preparation of his or her defense before the instructing chamber. It found that this was not the case when an individual had not been assisted by a lawyer during his interrogation by the prosecutor, and which had to appear before the instructing chamber within a timeframe which did not allow

³³⁵ Crim., 28 February 2012.

³³⁶ Crim., 2 September 2010, No 10-86.053.

³³⁷ Crim., 26 October 2005, No 05-85.847

³³⁸ Crim., 27 May 2009.

³³⁹ Crim., 1 March 2006.

³⁴⁰ Crim., 13 April 2010.

³⁴¹ Cass., (QPC) 11 June 2010.

his or her lawyer, appointed the previous day, to submit a defense brief.³⁴² When a person arrested under a EAW and her lawyer have not been notified of the date and time of the hearing according to the modalities provided by law, they are allowed to submit their brief on the day of the audience, without having to comply with any formal conditions.³⁴³ The *Cour de Cassation* quashed a decision by the instructing chamber to extend a EAW made without the lawyer and party having being notified of the date of the audience.³⁴⁴ It recognizes the right to a public hearing, except where it would undermine judicial proceedings, the interests or dignity of the person concerned.³⁴⁵ It also recognized the right to an interpreter.³⁴⁶ However, recently, the *Cour de Cassation* considered that the investigative chamber should not delay the execution of a EAW, despite the fact that the wanted person could not be assisted by a lawyer because of an unlimited strike by lawyers.³⁴⁷ It found that it was an 'insurmountable circumstance', but it is doubtful whether such approach is compatible with Article 6 para 3 ECHR.

- Right to an effective judicial remedy

The *Conseil Constitutionnel* made its first ever preliminary reference to the CJEU, asking whether the EAW Framework Decision prevented member states to provide for an appeal against a decision of the judicial authority which decides, within a 30 days delays, on a request for the extension (of the scope of) the mandate.³⁴⁸ The case concerned an English teacher who had gone to France with one of his underage pupils. He was requested by the British authorities for abduction, and was surrendered by the French authorities. However, once back in the United-Kingdom, he was charged with sexual assault. The British courts requested an extension of the mandate from the French authorities, which they granted; however, unlike a decision to surrender, this extension decision could not be challenged.³⁴⁹

³⁴² Crim., 12 March 2008.

³⁴³ Crim., 22 July 2009.

³⁴⁴ Crim., 20 May 2015, No 15-82469, ECLI:FR:CCASS:2015:CR02729

³⁴⁵ Crim., 19 Dec. 2006

³⁴⁶ Crim., 8 December 2010, No 10-87.818

³⁴⁷ Crim., 8 July 2015, No 14-86400. ECLI:FR:CCASS:2015:CR03567

³⁴⁸ Decision No 2013-314 QPC 4 April 2013.

³⁴⁹ Crim. 13 October 2004.

The CJEU responded that the EAW Framework Decision did not prevent such challenge, as long as the final decision was taken within the delays set out in Article 17 of the Framework Decision, namely 10 days following the consent of to surrender from the person or 60 days where no consent was given.³⁵⁰ When the case returned to the *Conseil Constitutionnel*, it considered that the absence of the possibility to challenge the extension decision constituted an unjustified restriction to the right to an effective judicial remedy. Therefore, the expression 'without appeal' was contrary to the constitution.³⁵¹

- Substantive rights

The *Cour de Cassation* instructed competent authorities to verify, before making a decision on surrender, whether it would not adversely affect in a disproportionate manner certain rights protected by the ECHR, in particular Article 3 (prohibition of torture, and inhuman and degrading treatment), Article 8 (the right to the respect of private and family life) and Article 10 (freedom of information and expression). However, in most cases, these checks do not prevent surrender.

Most cases invoking Article 3 concern refugees. The status of refugee does not prevent his or her surrender, except when sought for political motives; it however imposes certain obligations on judicial authorities before they decide to execute the warrant.³⁵² In a case in which a refugee requested under a EAW to serve a 8 years jail sentence for a drug related offense claimed that once he would have served his sentence in Portugal he ran the risk to be sent back to Iran, the French judicial authorities did not ask further clarification from the requesting authorities on the matter. The *Cour de Cassation* quashed the decision, considering they should have asked for further information as to what would happen after the refugee served his sentence, in order to ensure that his right not to be tortured or subject to inhuman and degrading treatment under Article 3 ECHR or his rights under the 1951 Geneva convention would be safeguarded.³⁵³ It also quashed a decision of the

³⁵⁰ C-168/13 PPU F. ECLI:EU:C:2013:358

³⁵¹ Cass., QPC 14 June 2013.

³⁵² Crim., 26 September 2007.

³⁵³ Crim., 7 Feb 2007, see also Crim. 26 September 2007.

investigative chamber which, in the case of a Kurdish refugee requested by the German authorities under an EAW, had not asked for clarification as to whether he ran the risk of being sent to Turkey following prosecution.³⁵⁴ However, French authorities cannot refuse to surrender a person based on simple allegation that the evidence against the person requested were obtained through torture or inhuman and degrading treatment if these are not substantiated.³⁵⁵

Regarding Article 8, the *Cour de Cassation* ruled that the instructing chamber, before deciding on the surrender of a mother of five kids in school age, legally resident in France, should take into account her right to a family life.³⁵⁶

Concerning Article 10 however, the case law has given precedence to judicial cooperation instead of protection of freedom of expression. The *Cour de Cassation* confirmed a decision of the instructing chamber which surrendered a person to the Portuguese authorities for serving a two and a half year jail sentence for defamation (criticizing treatment in Portuguese jails), without applying any proportionality check.³⁵⁷

The most controversial and mediatized case in France, and which raises concerns with regard to the protection of fundamental rights, and in particular freedom of expression, concerned the surrender of a Basque militant, Aurore Martin, to the Spanish authority. She was arrested in France under a EAW for 'participation in an terrorist organization and terrorism', participating in Spain, as a member of a political party, in public demonstrations and the publication of an article in which she presented herself as a member of that party, and taking part in public demonstration organized by that party. She appealed, unsuccessfully, the decision to execute the EAW, but the decision was confirmed; she then brought the matter before the *Cour de Cassation*, arguing that the qualification of terrorist acts did not correspond to the actual facts. The qualification was crucial, since acts of terrorism are not subject to the double criminality check. The problem lied in the fact that,

³⁵⁴ Crim., 21 November 2007.

³⁵⁵ Crim., 7 Aug 2013.

³⁵⁶ Crim., 12 May 2010.

³⁵⁷ Crim., 4 April 2007, No 07-81767.

in France, the party of which she is a member, is legal, whilst in Spain, it is illegal because it is considered a terrorist organization. In France, the facts would have qualified as the exercise of freedom of expression. However, the *Cour de Cassation* considered that the qualification of the facts belongs to the judge of the requesting state, and could not be revised by the instructing chamber, without referring the matter to the CJEU.³⁵⁸

The *Cour de Cassation* also ruled that investigative chambers could not base a refusal to surrender on violation of Article 5 para 3 ECHR.³⁵⁹

- Proportionality

So far, the *Cour de Cassation* rejects any proportionality testing at the stage of the execution of the EAW, considering it is for the courts of the requesting state to apply proportionality checks.³⁶⁰

- *Equal treatment of EU citizens*

Article 695-24 of the Code of Criminal Procedure, in its original version, enabled the surrender of French citizen to be subordinated to a guarantee that they could be returned to serve their sentence in France. It was however not extended to EU citizens resident in France. A Portuguese citizen, arrested in France under EAW to serve a five year jail sentence for drug trafficking dating back to 2002, and who worked in France since 2008, where he was married, asked for the benefit of Article 695-24. The *Cour de Cassation* referred the case to the CJEU, which ruled that member states could not exclude non-national EU citizens in an absolute and automatic manner, irrespective of their link with that member state.³⁶¹ The provision was amended by a 2013 law, which extended its application to any person residing for an uninterrupted period of five years in France.³⁶²

- *Freedom of movement of EU citizens*

³⁵⁸ Crim., 15 December 2010, No 10- 88.204.

³⁵⁹ Crim. 8 august 2007.

³⁶⁰ As confirmed in Crim., 28 November 2012, 12-87131.

³⁶¹ C-42/11 C-42/11, *Lopes Da Silva Jorge* ECLI:EU:C:2012:517.

³⁶² Law No 2013-711 of 5 August 2013.

Fair Trial International reports on a particular case which highlights the threat posed by the operation of the EAW on citizen's right of the defense as well as the right to move freely within the EU. In the late 1980s, Deborah Dark, now a grandmother, was placed in pre-trial detention for 8 months, and faced trial for drug related offences. The court found her not guilty, she was released and went back to the UK. However, after she returned to the UK, and without her knowing, the prosecutor appealed the decision. She was never summoned to appear to court. The appeal court found her guilty, and sentenced her to 6 years in jail, but Deborah was not informed about it. In 2005, France routinely issued a EAW against her. Between 2007 and 2009, she was arrested and detained in Turkey, Spain and the UK. Spanish and British courts refused to surrender her, but the EAW remained, with the consequence that she could not travel and visit her family for years, for fear of being arrested again. It is only following mobilization in her support that France only withdrew the EAW against her in 2010.³⁶³

Compensation

A French court of appeal awarded 40000 EUR compensation for the moral damage suffered by a man who had been surrendered to Spain by the French authority under a EAW for murder. He was eventually tried and acquitted, after a long period in traumatic circumstances.³⁶⁴

- Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition for judgments imposing custodial sentences or measures involving deprivation of liberty, in particular Arts 1, 2, 3, 6, 7, 8, 9, 10, 11, 14, 18, 19, 29

Transposition

The Transfer of Prisoners Framework Decision was transposed by the 2013 Law No 2013/711 (cited above). It created a new Chapter VI on the execution of decisions condemning to a *custodial sentences or measures involving deprivation of liberty* in application of the

³⁶³ See http://www.fairtrials.org/documents/Deborah_Dark_complete.pdf

³⁶⁴ CA Paris, 3 December 2012, N° 12/01184.

2008/909/JHA Framework decision, in Title II, Book V of the Code of Criminal Procedure (Articles 728-10 to 728-76).

Judicial application

No significant case law reported.

- Framework Decision 2008/947/JHA of 27 November 2008 on probation decisions and alternative sanctions, in particular Arts 1, 2, 3, 4, 10, 11, 19

Transposition

According to the Commission February 2014 report, France had not notified any transposition measures.³⁶⁵ France signed and ratified the Council of Europe's Convention of 30 November 1964 on the supervision of persons sentenced or under conditional liberty. However, only eight other member states have ratified it and it is not really in use. Moreover, France expressed a reservation to the convention, according to which it cannot carry out the execution of a foreign probation sentence not request the execution of such a sentence to another member state. French law thus needs to be adjusted to implement the Framework Decision. A draft law is currently under examination to transpose this Directive, which would adjust the Code of Criminal Procedure.³⁶⁶ The government placed it under the accelerated procedure (one reading per chamber). It was debated in the Senate on 4 November 2014, and was discussed in a first reading by the National Assembly on 23-24 June 2015.

³⁶⁵ European Commission, *Report to the European Parliament and the Council on the implementation of Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention*, 5 February 2014, COM(2014) 57 final

³⁶⁶ Draft Law related to the adaptation of the criminal procedure to the law of the European Union (JUSX1403244L)

- Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in criminal proceedings, in particular Arts 1-19.

It has not been transposed into French law.³⁶⁷ There seem to be no plan for its implementation, in particular since it will be replaced by the EIO Directive.

- Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence, in particular Arts 1-2-3, 7,8, 10, 11.

Transposition

This Directive was implemented by Law No 2005 of 4 July 2005 (adaptation to Community law in the field of justice). It created a new Chapter VI on the Transposition of the FD and added new articles to the Code of Criminal Procedure (Articles 695-9-1 to 695-9-29).

Judicial applications

Relevant in terms of the right to property and the right to an effective remedy, the Cour de Cassation ruled that anyone who pretends to have a right on frozen assets can challenge the freezing order, according to Article 173 C of the Code of Criminal Proceedings, within ten days from the implementation of the decision.³⁶⁸

- Framework Decision 2006/783/JHA on the application of the principle of mutual recognition for confiscation orders, in particular Arts 1,2,6,7,8,9, 11, 14, 18.

Transposition

It was transposed in domestic law by Law No 2010-768 of 9 July 2010 to facilitate seizure and confiscation in criminal matters. Its Article 14 added new provisions in the Code of

³⁶⁷ Source: European Judicial Network.

³⁶⁸ Crim., 13 February 2013.

Criminal Procedure (Articles 713-10 to 713-39), and modified some provisions of the Code of the State Domain.

Judicial applications

The *Cour de Cassation* considered that facts such as fraud and money laundering, would under French law justify a confiscation order, and would thus justify the recognition and execution of a confiscation order.³⁶⁹

1.1.2.2 'Approximation' measures

1.1.2.2.1. Victims' rights

- (Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings).

In 2009, the Commission deems implementation of this Directive unsatisfactory.³⁷⁰ France complied with Article 2 on respect and recognition, Article 3 on right of victims to be heard, Article 4 on victims right to information (although no specific provision spelled out the right to be informed about the outcome of the case, or the offender's released), Article 6 on specific (non-legal) assistance to victims, Article 7 on the covering of victims' expenses and Article 9 on compensation for the victims. France only provided victims with the right to interpreter if they were parties to the proceedings or a witness (Article 4), and adopted protection measures for victims, but not their family and allow for in camera proceedings to protect victims (Article 8). France had not transposed Article 10 which allows non-resident victims to make a complaint in their state of residence, and did not provide information on

³⁶⁹Crim. ,19 October 2011, No 11-80.247.

³⁷⁰ European Commission, *Report pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings* (2001/220/JHA), 20 April 2009, COM(2009) 166 final.

specialist services and victim support organization (Article 13), training (Article 14) or the prevention of secondary victimization (Article 15).

- Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

Transposition

This Directive should be transposed into domestic law by 15/11/2015. No legislation has been adopted so far to transpose it, but a draft law is under an accelerated procedure which would transpose the Directive.³⁷¹ The FRA 2014 report on fundamental rights nonetheless noted that France had 'established a comprehensive victim support service structure across the country'.³⁷²

- Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims

Transposition

According to Legifrance, the Directive was fully transposed in France on 1 January 2006. There was no specific measures adopted to transpose the Directive. The Directive is deemed implemented by existing legislative and regulatory provisions (?).³⁷³

³⁷¹ Draft Law related to the adaptation of the criminal procedure to the law of the European Union (JUSX1403244L) under discussion at the National Assembly.

³⁷² http://fra.europa.eu/sites/default/files/fra-2014-annual-report-highlights-2013-0_en_0.pdf, p. 5.

³⁷³ In particular, Law No 77-5 of 3 January 1977 guaranteeing the compensation of certain victims of bodily harm as a result of a criminal offence, Law No 81-82 of 1983 reinforcing security and protecting persons, Law No 86-1020 of 9 September 1986 relating to the fight against terrorism and attacks against state security, Law No 90-86 of 23 January 1990 on social security and health, Law No 90-589 of 6 July 1990 modifying the Code of Criminal Procedure and the insurance Code in relation to victims of criminal offences, Law No 2000-516 of 15 June 2000 reinforcing the protection of the presumption of innocence and the rights of victims.

- Directive 2011/99/EU on 13 December 2011 on the European Protection Order

Transposition

Provisions seeking to implement the Directive have been inserted in October 2014 into the draft law on the adaption of the criminal procedure to EU law, submitted by the government to the Parliament in March 2014, and currently under examination National Assembly.³⁷⁴

1.1.2.2.2. Rights of suspects and accused persons

- Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings

Transposition

It has been transposed in French law by Law No 2013-711 of 5 August 2013, which transposed a number of other EU instruments. It amended the Code of Criminal Procedure (Preliminary Article and Article 803-5). It is complemented by an executive implementation measure.³⁷⁵

- Directive 2012/13/EU of 22 May 2012 on the Right to Information in Criminal Proceedings

Transposition

It has been transposed by a specific transposition law, Law No 2014-535 of 25 May 2014, which modified numerous provisions of the Code of Criminal Procedure as well as the Customs Code.

³⁷⁴ Draft Law related to the adaptation of the criminal procedure to the law of the European Union (JUSX1403244L).

³⁷⁵ Decree No 2013-958 of 25 October 2013 applying the preliminary article and article 803-5 of the code of Criminal Procedure relating to the right to interpretation and translation.

1.2. EU legislation related to the protection of personal data

Introductory remarks – the French legal framework for data protection

In reaction to a scandal surrounding the proposal for the Ministry of the Interior to create a mega-file, France adopted, on 6 January 1978, Act No 78-17 on data processing, files and freedoms, which was one of the first of its kind in the world.³⁷⁶ It stated that data processing could not 'curtail human identity, human rights, private life or public or private freedoms' and included both preventive (a priori) and repressive (a posteriori) mechanisms. It also created a special independent administrative authority (the first one qualified as such in France), the *Commission Nationale de l'Informatique et des Libertés* (CNIL), to check that the processing of data complies with fundamental freedoms. French law was influential on international and European legal developments on the matter. It inspired the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data of 23 September 1980³⁷⁷ as well as the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108), which came into force in 1985 and which the *Conseil d'Etat* has recognized as directly applicable.³⁷⁸ Before turning to the application of EU data protection rules in France, it is useful to offer a brief presentation of French system of data protection, which combines a preventive and a repressive regime, in that it is based on this framework that the Directive will be enforced.

Preventive mechanisms: declarations and authorizations

The 1978 Law requires declaration or authorization formalities to be fulfilled for the processing of personal data. This a priori control was exercised by the CNIL. The non-respect

³⁷⁶Wachsman above n 26, 605; Letteron above n39, 413.

³⁷⁷ This set out guiding principles such as Notice (data subjects should be given notice when their data is being collected), Purpose (data should only be used for the purpose stated and not for any other purposes); Consent (data should not be disclosed without the data subject's consent); Security (collected data should be kept secure from any potential abuses); Disclosure (data subjects should be informed as to who is collecting their data); Access (data subjects should be allowed to access their data and make corrections to any inaccurate data); and Accountability (data subjects should have a method available to them to hold data collectors accountable for not following the above principles).

³⁷⁸CE, sect., 18 November 1992 *Ligue Internationale contre le Racisme et l'Antisemitisme*.

of declaration and authorization formalities is punishable by 5 years imprisonment and a 300 000 EUR fine (Article 226-16 Code of Criminal Procedure); in practice, courts have been reluctant to condemn legal and natural persons for such offences.³⁷⁹

Declaration procedure

Safe for the few data processing declared exempt by law (Article 22), data processing which is not likely to undermine private life or fundamental freedoms should be declared to the CNIL, with a statement that it conforms to legal requirements (Articles 22-23). The CNIL sends an acknowledgement of receipt.³⁸⁰ There also exist a simplified procedure for standard processing (Article 24).

Authorization procedures

The collection and processing of sensitive data (genetic data, social data, biometric data, data on criminal convictions, telecommunication, etc) by public and private bodies is subject to prior authorization by the CNIL, which must decide within two months (Article 25).

Database set up for the purpose of state security, defense or public security and those related to criminal prevention, investigation and proceedings are subject to a more demanding authorization procedure. They must be authorized by ministerial decision, following a reasoned and public opinion of the CNIL (Article 26). When they involved data related to racial or ethnic origins, political opinions, religious beliefs, health or sexual life, the processing of data must furthermore be authorized by a decree adopted in *Conseil d'Etat* (Article 27).

However, certain databases are currently not subject to the control of the CNIL. This is the case of intelligence database. The CNIL delivered an opinion, made public, on the draft law on intelligence, in which it recommends that such database should be submitted to the CNIL, following adapted modalities, to check their compatibility with the 1978 Law, basing its position on democratic legitimacy and the rights and freedoms of citizens.³⁸¹

³⁷⁹ Mattatia, F. *Traitement des données personnelles – Le Guide Juridique* (Eyrolles, 2013), 101-102

³⁸⁰ CE, sec 6 January 1997, *Caisse d'Epargne Rhone-Alpes Lyon*

³⁸¹ Opinion 6 March 2015.

Challenges

Decisions of the CNIL can be challenged before the Conseil d'Etat.

Repressive regime: criminal and administrative sanctions

In addition to the preventive authorization mechanism for the processing of personal data, the 1978 Law also provides for a posteriori control. This control was initially exercised by judicial courts, under the provisions of the Criminal Code (Article L.226-16 to L.226-31 for criminal offences, and Articles R.625-10 to R. 625-13 for misdemeanor) and the Code of Criminal Procedure. Violations are subject to a range of criminal penalties, depending on the qualification of the offence.

The non-respect of security obligations, the non-notification of security failure, the non-respect of rules related to research processing in the medical field, the non-respect of time limitation on data storage, the fraudulent, disloyal or illegal collection of personal data, data processing despite an individual's opposition (or assimilated lack of consent),³⁸² the processing of social security number without CNIL authorization, the processing of sensitive data, change of processing purposes, the divulgence of personal data which constitutes an illegal interference with private life, the un-authorized transfer of personal data outside of the EU, are considered as criminal offences, and can be sanctioned by 5 years imprisonment and a 300 000 EUR fine (less in resulting from negligence), whilst violation of the obligation of information, the right to access and communication, and the right of rectification, updating and erasure, are considered as misdemeanors (contraventions) and are subject to lighter sanctions (maximum 1500 EUR; 3000 EUR fine in case of second offense).

Beyond the 1978 law, other legislative provisions sanction illegal interference with private life (eg divulgence of the words or picture of someone in a private place, sanctioned to 1 year jail sentence and 450000 EUR fine under Article 226-2 and 2 of the Criminal Code, defamation under the 1881 Press Law, etc). Individuals can also take civil action based on Article 9 of the Civil Code.

³⁸²Cass, 14 March 2006 No 05-83.423.

This repressive dimension has been strongly reinforced by the implementation of the 1995 Directive through the 2004 implementing Law, which amended the 1978 law and which conferred on the CNIL the power to impose administrative sanctions, notably (Article 45). From 1978 to 2004, the CNIL's mission focused on raising awareness of the risks created by the development of ICT, offered advice on data processing and exercised a priori control. It performed regulatory functions through the adoption form of simplified norms for most common data processing types. It could carry investigations, on its own initiative, or following request from individuals or counterparts in other member states.³⁸³ This includes on-site control (upon judicial authorization).³⁸⁴ In case of violation of data protection rules, it could issue a public warning and bring the matter to the attention of the public Prosecutor.

In order to implement the Directive, which requires data protection authorities to have the power to impose sanctions, the 2004 significantly fleshed out the repressive powers of the CNIL. In addition to issuing public warnings, the CNIL can now also issue cease-and-desist injunctions, withdraw an authorization or impose financial sanctions, which are made public (up to 150000 EUR, 300 000 EUR in case of second violation). It can also bring violations before the Public Prosecutor, or bring emergency proceedings seeking necessary measures against serious threats on fundamental freedoms.

The CNIL independence is guaranteed by its composition and organization.³⁸⁵ The CNIL preventive control and notice functions have been organizationally separated from the judging and sanctioning functions (entrusted to a restricted committee). Bodies subject to investigation may be assisted by a lawyer.³⁸⁶

Jurisdiction

³⁸³ A refusal to investigate can be challenged under judicial review proceedings (*Recours pour excès de pouvoir*), but the administrative will only apply limited control (*contrôle restreint*). CE, 5 December 2011 *Laffont*.

³⁸⁴ CE, sect 6 November 2009, *Ste Inter confort*

³⁸⁵ Four Parliamentarians, two members of the Economic, Social and Environmental Council, six representatives of high jurisdictions (two from the *Conseil d'Etat*, two from the *Cour de Cassation* members and two from the Court of Auditors), and five qualified public figures, one appointed by the President of the National Assembly, one by the President of the Senate, three by the French Cabinet (3 public figures). The mandate of the commissioners is for 5 years, or for parliamentarians, as long as the duration of their mandate

³⁸⁶ For information in English on the CNIL, see *The CNIL in a Nutshell* (2014) at http://www.cnil.fr/fileadmin/documents/en/CNIL_EN_BREF-VEN-VD.pdf

The 1978 law applies to processing the controller of which is either established on French territory or established outside of that territory, but using processing means situated in France. Individuals have tried to challenge data processing by service providers based outside of the EU (eg companies such as Google, Facebook, Twitter, etc). In most cases, French law was declared not applicable, based on Article 5 of the Law. However, in *Mme C. / Google France et Inc.*, the TGI of Montpellier of 28 Oct 2010, acting in the context of emergency proceedings, applied French law to condemn Google Inc to remove search results and pay a fine. The plaintiff had asked Google France to remove results of searches mentioning her name and reference to a porn video, to the digitalization and diffusion of which she had not consented. Google refused, and directed her to web hosts of the video. The French court considered that French law applied to any data processing, and is thus applicable to search engines, which must respect the right to oppose data processing. It rejected the argument based on freedom of expression, as it had to be balanced against privacy. In another similar case, the Paris TGI, on 2 Feb 2012, found Google liable and ordered it to remove links to pages hosting a porn video, without even addressing the territorial issue. This approach to jurisdictional matter is similar to the one adopted by the CJEU in the Google case.

Transposition of the EU data protection related Directives

- Directive 95/46 on the protection of individuals with regard to processing of personal data and on the free movement of such data (Data Protection Directive) [1995] OJ L281/31.
- Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector (ePrivacy Directive) [2002] OJ L201/37.
- Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive (Data Retention Directive) [2006] OJ L105/54. [annulled]

The transposition and implementation of the three directives, given their interconnections, will be addressed together.

Legislative transposition and executive/administrative implementation.

The 1995 Directive required a significant reorganization of the complex French system of data protection. Eighteen executive *acts* (decrees) were adopted in order to bring domestic rules in line with the requirement of the Directive and the protection of personal data which it confers on individuals in the context of specific types of data processing.³⁸⁷

The legislative transposition of the Directive came late, in the form of Law No 2004-801 of 6 August 2004 relating to the protection of natural persons towards the processing of personal data, which amended the 1978 Law. It was supplemented by implementing decrees.³⁸⁸

French civil society organizations, as well as members of the government, were strongly supporting and campaigning for the right to be forgotten, long before the 2014 CJEU decision. Their efforts led to the adoption of two Charters on the Right to the Forgotten (*Charte du droit à l'oubli numérique dans la publicité ciblée* on 13 September 2010, and the *Charte du droit à l'oubli numérique dans les sites collaboratifs et moteurs de recherche* on 13 October 2013). These Charters have not been signed by Facebook and Google. On 30 May 2014, the CNIL released a practical note in its website explaining how to enforce the right to be forgotten.³⁸⁹ Following the 2014 CJEU decision, Google release an online form for relisting requests. Two months later, France was the country from which most requests were

³⁸⁷ Notably, Decree No 99-919 of 27 October 1999 related to processing of personal data for medical purposes, Decrees No 99-1090 and 99-1091 of 21 December 1999 and 2006-1807 of 23 December 2006 relating to the storage and processing of data related to civil partnerships, and authorising for that purpose the processing of registers by court's registry or diplomatic or consular agents ; Decree No 2000-413 of 18 May 2000 on the creation of the national database of genetical footprint; Decree No 2002-36 of 8 January 2002 transposing EU Directives 98/10/EC and 97/66/EC on mobile telecommunication in conformity with the 1995 Directive ; Decree No 2003-752 of 1 August 2003 relating to universal telephone books and universal information services ; Decree No 2003-755 of 1 August 2003 modifying the Code of Posts and Telecommunication in transposition of the 1995 Directive ; Decree No 2004-470 of 25 May 2004 related to the national database of genetic footprints, Decree No 2004-1266 of 25 November 2004 related to the conditions of entry and stay of foreigners and the experimental creation of a database of personal data of foreigners requesting a visa, Decree No 2005-585 of 27 May 2005 related to the Ministry of Interior fingerprint database ; Decree No 2005-627 of 30 May 2005 related to the national database of sexual offenders ; Decree related to the creation of an experimental database of personal data related to Charles De Gaulle airport, Decree No 2006-12 43 of 11 Oct 2006 related to the digitalization and transmission, by transporst companies, to French border authorities, of travel documents and visa (abrogated on 16 November 2016) ;

³⁸⁸ Decree No 2005-1309 related to the application of the Law No 2004-801 amending the 1978 Law, amended by Decree No 2007-451 of 25 March 2007.

³⁸⁹ <http://www.cnil.fr/documentation/fiches-pratiques/fiche/article/comment-effacer-des-informations-me-concernant-sur-un-moteur-de-recherche/>

received, followed by German and the UK.³⁹⁰ On 10 April 2015, the Parliament adopted a convention which protects the right to be forgotten for cancer patients, who have been cured, and who otherwise find it very difficult to get insurance, obtain a mortgage, etc.³⁹¹

The 2002 e-Privacy Directive was implemented by the 2004 E-commerce Law³⁹² and a 2005 decree.³⁹³ France did not adopt any legislative measure for the transposition of the 2006 Data retention Directive, on the ground that the French legislative framework already complied with the Directive. It however adopted executive decrees, one which modified the Code of Criminal Procedure and the Code of the Posts and Telecommunication to ensure the Directive's application,³⁹⁴ and another one in 2011, implementing the 2004 E-commerce law, which specifies which data should be collected and stored, and for how long (one year).³⁹⁵

Judicial application of rights derived from EU data protection instruments

Constitutional enforcement

In a 1993 Decision, the *Conseil Constitutionnel* qualified the 1978 Law as a legislative instrument for the protection of private life.³⁹⁶ Even though it does not apply the law as such, it uses it as a norm of reference and uses the reasoning provides by the law concerning the lawful nature of databases set up by legislative acts.

The 2004 Law which amended the 1978 Law and implemented the 1994 Directive was referred to the *Conseil Constitutionnel*, with an argument based on violation of privacy. One of the provisions challenged was Article 8 of the Law, which transposed Article 8.2.b of the

³⁹⁰ http://www.lemonde.fr/pixels/article/2014/07/25/google-la-france-championne-d-europe-du-droit-a-l-oubli_4463086_4408996.html#1dgdwUHWp6leF7j8.99

³⁹¹ Le Monde, 'Le droit à l'oubli pour les maladies du cancer', 10 April 2015, http://www.lemonde.fr/sante/article/2015/04/10/le-droit-a-l-oubli-pour-les-malades-du-cancer-adopte_4614125_1651302.html

³⁹² Law No 2004-575 of 21 June 2004 for the confidence in e-commerce.

³⁹³ [Decree No 2005-862 of 26 July 2005, relating to the conditions of establishment and exploitation of networks and the provisions of electronic communications services.](#)

³⁹⁴ [Decree No 2006-358 of 24 March 2006 relating to the retention of electronic communication data.](#)

³⁹⁵ Decree No 2011-219 of 25 February 2011 relating to the retention and communication of data enabling the identification of all person having contributed to the creation of online content.

³⁹⁶ Decision No 92-316 DC of 20 January 1993.

Directive (related to data processing in the context of employment). As Article 8 of the Law was faithfully transposing the relevant provision of the Directive, the constitutional judges declared themselves incompetent to review it, given the constitutional obligation of transposition of EU Directive.³⁹⁷

The *Conseil Constitutionnel* reviews legislation which set-up police database. It controls whether a database is necessary and proportionate to the security objective pursued.³⁹⁸ Whilst it considered that the *Fichier National des Empreintes Genetiques* (FNAEG), a national genetic fingerprint database, reconciled appropriately the requirement of criminal investigation, individual freedom and private life,³⁹⁹ it found that the database on secured electronic titles (civil status, digital fingerprints, etc), in that it affected the whole population, constituted an excessive intrusion in the private life of innocent people ('file of honest people').⁴⁰⁰

The controversial HADOPI Law of 12 June 2009 on the diffusion and protection of creation on the Internet, was submitted to review by the *Conseil Constitutionnel*. One of the problematic aspect was that this independent authority, Hadopi, could access nominative personal data without judicial intervention, contrary the constitutional jurisprudence. However, the *Conseil Constitutionnel* considered that the intervention of HADOPI (eg access to personal data in order to order the suspension of Internet access) was justified by the 'scale of counterfeiting committed via the internet' and the 'need to limit, in the interest of the good administration of justice, the number of violations brought before the Authority.' It took into account that HADOPI was 'integrated' in the judicial system (challenge possible before ordinary courts) and imposed conditions that the processing of such data complied with the privacy protection requirement of the 1978 Law, that the data could only be

³⁹⁷ It also rejected the other arguments based on violation of constitutional requirements (it even endorsed a controversial provision which allowed private persons to collect data related to criminal sanctions for the benefits of victims, as it considered that the data would acquire a nominative character only in the context of judicial proceedings and processing was subject to the CNIL authorization). Decision No 2004-498 on the Law of 29 July 2004.

³⁹⁸ See Wachsman above n26, p. 611.

³⁹⁹ Decision No 2010-25 QPC of 16 September 2010.

⁴⁰⁰ Decision No 2012-652 DC of 22 March 2012.

transmitted to HADOPI or judicial authorities, and that the CNIL should authorize such processing and ensure the respect of data protection rules, in particular those related to the conservation of the data.⁴⁰¹

The ECtHR followed the French *Conseil Constitutionnel* when it considered that the *Fichier Judiciaire National Automatise des Auteurs d'Infractions Sexuelles* (FIJAS), a database of sexual offenders, now also including violent attackers, even though the listing in such database carried serious consequences (eg security measures, restrictions, prohibition to exercise commercial activities...), could not be considered as a penalty, and thus did not fall under the prohibition on the retroactivity of criminal penalties.⁴⁰²

However, on 18 September 2014, the ECtHR condemned France as it found aspects of the STIC database (Criminal Convictions Database) in violation of Article 8 ECHR (private life). The case concerned an individual whose case had been closed following criminal mediation, and could not obtain his removal from the STIC file. Courts can not order removal of the file in such situation, since legislative provisions of the Code of Criminal Procedure (Article 230-8) restricts circumstances under which files can be removed from the TAJ.⁴⁰³

Administrative courts enforcement

According to a search in Legifrance, the 1995 Data Protection Directive is mentioned in 33 administrative court decisions (25 by the *Conseil d'Etat* and 8 by the Administrative Appeal Court), the 2002 Directive was invoked in six cases before the administrative courts, all before the *Conseil d'Etat*, and the 2002 Data retention Directive in three cases before the *Conseil d'Etat*. These cases either challenged executive measures transposing the Directives, the processing of data by public authorities or public service bodies, or decisions of the CNIL.

The *Ligue Française pour la défense des droits de l'homme et du citoyen* challenged the decree of 6 May 1999 which adjusted the modalities of transmission to health authorities of

⁴⁰¹Decision No 2009-580 DC of 10 June 2009.

⁴⁰²ECtHR, 17 December 2009 *Bouchacourt* (App. 5335/06), *Gardel* (App.16428/05) et *MB* (App.22115/06) v *France* ; the *Conseil Constitutionnel* had qualified the listing in the database as a 'police measure', non-subject to adversarial requirement (Decision No 2004-492 DC of 2 March 2004).

⁴⁰³ ECtHR, 28 September 2014, *Brunet v France*, No 21010/10.

individual data concerning particular (eg contagious) diseases, invoking the 1995 Directive.⁴⁰⁴ The *Conseil d'Etat* rejected argument according to which the absence of consultation of the CNIL under the decree was contrary to Article 20 of the Directive.⁴⁰⁵ The GISTI, LDH, and the association '*Imaginons un Reseau Internet Solidaire*' challenged Decree No 2005-937 of 2 August 2005 (on the processing of data related to requests for validation of declarations by persons hosting foreigners). They argued that it was contrary to the 1995 Directive and the EU Charter provision on Data protection, in addition to domestic provisions and the 1981 Convention.⁴⁰⁶ The *Conseil d'Etat* however upheld the decree, considering that the collection of data concerning the place of accommodation as well as the host's financial situation were relevant to the objective pursued.

In most cases in which the Directive was invoked against violation of data protection rules by public bodies, the applicants did not provide any detailed argumentation supporting the violation of protective provisions of the Directive. Usually, parties' lawyers, as well as the courts, prefer to rely and articulate argumentation on the basis of domestic provisions. In one such case, an administrative court rejected a parents' opposition to the listing of their daughter in pupils' database based on concerns related to the security of the database as a result of interconnection. They argued, inter alia, a violation of Article 14 of the Directive (implemented by Article 38 of the 1978 Law), but the court considered that they did not bring sufficient evidence of such risks and considered it unnecessary to make a request for a preliminary ruling to the CJEU.⁴⁰⁷

The *Conseil d'Etat* invoked Article 10 and 11 of the 2002 Directive, as well as the *travaux preparatoires* leading to the 2004 amendment of the 1978 law, to interpret the 1978 law in a way which supported the imposition by the CNIL of a 20000 EUR public fine on a real estate company which had sent sms to individuals for marketing purposes without having obtained

⁴⁰⁴CE, 30 June 2000, *Ligue française pour la défense des droits de l'homme et du citoyen* N° 210412

⁴⁰⁵ It also refused to annul for incompatibility with domestic law the provision which provided for the transfer of data necessary to the implementation of emergency investigation and intervention measures but annulled a provision which passed on to a decision of the Health ministry the task of determining the list of elements which should be notified.

⁴⁰⁶ CE, 26 July 2006, Gisti, LDH et IRIS, No 285714 .

⁴⁰⁷ CAA, Lyon, 22 April 2014, N° 12LY24711 .

their consent when they had collected their phone numbers and had not respected their right to information and opposition.⁴⁰⁸

Given that parties' lawyers and courts tend to rely on domestic transposition norms, it is necessary to provide an overall assessment of how the domestic provisions which implement rights conferred in the Directive are invoked and applied in administrative courts.

Administrative courts consider that the content of personal datafile is divisible, and that all information which does not compromise the objective of the processing must be communicated to the individuals, as well as the judge, in line with adversarial principles.⁴⁰⁹

The *Conseil d'Etat*, like the CNIL, controls the compatibility with the 1978 law, and the ECHR, of the collection of certain data for public databases. Under the influence of the ECtHR, the *Conseil d'Etat* exercises a closer scrutiny over the collection and processing of certain data by government bodies or public services. Both the CNIL and the *Conseil d'Etat* would generally sanction processing where there is no evidence that the means used are necessary and not just useful or practical.

For example, it considered that was compatible with the 1978 Law the collection of photographs and fingerprints of children above 12 years of age for the OSCAR database which pursued the objective of the fight against fraud as it enabled immigration and integration authorities that other persons sought financial assistance for children for which the help has already been granted.⁴¹⁰

Reviewing decisions of the CNIL which objected to the setting up of a database of trustful tenants, and another one on unpaid rents, it found that the first CNIL objection decision illegal as it was only based on interference with the right to housing, without checking whether its modalities complied with the 1978 law, but endorsed the second, as the CNIL decision had been based on deficiencies in guarantees, in that the database did not specify

⁴⁰⁸CE, 23 March 2015, *Société Groupe DSE France*, N° 357556
ECLI:FR:CESSR:2015:357556.20150323

⁴⁰⁹CE, Ass., 2 Nov 2002, *Moon*.

⁴¹⁰CE, 20 October 2010, no 334974.

the reasons for failed payment and did not prohibit access to private owners to this database.⁴¹¹

It found that the collection of eight fingerprints, as opposed to the two reproduced on the passport, appeared unnecessary and excessive with regard to the objective of the processing.⁴¹² It also judged that the Eloi Decree of 27 December 2007 and the collection of the national identification number was neither relevant nor suitable to the objective of the processing, namely the execution of return measures against illegal migrants, since the Ministry only indicated that this number was used as a search criteria for different users of the database.⁴¹³

The *Conseil d'Etat*, in its latest annual report,⁴¹⁴ focused on digitalization and fundamental rights, identifying threats and challenges, as well as making proposals for a better protection of fundamental rights. This supplements the awareness raising activities of the CNIL.

They also challenged the decree which imposed data retention as provided under the 2006 Directive, based on legislative and constitutional grounds (and not Data Protection and e-privacy Directive) but the *Conseil d'Etat* confirmed its legality.⁴¹⁵

Administrative courts thus contribute to the enforcement of the Directive in their control over the collection and processing of personal data by public authorities. They however mostly do so based on the national legislation and constitutional provisions and in the light of the ECHR and ECHR case law, although at times EU directives have been invoked.

Ordinary courts enforcement

The bulk of cases dealing with violation of data protection rules are dealt with by ordinary court, acting in criminal capacity under the provisions of the Criminal Code and Code of

⁴¹¹CE, 7 April 2010, *Sté Infobail*, No 309546 et 30954.

⁴¹²CE 26 October 2011, *Association pour la promotion de l'image et autres*, No 317827.

⁴¹³CE, 30 December 2009, No 312051, *Association SOS Racisme et a.*

⁴¹⁴See ' Étude annuelle 2014 - Le numérique et les droits fondamentaux' (2015). For a summary in English, see <http://www.conseil-etat.fr/content/download/33163/287555/version/1/file/Digital%20technology%20and%20fundamental%20Rights%20and%20freedoms.pdf>

⁴¹⁵CE, 20 November 2013, *M. J... et autres*.

Criminal procedure listed above, or in civil capacity in action in compensation. In most reported cases however, EU instruments are not invoked, or if they are, they tend to play a marginal role in the enforcement of data protection rules. In this case, it may be explained by the advanced stage of development of the legal protection of personal data in France prior to the adoption of the EU Directives.

A search in Legifrance results in the identification of 6 decisions by ordinary courts (5 for the Cour de Cassation and 1 for the Appeal Court) which mention the 1995 Directive, and none the other two EU instruments.

The first case which contained a referwnce to the 1995 Directive concerned an appeal by the Church of Scientology against a criminal condemnation for interference with the work of the CNIL and data processing despite opposition. The Church did not provide detailed argumentation on the Directive, and the *Cour de Cassation* confirmed the appeal court's ruling without referring to the Directive.⁴¹⁶ It rejected arguments based on a violation of the Directive in a case involving a individual's request for removal from the digital fingerprints database, because due process requirements had been fulfilled.⁴¹⁷ It found not violation of the Directive or relevant domestic provision in a case involving global seizures by the competition authority, including personal mails and mails between the firm and their lawyers (protected by professional privileged) sent from professional e-mail addresses, since the judge which examined the request for annulment of the seizure had properly justified its decision that the mail server files were not dividable and were likely to include information relevant to the investigation.⁴¹⁸

The *Cour de Cassation* followed the wide interpretation in Article 2 of the Directive regarding what constitutes data processing to include the processing of data collected by tachographs (devices that tracks the activities of truck drivers). However, it overruled the Appeal Court and considered that the fact that the employer had not declared its use of the device to the CNIL, in breach of the 1978 law, did not deprive the employer from relying on data collected

⁴¹⁶Crim., 28 September 2004, No 03-86604.

⁴¹⁷Cass., crim., 1 October 2008, No 07-87231.

⁴¹⁸Cass., Crim., 24 April 2013, No 12-80346; ECLI:FR:CCASS:2013:CR01874.

by the tachograph against a driver in dismissal proceedings for fault.⁴¹⁹ French courts also followed the interpretation of Group 29, a consultative organ created under Article 9 of the Directive, which assimilates the 'net send' functions of Windows to e-mailing, and thus considered it covered by the principle of secrecy of correspondence. It consequently refused to consider as valid evidence such messages intercepted and printed by the employer in a case against the employee, given the disproportionate interference with private life which was not justified by the legitimate interest of the employer.⁴²⁰

The *Cour de Cassation* confirmed an appeal court decision which had found a violation of Article 7 of the Directive and relevant French legislative provision, in a case in which an individual had collected e-mails addresses through specially designed softwares and send spams, without the consent of their holders, for marketing purposes. In this case, the court, in an interesting move, assimilated the lack of consent to opposition, and applied relevant provisions.⁴²¹

Given that parties' lawyers and courts tend to rely on domestic transposition norms, it is necessary to provide an overall assessment of how the domestic provisions which implement the rights and obligations of the Directive are invoked and applied in administrative courts.

We will not look into cases which concern failure to comply with declaration or authorization formalities, as these are not required under the EU Directives (although academic assessments suggest that such failures rarely result in severe sanctions).⁴²²

Failure to respect information and access rights have generated a fair amount of cases, and have led to sanctions, which are however weaker than for violation of other obligations, since these only constitute misdemeanour. The *Cour de Cassation* considered that non-intelligible communication about the right to access information constitutes an offence from

⁴¹⁹Cass., Soc., 14 jan 2014, No 12-16218; ECLI:FR:CCASS:2014:SO00006 .

⁴²⁰CA Douai , 30 march 2007, No 06/01805.

⁴²¹Crim., 14 March 2006 , No 05-83423.

⁴²²Mattatia above n 379, 101.

the moment the information is sent out.⁴²³ A first instance court rejected a request by someone who had been listed on a black list by mobile operators organized in an organization (Preventel), considering that this organization had complied with information requirement. The Montpellier Appeal court specified that web hosts must comply with individual's right to request the erasure of their personal data, even when such data were legally collected and without a judicial decision. It condemned the host to pay 2200 EUR damages to the plaintiffs.⁴²⁴

The processing of personal data despite individual's opposition has led to a number of court cases. We already mentioned the Scientology case, as well as the 2006 software case, in which EU Directives were invoked. Courts also sanctioned the sending of advertising despite opposition.⁴²⁵

The right to be forgotten, explicitly recognized by the 2014 decision of the CJEU based on the 1995 Directive, is actively enforced by French court, but is also balanced, where necessary, with the freedom of expression and the right of the public to information.

At first, the Cour de Cassation had been reluctant to condemn Google for insult or defamation resulting from functions such as Google Suggest, which works based on algorithms,⁴²⁶ and considered that such functions did not constitute a database, and thus did not fall under the scope of the 1978 Law.

However, courts have, on occasion, enforced a right to be forgotten based on Article 6 of the e-Commerce law. A ex-porn actress who had become a legal secretary ask website to removed old porn videos in which she acted from the internet, and she also asked Google to remove links to these videos for searchers with her name. French courts considered that although the individual had given consent before the filming of these videos, she had not

⁴²³Cass., Crim, No 2528 of 26 May 2008.

⁴²⁴CA Montpellier 15 Dec 2011, cited in Mattatia above n 379, 117.

⁴²⁵CA Toulouse, 2nd correct., 12 January 2005.

⁴²⁶TGI de Paris, Civ 17^{ème}, 12 June 2013, *Les Editions R. / Google France, Google Inc.*; Cour de cassation, Civ 1^{ère}, 19 June 2013, *Google Inc. c/ Société Lyonnaise de garantie*

consented to their digitalization and diffusion on the Internet, and should be able to rely on a right to be forgotten.⁴²⁷

In January 2014, and thus before the CJEU decision, the *Cour de Cassation* eventually assimilated listing on Google search to data processing, which thus was covered by the 1978 Law. A gallery owner had brought legal action against Google under the 1978 Law for listing, under a search with his name and surname, an article which dealt with an old criminal sanction against him, which in his view harm his reputation. Google argued the law was not applicable as this listing did not constitute processing, but the court disagreed and condemned Google for not having given the individual the right to oppose the use of his personal data.⁴²⁸

In December 2014, The Paris TGI, acting in the context of emergency proceedings, for the first time enforced the Directive's right to be forgotten against intermediaries and instructed Google Inc to delist a press article.⁴²⁹ The plaintiff had requested Google Inc, via the special online request form created to implement the CJEU Google decision, to remove the link to a 2006 newspaper article which dealt with a criminal condemnation for fraudulent activities, in searches with her name. Google had rejected the request, invoking the right of information of the public. The plaintiff brought legal action against Google Inc, relying on under Article 38 of the 1978 Law (excessive data collection), Article 6c) of the Data Protection Directive, and Article 809 of the Code of Civil Procedure. The Court considered that the plaintiff, in this case, had overriding and legitimate reasons prevailing over the right to information of the public, because of the nature of the personal data involved, the motivation of the delisting request (access to the article via Google based on her name interfered negatively with her search for a job) and the time lapsed since the criminal condemnation (8 years) and the fact that it was not mentioned on her criminal record. The TGI hereby determined a number of

⁴²⁷TGI de Paris, 15 February 2012, *Diana Z. c/ Google*

⁴²⁸Tribunal de Commerce of Paris, 28 January 2014, *X contre Google Inc.*

⁴²⁹TGI Paris, 19 December 2014, *Marie-France M. c/ Google France et Google Inc*, http://www.legalis.net/sip.php?page=jurisprudence-decision&id_article=4425.

cumulative conditions which framed the exercise and enforcement of the right to be forgotten.

French courts have since actively enforced the right to request web hosts or intermediaries to remove or delist defamatory articles.⁴³⁰

In cases involving requests for the removal or delisting of press articles denouncing problems in the functioning of justice or public institutions, courts have however generally decided against the right to be forgotten, and in favour of freedom of information and expression.⁴³¹ For example, on 28 May 2014, the appeal court of Paris decided in favour of the newspaper *l'Express* which had refused to remove an article which denounced corruption activities by a judge. The court considered that 'where information revealed by the press related to the functioning of fundamental institutions of the State, a greater freedom of expression is tolerated, which is the case here concerning the behaviour of a judge'. They considered that it was 'a subject of general interest which must be debated freely in a democratic society, irrespective of the date of the alleged facts'. It considered that the delisting of the article ... 'would interfere seriously with freedom of expression guaranteed under Article 10 [ECHR].⁴³² In March 2015, a court rejected the request for the removal and delisting of an article, dating back to 2011, which concerned the placement in custody of a sportsman for rape, and was still accessible through search engines using his name. The individual, who had exercised a *droit de réponse* through insertion, nonetheless brought legal action against the editor of the daily newspaper based on Article 9 of the Civil Code (privacy) and Article 38 of the 1978 Law. The court found that the personal information revealed in the article used were 'manifestly necessary' to the realisation of the legitimate interest of the newspaper, in that the information dealt with the functioning of justice and the processing of cases involved serious attacks in persons and in that they involved a

⁴³⁰TGI de Paris, réf., 16 September 2014, *M. et Mme X et M. Y / Google France*. The court ordered Google to delist links to defamatory article, and imposed penalty payment (1000 EUR/day) and the payment of legal costs. The ruling applied not only to Google.fr, but to Google Inc.

⁴³¹ Eg CA de Paris, 28 May 2014

⁴³² See 'En Justice, la liberté d'expression surplante parfois le droit à l'oubli', <http://www.nextinpact.com/news/90707-en-justice-liberte-d-expression-surplante-parfois-droit-a-l-oubli.htm>

person whose job called upon the public and offering activities to children.⁴³³

Beyond the right of access, information and opposition of individuals, courts are relatively actively enforcing the obligations of the Directive, even if under the guise of applying domestic laws.

There have been many court cases dealing with the fraudulent, disloyal or illegal collection of personal data. Quite a few concerned the constitution of databases based on telephone book data, and led to condemnation.⁴³⁴

Failure to respect security obligation led to few cases, but the *Cour de Cassation* confirmed 30000 EUR and 50000 EUR fines against the executives of a doctors' union which had set up data processions without declaration to the CNIL and to which third parties got access. They were accused of not having carried out necessary training.⁴³⁵ The Paris Appeal court however refused to condemn an Internet user (in this case he was a journalists) for having accessed personal data as a result of a security failure by a the Tati clothes retailer, in particular as he had no intention to harm and reported the security failure to the company ('white hackers').⁴³⁶

Courts have sanctioned misuse of personal data (ie use different from the original purpose). For example, they sanctioned the use for electoral campaign purpose by a candidate of constituents addresses which he had obtained for the national utility company (EDF-GDF);⁴³⁷ the sharing by policemen of data concerning freemasons found in the police criminal act data base (STIC) and wanted person database with a freemason leader.⁴³⁸ Investigation were also started against IKEA for having hired detectives to obtain data from the STIC about its employees, job applicants, clients, etc.⁴³⁹

⁴³³TGI Paris, 23 Mars 2015, *M. P. c/ 20 Minutes France*.

⁴³⁴For a summary, see Mattatia above n 379, 121

⁴³⁵Crim., 30 October 2001, No 99-82.

⁴³⁶TGI Paris, 13th ch, 13 Feb 2002, [Kiketoa]; CA Paris 30 Octobre 2002.

⁴³⁷CA Aix-en-Provence, 27 May 1999.

⁴³⁸Crim., 20 June 2006, No 05-86.49,

⁴³⁹Mattatia above n 379, 139

The illegal processing of sensitive data have led to a number of condemnations. Courts sanctioned a company which had carried out an online poll during the presidential elections asking respondent who they would vote for, as well as their civil status, date of birth, professional situation, and e-mail address. During a control, the CNIL realized the data were stored together with the email addresses, and brought the case to State prosecutor. The first appeal court found the company director guilty of fraudulent collection of data, but the appeal court decide the case under the prohibition to process sensitive data.⁴⁴⁰

There are however limits to the effective nature of criminal remedies. Indeed, commentators observe that sanctions tend to be rare, and weak, and do not make use of the full range of sanctions, which are potentially very sever (up to 5 years in jail and 300000 EUR fine for criminal offenses, which is more than for involuntary manslaughter!). At the time of transposition of the Directive, in 2004, there were discussions on the lowering of penalties, but they eventually remained unchanged. Amongst the problems identified, they highlight the lack of interest of victims in suing for their right, difficulties sin assessing the damage, and the lack of judicial expertise.⁴⁴¹

Enforcement by the CNIL

The CNIL is active in enforcing data protection rules. Its effectiveness has been reinforced since 2004, when it was granted sanctioning powers, in transposition of the 1995 Directive. It exercises a priori control, through the declaration and authorization mechanisms, as well as a posteriori control and sanctioning.

In case it finds violation of data protection rules, the CNIL first gives formal notice, and if the legal or natural person does not comply, it can impose sanctions.

In the last decade, the CNIL received around 5000 complaints a year. In 2014, the CNIL received 5825 complaints (16% dealing with commerce and marketing, 14% work related, 12% bank and insurance, 11% public authorities). 39% concerned the Internet (increase).⁴⁴²

⁴⁴⁰T. Corr Nanterre, 4 June 2004, cited in Mattatia above n 379, 135

⁴⁴¹Mattatia above n 379, 146.

⁴⁴²CNIL, 35 Annual report (2014). http://www.cnil.fr/fileadmin/documents/La_CNIL/publications/CNIL-35e_rapport_annuel_2014.pdf.pdf

In most cases, people were opposed to their inclusion in a database or sought the removal of unwanted videos, pictures, etc.⁴⁴³ Following the 2014 CJEU ruling, the CNIL received 150 complaints concerning the refusal of delisting requests by search engines. On 10 June 2015, the CNIL publically notified Google that it must respond to delisting request by delisting links from *all* Google site extensions (such as google.fr, .uk, .com,). If it does not comply, the CNIL may issue a public warning.⁴⁴⁴

In 2014, the CNIL received 5246 requests for indirect access to their personal data in police, intelligence and tax databases. These concerned mostly the database of unpaid taxes (FICOBA) and the Judicial Past Database (TAJ, Fichier des Antecedents Judiciaires) DAJ, which replaces the STIC (Criminal Convictions Database) and JUDEX.⁴⁴⁵ The CNIL carried out 6656 checks. In half of the cases, the data were correct; the file was removed in about 20% of the request, and in another 25% or so, the file was corrected.

The CNIL modulates its sanctions, which range from a confidential warning, to a public warning, confidential fine, public fine, confidential injunction to stop the processing and public injunction to stop processing, depending on the seriousness of violations and the willingness to cooperate of the accused person.

The CNIL imposes sanctions for bad faith⁴⁴⁶ or insufficient cooperation with the CNIL.⁴⁴⁷ It has, for example, issued public warning on those grounds to banks or mobile operators.⁴⁴⁸

It imposes fines for spamming,⁴⁴⁹ for processing of data on racial and ethnic origins,⁴⁵⁰ unauthorized transfer of data outside the EU,⁴⁵¹ failure to obtain consent, failure to respect the right of opposition, security failure, excessive conservation of data, lack of relevance and

⁴⁴³CNIL, 35 Annual report (2014). http://www.cnil.fr/fileadmin/documents/La_CNIL/publications/CNIL-35e_rapport_annuel_2014.pdf.pdf, p. 45.

⁴⁴⁴ Decision 2015-047 giving formal notice to Google Inc.

⁴⁴⁵CNIL, 35 Annual report (2014). http://www.cnil.fr/fileadmin/documents/La_CNIL/publications/CNIL-35e_rapport_annuel_2014.pdf.pdf, p. 45.

⁴⁴⁶Deliberation No 2006-174 of 26 June 2006.

⁴⁴⁷Deliberation No 2006-245 of 23 November 2006.

⁴⁴⁸Deliberation No 2006-246 of 23 November 2006, Deliberation No 2006-208 of 21 September 2006

⁴⁴⁹Deliberation No 2007-352 of 22 November 2007 (5000 EUR fine)

⁴⁵⁰Deliberation No 2006-281 of 14 December 2006 (15000 EUR fine)

⁴⁵¹Deliberation No 2006-281 of 14 December 2006 (30000 EUR fine)

excessive character of data, etc⁴⁵² It imposes more severe sanctions in case of multiple violations taking into account the economic benefits derived from the breach.⁴⁵³ For example, on 17 March 2011, The CNIL imposes 100 000 EUR fine against Google for collecting individual meta-data to set up its geolocalization services.⁴⁵⁴

In 2014, the CNIL carried out 421 controls including 333 under the 1978 Law. It found some problems with the databases managed by penitentiary establishments, and informed the Justice Minister about it. It issued 62 formal notices and imposed 18 sanctions (8 fines, 7 warnings). For example, it imposed a 150 000 EUR fine on Google for lack of information, non specification of the length of data conservation, illegality of data combination, and failure to obtain consent; a public warning on DHL for security failure and exercise storage of data; a 3000 EUR fine for violation of the right of opposition by a company called Sphere; 5000 EUR fine for failure to respect formalities, lack of information, excessive storage of data, security failure, lack of cooperation by Loc Car Dream, 10000 EUR fine on the Association Juricom for failure to respect the right of opposition, etc.⁴⁵⁵

Although the fines which the CNIL can impose (up to 150 000 EUR) are high, they are not deterrent enough for big company. In such case, the publicity of the fine or injunction are probably more effective, in that they affect the reputation of those firms, and incite them to bring their practices in line with the law.

The CNIL tends to impose more frequent and severe sanctions than courts. This can be explained by the fact that if controllers comply with the CNIL's formal notice, they will avoid sanctions; therefore, the CNIL can only imposes sanctions on those who persevere in the violation, thus justifying heavier sanctioning.⁴⁵⁶

⁴⁵²See yearly reports for details.

⁴⁵³Deliberation No 2007-374 of 11 December 2007 (40 000 EUR fine on an SME); Deliberation No 2002-322 of 25 October 2002 (10 000 EUR fine and injunction to stop processing).

⁴⁵⁴Deliberation No 2011-035 of 17 March 2011.

⁴⁵⁵For a full list of the sanctions imposed in 2014, see

http://www.cnil.fr/fileadmin/documents/La_CNIL/publications/CNIL-35e_rapport_annuel_2014.pdf.pdf, p. 56.

⁴⁵⁶Mattatia above n 379, 166-167

In addition to these sanctions, the CNIL can bring matters before the State Prosecutor (although it rarely does so), as well as bring emergency proceedings in case of serious fundamental rights violations.

Sanctions by the CNIL are not exclusive of criminal sanctions, as the principle of non bis in idem is deemed not to apply. Individuals may bring acts before both CNIL and courts, and both types of sanctions may be pronounced.⁴⁵⁷ Moreover, courts and the CNIL cooperate, with courts asking advice to the CNIL, and the CNIL informing the State prosecutor of violations that come to its knowledge.

This report focused on sanction mechanisms. However, in relation to data protection, preventive and awareness raising are particularly important in order to avoid infringement of individual rights. The CNIL carries out important awareness raising activities, and so do a number of national associations (the regular French human rights organization, such as the LDH, or the GISTI, and more specialized one such as the '*Imaginons un Reseau Internet Solidaire*', Internet Society France) and international NGOS (eg Electronic Frontier Foundation, MoveOn.org) which provide supports to victims of violations.

Civil society

In addition to courts and the CNIL, civil society mobilization can also exercise pressure on politicians to prevent the setting up of intrusive database. For example, in 2008, the Prime Minister was forced to withdraw the Edvige database which processed data of individuals above the age of 13 who had sought, exercised or exercising a political, trade union or economic mandate or who play a significant institutional, economic, social or religious role, if necessary for law enforcement purposes.⁴⁵⁸ It was withdrawn following strong civil society mobilization.

⁴⁵⁷ Crim., 20 June 1996, Crim. 4 June 1998, Cass crim. 19 Jan 2000.

⁴⁵⁸ Decree No 2008-632 of 28 June 2008.

2. Enforcement of selected civil rights

Question 1 – Source of protection

✓ What are the sources of protection of each of this right? Do you see any problems in this regard? (eg the right is recognized only in a lower level norm, or multiple sources with different authority and meanings, etc.)

Question 2 – Scope and limits of the right (including balancing with other rights)

✓ What is the scope and what are the limits of this right? Are there any deficiencies in this regard (eg non-compliance with EU or ECHR standards)? How are they balanced against other rights, values or interests?

Question 3 – Interpretation and application

✓ How is this right interpreted and applied by courts? Are there any deficiencies in this regard?

Question 4 – Case law protecting civil rights

When the right in question is recognised through case law, how are they enforced? Is there a relevant doctrine of precedent? Can violation of judge-made principle be invoked in courts? Must judges bring up of their own motion civil rights violations? Etc.

Question 5 – Judicial enforcement institutions and bodies

✓ Which institutions are responsible for the enforcement of this rights in your country? Please expose here the structure of the judicial system of the country under study. Indicate, in particular, whether the country under study has a constitutional court or equivalent body. If not, how is compliance with international, European (including EU) and national (constitutional) civil rights guaranteed. Explain the role of other relevant bodies (eg ordinary courts, specialised courts, etc.)

✓ How are these institutions regulated at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other)

✓ Is the independence of these institutions and organs guaranteed? If so, how? Have there been concerns related to the independence of the judiciary in the country of study, which could undermine the effective enforcement of the selected civil right? Please indicate the different modes and modalities of enforcement of civil right carried out by the different judicial institutions involved.

✓ What are currently the main judicial procedures available to sanction, remedy or compensate for violations of the selected civil right (eg judicial review, damages, emergency measures, etc.). Indicate for each of them important information related in particular to time limits, costs, legal aid availability, length of proceedings, type of actions (eg collective action, class action), admissibility criteria (including standing conditions, delays, etc) as well as merits conditions (acceptable grounds, substantive conditions, degree of control, evidential aspects, burden of proof, etc.). What are the consequences of successful or unsuccessful legal actions under each of the procedures (annulment, compensation, sanctions, etc.)

✓ Is the judiciary effective and/or trusted to protect civil rights, or do people turn to alternative modes of action in order to protect these rights (ie demonstration, media involvement, social network activities, lobbying, etc)

Please indicate particular weaknesses and deficiencies, or on the contrary, elements of good practice, which are worth highlighting in that they are likely to have a particular impact on the enforcement of civil rights in the EU.

Question 6 – Non-judicial enforcement institutions and bodies relevant for the enforcement of the selected civil right

✓ Are there non-judicial/administrative procedures available to enforce the selected right against public authorities or private actors involved in public policy activities (eg delivery of public services, quasi-regulatory bodies, etc.) ?

✓ Are there non-judicial procedures available to uphold these rights against private actors (eg employers, landlords, etc.)?

- ✓ Which organs, institutions, or bodies contribute to promoting and enforcing the selected civil right? (eg equality body, ombudsperson, governmental supervisory authorities, etc.)
- ✓ How are procedures before these bodies regulated at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?
- ✓ What is their respective mandate? Were/are they discussions as to expanding, or reducing their mandate?
- ✓ What are their powers? (eg consultation, information-gathering, reporting, adjudication/decision-making, regulatory powers, etc)? Were they/are they discussions as to expanding, reducing their powers?
- ✓ How independent are they from government, parliament, stakeholders, others? Please pay particular attention to powers of appointment, and termination of the mandate of actors, as well as the bodies' decision-making procedures?

Question 7 – Access to Justice

- ✓ Are access to justice rights (fair trial, due process, right to an effective remedy...) respected when it comes to the enforcement of the selected right? Are there particular problems in that respect. Please develop.
- ✓ Does the principle have a broad scope of application, or are there exceptions?

Question 8 – “Support structures”

- ✓ What is the role of NGO or other civil society actors (eg legal entrepreneurs, etc.) in bringing awareness about modes of enforcement of the selected civil right and in supporting actions to uphold the selected right using judicial or non-judicial means? Please give as many details as possible and identify the most relevant actors
- ✓ Does the organization and structure of the legal professions support the selected civil right claims? In particular, are there developed legal aid systems or pro bono schemes, or any other relevant support system which purports to enable public interest litigation aimed

at promoting/supporting the development and effective enjoyment of the selected civil rights.

✓ Does legal training contribute or undermine the effective protection of the selected civil rights? Please give evidence based on standard law-school and/or bar-exams curricula?

✓ What are the relationship between legal elites, political/governmental elites and civil society organizations? Do they contribute or undermine civil rights litigation and enforcement?

✓ What is the role played by academic scholars in promoting and supporting the effective enforcement of the selected civil rights?

Question 9: Further practical barriers to the effective enjoyment of the selected civil rights

✓ Can you identify further barriers to an effective enjoyment of the selected civil rights in practice?

Please, include here (or repeat) particularly problematic barriers towards the enforcement of the selected civil rights (such as overbearing costs, judicial corruption, unavailability of legal aid in practice, lack of information about the rights, lack of expertise on the part of attorneys or other legal actors, intimidation towards people who want to enforce their rights, etc.)

✓ Can you identify linguistic barriers, and/or barriers related to difference between legal and judicial culture and practices which could undermine the effective enforcement of the selected civil rights, in particular for mobile EU citizens/Third Country Nationals?

Please, make sure to point out right-, gender-, or minority-specific differences with regard to an effective enjoyment of the selected civil rights.

Question 10: Jurisdictional issues in practice

✓ Personal

o Is there any de jure or de facto difference in the effective enjoyment of the selected civil rights in your country depending on the status of the person? (differences between

natural and legal persons; citizens of that state; EU citizens; third country nationals; refugee; long term resident; family members; tourists; etc.)

✓ Territorial

○ Are there any de jure or de facto differences in the effective enjoyment of the selected civil rights in different parts, provinces or territories in your member states?

✓ Material

○ Are rights enforced differently in different *policy areas* (e.g. security exceptions, foreign policy exclusion, etc.)? Please, make an assessment on the basis of practice, too (eg more deference accorded in the balancing to the executive when it comes to these policy areas, though the legal framework – what you described in the response to the D7.1. questionnaire — is itself not different from other areas).

✓ Temporal

○ What is the temporal scope of protection in the enforcement of the selected civil rights? Are there any notorious or systematic deficiencies in how deadlines are determined or related to the length of proceedings in practice? Please, answer this question from the viewpoint of the practical application of the rules on deadlines for both initiating proceedings, reviews, etc., and for the court's duty, if there is any (next to Art 6 ECHR), to complete proceedings.

Please offer details as to how different rights are enforced to different *categories of persons* in *different location and policy contexts over time*?

Question 11: Systematic or notorious lack or deficient enforcement of the selected civil rights in the country under study?

Please, discuss here in detail any 'revealing' cases of weaknesses in the effective exercise of selected civil rights in your country. Try to identify the reasons (eg political influence, financial hurdles, lack of expertise, etc.). Feel free to either repeat here, or refer back to points elaborated upon in previous replies.

Question 12: Good practices

- ✓ Please highlight legal frameworks, policies, instruments or practical tools which facilitate the effective exercise of the selected civil rights in the country under study.

For each of the rights examined (freedom of expression, freedom of expression of religious belief/freedom of religion, and the right to civil status and nationality document), all the questions have been addressed. However, in order to ensure conceptual integrity and clarity, these have not always been addressed in the suggested sequence. For further details on questions 5, 6 and 7, see also preliminary part of this national report.

2.1 FREEDOM OF EXPRESSION

Freedom of expression is not only an individual right, but also a core citizenship right, for without the free expression and communication of ideas, individuals cannot meaningfully participate in public life. It is the 'cornerstone' of democracy and human rights,⁴⁵⁹ and 'an infallible barometer of the authentically liberal character of a specific society: where it is threatened, one can be sure that freedoms in general will soon perish'.⁴⁶⁰

This being said, whilst free speech is legally protected in all member states of the EU, there remain significant variations as to its scope and limits. These may turn problematic, in a European Union in which people, books, newspapers, films, and other carrier of text and speech cross borders freely, and in a day and age in which words reach everywhere through the Internet. This can easily result in someone being sued for defamation in one country, for words expressed in another country, which protects freedom of expression differently (EU law scholars will be familiar with Professor Weiler's case, exposed below). This concern even led the Commission to object to the systematic recognition of courts decisions from other member states in defamation cases.⁴⁶¹ Divergences are problematic for EU citizens, who may simply not be aware of the limits of free speech imposed on them.

⁴⁵⁹Commission EDH, *Vogt v Germany* (1993), App 17851/91.

⁴⁶⁰Wachsman – Notice 16 'La liberté d'expression' in Thierry Renoux (ed) *Protection des libertés et droits fondamentaux* (La documentation française, 2011) 243-252, 243.

⁴⁶¹ See Commission 'Proposal for Regulation of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters', SEC

It is thus particularly important to examine its protection in a comparative perspective. As France is notorious for limiting freedom of expression to protect other purposes, and that these restrictions play out in the context of concrete cases in which freedom of expression clashes with other rights or interests; this, in itself, justifies having a closer look how it is protected in legal practice. One remarkable feature of the protection of freedom of expression in France is its strong roots in 19th century press law, which has exercised an important influence on later development.

International and European protection of freedom of expression – scope and limitation

Internationally, freedom of expression is guaranteed by Article 19 of the Universal Declaration of Human Rights, Articles 19 and 20 of the International Covenant on Civil and Political Rights, and Article 10 of the European Convention on Human Rights. Article 19(2) ICCPR provides that “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. Article 10(1) ECHR provides that ‘Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...’.

Article 11 of the EU Charter of Fundamental Rights provides that ‘everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers (1) and that ‘freedom and pluralism of the media shall be respected (2).

(2010) 748 Final. On the diversity in member states defamation laws, see Commission study, *Comparative study on the situation in the 27 member states as regard to the law applicable to non contractual obligations arising out of violations of privacy or the right related to personality* at http://ec.europa.eu/justice/civil/files/study_privacy_annexe_3_en.pdf

Still, freedom of expression, like most other conditional rights, may be limited by law. International and European human rights instruments accept, and even impose, certain limitations on free speech.

Article 19(3) ICCPR provides that 'the exercise of [freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order or of public health or morals.' Article 20 (2) also instructs states to prohibit 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.'

Article 10(1) ECHR provides that States may require 'the licensing of broadcasting, television or cinema enterprises, whilst Article 10(2) ECHR states that '[the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.' The ECtHR imposes that any interference with freedom of expression be 'necessary in a democratic society'). The ECtHR exercises a growing influence on the definition of freedom of expression and its possible restrictions in French law, and triggered legislative and jurisprudential adjustments.⁴⁶²

Article 51 of the EU Charter of Fundamental Rights states that 'any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

⁴⁶²Wachsmann above n 26, 490; see also the 2013 Annual Report of the Cour de Cassation, at https://www.courdecassation.fr/IMG/pdf/cour_de_cassation_rapport_2013.pdf (284-285).

Freedom of expression in France – general constitutional and legislative framework

Freedom of expression receives constitutional protection based on Article 11 of the 1789 Declaration of the Rights of the Man and the Citizen, which states that the 'free communication of thoughts and of opinions is *one of the most precious* human rights; and thus every citizen shall speak, write, and publish freely except for the reactions to the abuse of this freedom in cases determined by law.' The *Conseil Constitutionnel* considers freedom of expression as 'so precious that its existence is one of the essential guarantees of the respect of other rights and national sovereignty.'⁴⁶³ It must be effectively guaranteed, irrespective of the support, content or medium of expression.⁴⁶⁴ All types of speech are protected.⁴⁶⁵ Protection covers the press,⁴⁶⁶ audio-visual communication,⁴⁶⁷ and the Internet.⁴⁶⁸

The Constitution affords an important role to the legislator in the defining, protecting and limiting fundamental freedoms, including freedom of expression (Article 34). Indeed, it provides for the legislator to adopt rules related to 'civic rights and fundamental guarantees granted to citizens for the exercise of public freedom'. The 2008 constitutional revision added to this the protection of the freedom, pluralism, and independence of the media.

This legislative empowerment clause has positive and negative dimensions. First, the legislator should adopt legislative measures to promote and support the exercise of the

⁴⁶³ Decision No 84-181 DC of 10 and 11 October 1984 [press enterprise]; Decision 2010-3 QPC, of 28 May 2010.

⁴⁶⁴ See Colliard C.A. and Letteron, R. *Libertés Publiques* (8th ed., Dalloz, 2005), 451-453.

⁴⁶⁵ The French *Cour de Cassation* has adopted the liberal approach adopted by the ECtHR on the matter. It recognised advertising as falling under the protective scope of Article 10 of the Declaration. Com., 15 November 1994, No 9221560 and 9221701; Crim., 19 November 1997, Bull crim 1997 No 393 p. 1317.

⁴⁶⁶ Decision No 84-181 DC of 11 October 1984 [merger, transparency and pluralism of press enterprises].

⁴⁶⁷ Decision No 82-141 DC of 27 July 1982 [audiovisual communication]; see also the Fillioud Law of 29 July 1982, and Law 86-1067 of 30 September 1986.

⁴⁶⁸ See law No 2000/719 of 1 August 2000, and Law No 2004-575 of 21 July 2004 on e-commerce; see also Decision No 2009-580 DC of 10 June 2009 [diffusion and protection of creation on the Internet], mentioned in the Leloup, D, and Laurent, S. "Charlie", Dieudonné... : quelles limites à la liberté d'expression ?, 14 January 2015, *Le Monde*, at http://www.lemonde.fr/les-decodeurs/article/2015/01/14/de-charlie-a-dieudonne-jusqu-ou-va-la-liberte-d-expression_4555180_4355770.html#RBPuziml7UqlRmSk.99

listed rights.⁴⁶⁹ For a while, the *Conseil Constitutionnel* even prohibited regressive legislation (*effet-cliquet* doctrine),⁴⁷⁰ but this approach has now been abandoned. The legislator can thus amend or even abrogate protective legislative provisions, provided it respects constitutional requirements.⁴⁷¹

Second, the legislator can adopt measures which not only recognise and support the exercise of fundamental freedom, but also provisions which restrict them. These must however respect constitutional obligations:⁴⁷² they must pursue an objective of general interest⁴⁷³ or seek to reconcile conflicting rights. Freedom of expression must thus be balanced with 'objectives of constitutional value such as the safeguard of public order, the respect of other's freedom and the respect of the pluralist character of socio-cultural expression trends which these modes of communications, given their considerable influence, may undermine', as well as 'technical constraints inherent to audio-visual media'.⁴⁷⁴ This approach allows for a relatively broad range of permissible restrictions, which may go beyond what the ECHR allows. Since 2010, the *Conseil Constitutionnel*, rallying behind the ECtHR, requires that interferences with freedom of expression be 'necessary, suitable, and proportionate to the objective pursued' (proportionality control).⁴⁷⁵

In France, the exercise of freedom of expression is protected, as well as limited, by an old 1881 Press Law, amended several times, but still in force.⁴⁷⁶ It follows a repressive model,⁴⁷⁷

⁴⁶⁹Vidal-naquet A., *Les « garanties légales des exigences constitutionnelles » dans la jurisprudence du Conseil constitutionnel* (Paris, Université Panthéon-Assas, coll. Thèses, 2007, p. 267), cited by Bargues, C. 'Les acteurs juridiques et les normes constitutionnelles reconnaissant les droits de l'homme en France', *La Revue des droits de l'homme*, at <http://revdh.revues.org/1358>

⁴⁷⁰Decision No 93-325 DC of 13 August 1993 [immigration law]

⁴⁷¹Champeil-desplats, V., 'Le conseil constitutionnel a-t-il une conception des libertés publiques ?', *Jus politicum*, n° 7, p. 16 et s.

⁴⁷²Decision No 82-141 DC of 27 July 1982.

⁴⁷³Decision 85-198 DC of 13 December 1985 [Tour Eiffel]

⁴⁷⁴Decision No 82-151 of 27 July 1982 [law on audiovisual communication].

⁴⁷⁵Decision No 10-3 QPC of 28 May 2010, *Union des Familles en Europe*.

⁴⁷⁶Law of 29 July 1881 on the freedom of the press, latest amended on 15 November 2014. Previously, it had been amended by the 1972 Pleven Act to prohibit incitement to hatred, discrimination, slander and racial insults; by the 1990 Gayssot Act which added prohibition of racist, antisemitic or xenophobic activities, including Holocaust denial; by the Law of 30 December 2004 which prohibited hatred against people because of their gender, sexual orientation, or disability; and by a 2013 law which outlawed 'direct' or 'indirect' incitement of terrorism.

⁴⁷⁷See Leloup and Laurent, above n 468.

which allows the free expression of thoughts, whilst providing for sanctions in case of abuses prohibited by law. It is for judges on a case-by-case basis, to determine and punish violations. This repressive regime nonetheless coexists with a growing range of preventive mechanisms. In sensitive sectors, prior declarations or authorisation are, indeed, required.

Financial concentration, and the self-censorship which it may impose, also undermine what was originally conceived as a liberal regime.

Territorial jurisdiction

Recently, a French court considered that a provision in Facebook's general conditions which attributed competence to Californian courts was abusive and thus invalid. As a result, it declared itself competent to decide on a dispute between Facebook and an internet user whose account had been deactivated after he had published online a reproduction of the the famous and provocative painting by Courbet, the Origin of the World.⁴⁷⁸

Remedies

Violations of freedom of expression or of provisions which provide for lawful limits to free speech may be brought before either ordinary courts (in their civil or criminal composition) or administrative courts. Emergency proceedings (*référé*), whether civil or administrative ones, are increasingly used to protect free speech, or conversely, prevent abuse of it.⁴⁷⁹ The *Conseil d'Etat* recognised explicitly freedom of expression as a fundamental freedom for the purpose of Article L. 521-2 (*référé*).⁴⁸⁰ Moreover, since the introduction of the *Question Prioritaire de Constitutionnalité*, individuals can ask the competent court to refer legislative provisions which restricts freedom of expression to the *Cour de Cassation* or the *Conseil d'Etat* who may then request the *Conseil Constitutionnel* to determine whether these are

⁴⁷⁸TGI Paris, 5 March 2015, *Frédéric X. c/ Facebook Inc.*

⁴⁷⁹Wachsman above n26, 496.

⁴⁸⁰CE, ord., 2 May 2007, *Commune de St Leu*, No 305203.

compatible constitutionally norms.⁴⁸¹ How these different remedies are used is exposed in the sections below in the context of specific limitations to free speech.

Legislative restrictions and judicial enforcement

French legislation imposes numerous restrictions on freedom of expression to protect persons, fundamental values, public order or the rights of others.⁴⁸² Notably, it prohibits defamation, insult, incitement to hatred (which includes glorification of terrorism and crime against humanity), discriminatory, anti-semitic and racist statements, and invasions of privacy; it also imposes limitations aimed at protecting public order, public health, public interests, the environment, the youth, etc.⁴⁸³ These restrictions are subject to judicial control.

In the light of recent Paris attacks, and on-going controversies surrounding the publication of provocative caricatures by the weekly magazine *Charlie Hebdo* which portrayed the prophet Mohamed in negative light, it is important to highlight that that French law does not criminalise blasphemy (ie the act of insulting or showing contempt or lack of reverence for God). The 'right to mock religion' goes back to the 1789 revolution; after a long struggle with the catholic church, the 1789 political leaders abolished blasphemy as a crime which was previously punished by the death penalty. French law draws a distinction between attacking an idea or belief (ie religion) (which is permitted) and attacking believers (which is subject to criminal penalties), although the line is not always so easy to draw. For example, the actress Brigitte Bardot was convicted and fined for writing 'We are tired of being led around by the nose by this population that is destroying our country,' whilst the writer Michel Houellebecq (whose new novel was featured in the issue of *Charlie Hebdo* that came out just before the attack) was charged but eventually acquitted, for having said in an interview that Islam "is the stupidest religion.' Bardot was found to target her hostility toward Muslim people

⁴⁸¹ Constitutional Law No 2008-724 of 23 July 2008, JORF No 171 of 24 July 2008 p.11890; Organic Law No 2009-1523, 10 December 2009 (relating to the application of Article 61-1 of the Constitution), JORF No 0287 of 11 December 2009 p.21379.

⁴⁸² See Index on Censorship, at <http://www.indexoncensorship.org/2013/08/france-faces-restrictions-on-free-expression/>

⁴⁸³ See Leloup and Laurent, above n 468.

(incitement to racial hatred), and was thus found guilty, but Houellebecq who was critical of the religion (blasphemy), was not.⁴⁸⁴

Press freedom and freedom of expression have long been intertwined in French legal history. The basic legislative framework for setting the scope and limits of freedom of expression is the 1881 Press law. Further limitations or restrictions to the exercise of freedom of expression can nonetheless be found in other legislative provisions.

The protection of persons

Defamation, insult and special offenses

Article 29 of the 1881 Press law prohibits *defamation* and *insult*.

Defamation (or libel) is defined as 'any allegation or attribution of fact harming the honor or the consideration of a person or a body to which that fact is imputed', whilst insult (*injure*) is defined as 'any outrageous expression, despising statement, or invectives which does not concern the attribution of any fact'. Defamation thus concerns the attribution of false fact to a person, whilst insult is a result of 'the extreme expression of thoughts'.⁴⁸⁵

Both offences have in common that they require some publicity, which must go beyond the limited circle of a community of interests.⁴⁸⁶ Moreover, the targeted person must be easily identifiable.⁴⁸⁷ Finally, there is an intentional element, which in the case of defamation is presumed. Defamation and insult on the Internet are covered by the same regime. However, judge can request the lifting of anonymity in order to identify the author of defamatory or injurious statements.⁴⁸⁸

⁴⁸⁴ See article in the New Yorker, <http://www.newyorker.com/news/news-desk/french-law-treats-dieudonne-charlie-hebdo-differently>

⁴⁸⁵ Letteron above n 39, 437. Provocation does not provide a lawful defense, but may lead to lesser penalty.

⁴⁸⁶ Cass., crim., 27 May 1999, Bull. Crim No 112 p. 29

⁴⁸⁷ The law punishes the 'publication of defaming statements, even where this is done in a dubious manner, or where it targets a person or a body not explicitly named, but whose identification is made possible by the terms of incriminated speeches, shouts, threats, writings or prints, or posters' (Article 29.1). See also Civ. 2eme, 3 Feb 2000, Bull. Civ. No 23, p. 16.

⁴⁸⁸ Law No 2004-575 of 21 June 2004.

Defamation is characterized by (1) a precise statement of facts. For example, calling a judge 'irresponsible' does not constitute defamation as it is too vague (but it could be an insult).⁴⁸⁹ The *Cour de Cassation* also refused to qualify as defamation violent rap lyrics accusing police forces of having killed 'hundreds of brothers' in all impunity, as they did not mention any specific fact.⁴⁹⁰ Furthermore, there should be harm caused to the honor or consideration of the persons, which includes an inevitable subjective element, and makes the distinction between criticism and defamation delicate.⁴⁹¹ Finally, the targeted person must be identifiable, even if only by a closed circle.⁴⁹² The ECtHR approved the condemnation by French courts of the author of a book which accused one famous resistant of being involved in the arrest of another famous resistant, the allegation being based on the defense briefs of a 'collaboratoteur'.⁴⁹³ The *Cour de Cassation* adopted that same standpoint in a later case where it considered that allegations in 'disguised or dubitative forms' or through 'insinuation' may qualify as defamation.⁴⁹⁴

To defend themselves, the authors of the statement must prove either that the acts are true⁴⁹⁵ or that they believed in good faith that these were true. The 'truth exception' defense cannot be invoked where the facts concerns private life of a person.⁴⁹⁶ Until recently, individual accused of defamation were also prevented from bringing evidence of the truthful nature of the alleged acts when these went back more than ten years, or concerned an offence subject to an amnesty or prescription, or which had led to a condemnation which have been revised or rehabilitated. These exceptions have however been invalidated recently by *Conseil Constitutionnel* following QPCs, as incompatible Article 11 of the 1789 Declaration,⁴⁹⁷ thereby bringing French law in line with ECtHR requirements.⁴⁹⁸ These cases

⁴⁸⁹Crim. ,13 April 2010 *M. Franz-Olivier X et Societe Le Point Hebdo*, No 09-82389.

⁴⁹⁰Cass, ass. Plen., 25 June 2010, *Procureur general pres la cour d'appel de Versailles. M. Mohamed X, M. Emmanuel Y.*, No 08-86891.

⁴⁹¹Crim., 7 November 1989, JZ No 86-90812.

⁴⁹²Crim. 27 April 2011, *M.X. Jean-Etienne VY.*, No 10-83771. *M. Jean X.* No 09-84328.

⁴⁹³ECtHR 8 June 2004 *Chauvy v France* App. 64915/01.

⁴⁹⁴Crim., 31 January 2012 *M. Mohamed X* No 11-82012.

⁴⁹⁵Article 55 of the Press law.

⁴⁹⁶Ordinance of 6 May 1944; Article 35 of the 1881 Law.

⁴⁹⁷Decision No 2011-131 QPC of 20 May 2011, ;Decision No 2013-319 QPC of 7 June 2013 *M. Philippe B.*

⁴⁹⁸ECtHR 7 November 2006, *Mamere v France* App. No 12697/03

highlight the importance of the new QPC procedure for the protection of freedom of expression.⁴⁹⁹

In order to prove good faith, the authors of the statement must show sincerity, a legitimate aim (eg information of the public), that the defamatory statement are proportionate to the objective pursued, and prudence.⁵⁰⁰ In the case of a book accusing French military forces in Rwanda of participation in the Rwandan genocide, the *Cour de Cassation* rejected good faith because the authors had not gathered sufficient factual evidence supporting the claim.⁵⁰¹ French courts also condemned the authors of a novel called '*Le process de Jean-Marie Le Pen*', which mixed fictional and real events, a solution upheld by the ECtHR, because the applicants had not carried out 'basic verifications' of alleged facts attributed to Jean-Marie Le Pen and should have maintained a 'minimum of moderation and propriety'.⁵⁰²

The cumulative jurisprudential criteria for establishing good faith are demanding, and can prove particularly damaging for satirical or critical magazines or in case of on-air statements.⁵⁰³ Courts are not always consistent in the way they take account of specific contexts to modulate their requirements. For example, they sometimes applied prudential conditions, other times not, to statements which were critical of institutions.⁵⁰⁴ The *Cour de Cassation*, under the influence of the ECtHR, relaxed its position in relation to statements expressed in the context of political campaigns, in an attempt to balance the protection of the reputation of persons with the needs of public debates.⁵⁰⁵

Under the influence of the ECHR, which considers that only grave abuses of freedom of expression can justify state interference through a condemnation, French courts are displaying increasing caution towards condemning authors of allegedly defamatory

⁴⁹⁹Wachsman, above 26, 460, 487.

⁵⁰⁰Wachsman, above 460, 250.

⁵⁰¹Crim., 13 March 2012, *M. Jean –Claude X* No 11-85580.

⁵⁰²ECtHR, 22 October 2007, *Lindon, Otchakovsky-laurens and July v. France*, App . 21279/02 and .36448/02

⁵⁰³Wachsman, above 26460, 648.

⁵⁰⁴Crim., 23 March 1978, *Foyer* (criticism of judges trade unions); contrast with Crim., 12 June 1978 (criticism of the functioning of police services).

⁵⁰⁵Ch. Mix., 24 November 2000, BICC 15 Jan 2001,

statements.⁵⁰⁶ This trend is particularly evident since a 2008 decision, in which the *Cour de Cassation* overruled a condemnation for an article reporting on the fraudulent acquisition by a bank of a foreign insurance company, which had costs tax-payers a significant loss. Referring to both the defamation provisions in the Press law and Article 10 ECHR, it considered that 'it was for the judges on the merits to identify all intrinsic or extrinsic circumstances related to the alleged facts included in the texts which refers to them'.⁵⁰⁷

Judges are generally stricter when it comes to defamation online, because of the potential reach and harm of this particular media.⁵⁰⁸ However, they refrained from considering all publication on the Internet as public, as certain information are only available to a closed circle (eg forum, website members).⁵⁰⁹ French courts also exonerate bloggers from defamation claim for simply reproducing the text of articles which includes defamatory statements, without expecting them to have made an enquiry into the truthful nature of the facts alleged (presumption of good faith).⁵¹⁰ As for insult, there is no different treatment between the different media, save with regard to provocation, which on the Internet will be assessed taking into account the tone of the online exchange of views.⁵¹¹

Restrictions on freedom of speech imposed by French defamation law can have repercussions well beyond the French borders. EU lawyers may, indeed, have followed with interest the unfolding of the Weiler case.⁵¹² The Israeli-French author of an academic book brought criminal defamation proceedings in French courts against American Professor Joseph Weiler who had published a critical review of that author's book (published by a Dutch publisher) by a German law professor in the review section of the US-based European

⁵⁰⁶ See 2013 Annual Report of the *Cour de Cassation*, https://www.courdecassation.fr/IMG/pdf/cour_de_cassation_rapport_2013.pdf, 284-285.

⁵⁰⁷ Cass, Crim., 11 March 2008, No 06-84.712.

⁵⁰⁸ For example, they did not hesitate to condemn an Internet site accusing someone of sexual attacks on minors. CE, 20 February 2007, No 06-84310.

⁵⁰⁹ TGI Paris., réf., 5 July 2002.

⁵¹⁰ TGI Paris, 17 March 2006, *Communication Commerce Electronique*.

⁵¹¹ ⁵¹¹ Someone cannot sue for insult where his or her tone in the online exchange was aggressive. TGI Paris, 17 Sept 2010, Legavox, 23 Jan 2011.

⁵¹² TGI Paris, *Public Prosecutor v Weiler*, 3 March 2011, App 0718523043, available at <http://www.ejiltalk.org/wp-content/uploads/2011/03/Public-Prosecutor-v-Weiler-judgement-March-3-2011-3.pdf>

Journal of International Law website. The Paris First Instance Court eventually declined jurisdiction, as it could be established that the plaintiff had been forum-shopping and it could not be proven that the review of the book was accessible from France or was actually consulted in France before the end of the statute limitation period; incidentally, it also qualified the academic criticism in the book review as legitimate, and not libelous. Still, as Professor Weiler himself stated, 'the very fact of being subject to a criminal process by French public authorities and having to undergo a criminal trial ... coupled with the heavy financial burden of defending a case – expenses which are in large part not recoverable even if acquitted – constitutes a serious chilling effect on editorial discretion, freedom of speech and the very important academic institution of book reviewing'.⁵¹³

Defamation against individuals is punished by a 12 000 EUR fine. Defamation against tribunals, courts, armies, and public administration and bodies⁵¹⁴ or against the President of the Republic, ministers, civil servants, public agents, state-employed clergymen, citizens in charge of a public mandate or service in a permanent or temporary manner, member of a jury, in their functions and quality, or a or witness because of his or her testimony⁵¹⁵ is punished by a 45 000 EUR fine. The *Cour de Cassation* has issued a number of decisions in which it upheld defamation charges for offending statements made against public agents which it considered went beyond the limits of freedom of expression, as their authors had not displayed sufficient seriousness in the investigation and reserve in expression (the case concerned statements assimilating their activities to crimes committed by the Vichy police).⁵¹⁶

Insults against individuals, when not provoked, and insult against the above personalities are subject to a 12 000 EUR fine. Insults against persons by reasons of their origins or their belonging (or non-belonging) to an determined ethnical group, nation, race or religion, or against a person or a group of persons because of their sex, sexual orientation or identify, or

⁵¹³ Editorial, J.H.H Weiler, 'Book Reviewing and academic freedom, European Journal of International Law' Vol 20 No 4 (2010) p. 974. <http://www.ejil.org/pdfs/20/4/1952.pdf>

⁵¹⁴ Article 30 of the Press Law.

⁵¹⁵ Article 31 of the Press law; except where it concerns their private life, covered by Article 32.

⁵¹⁶ Crim., 28 may 2013, No 12-83.225.

disability, or would have incited to discriminate against these persons can lead to six-months jail sentence and 22 500 EUR fine.⁵¹⁷

Sentences are applicable to defamation or insult against deceased persons' memory only in case the authors intended to harm the honour or the consideration of their living heirs, spouses or legatees.⁵¹⁸ These benefit from a response right.⁵¹⁹

Articles 37 to 41 prohibits the release of certain information to protect judicial proceedings, the identity of members of secret services, minors who have disappeared, are victim of a crime or neglect, or committed suicide, or victims of sexual aggressions, the anonymity of adoption, etc.

In the field of defamation, under Article 46 of the Press law, plaintiffs should bring action before criminal courts. If they turn civil courts, these must apply the substantive and procedural guarantees of the 1886 law, which are protective of free speech.⁵²⁰ In cases which involve interference with privacy rights, civil courts are competent, including in emergency proceedings.⁵²¹

Individuals have been increasingly inclined to seek civil law remedies, as these provide for a broader range of measures and higher damage awards, in case of condemnation.

The *Cour de Cassation* at first considered civil liability as widely applicable to abuse of free speech,⁵²² including those covered under the criminal provisions of the Press law, whilst lower courts considered it should be limited to abuses not covered by the Press law (eg deformation by the journalist of statements made by the plaintiff or violation of fundamental freedoms).⁵²³ The *Cour de Cassation* reconsidered its position and abuse of free speech prohibited under the Press law can no longer be compensated based on Article 1392

⁵¹⁷ Article 33 of the Press law.

⁵¹⁸ Article 34 of the Press law.

⁵¹⁹ Under Article 13 of the Press Law.

⁵²⁰ However, they sometime apply common law. Cass, 1ere Civ. 8 April 2010, Bull civ I No 87

⁵²¹ Article 9 of the Civil Code.

⁵²² Civ. 2e, 5 May 1991, *Legipresse* 1994.III. 20 (refusal to condemn the editor of a magazine which had public pictures of scouts carrying out erotic acts with licentious captions); Versailles, 17 may 1995 *Legipresse* 1995. III. 170; Civ 2eme, 24 Jan 1996, D. 1997. 269. Cited in Wachsman, above 26460, 497.

⁵²³ Paris 18 Feb 1992 *Legipresse* 1992.III. 112 (refusal to condemn the news paper *Le Canard Enchaîné* for a satirical cartoon).

of the Civil Code.⁵²⁴ Civil proceedings can only be used to fill gaps in the protection left by criminal law, but cannot be substituted to them. In a recent decision, the *Cour de Cassation* confirmed the autonomy and prevalence of the special remedies provided under the 1881 Press Law.⁵²⁵

Emergency proceedings became also increasingly used in defamation cases not involving privacy.⁵²⁶ The *référé* procedure enables courts to impose very restrictive measures on freedom of expression, such as provisional awards of damages, penalty payments, the publication of a communication, publication ban, texts removal, seizure of document, etc. Higher courts are nonetheless trying to limit abuse of emergency proceedings to curtail freedom of expression. First of all, the *Cour de Cassation* reminded of the requirement to respect a strict 10-day delay, within which the accused can bring proof of the truthful nature of the alleged fact, a requirement which should limit the temptation to request such measures.⁵²⁷ Moreover, appeal courts exercise greater scrutiny on the use of such interim measures by first instance courts acting in *référé*.⁵²⁸ In a notorious case, a civil judge imposed the removal of the expression 'how many dead' from the title of an article on the health-adverse impact of a medicine called Mediator. The Appeal Court overruled the measure.⁵²⁹ *Référé* can still be used to protect the presumption of innocence, where journalists do not respect it.⁵³⁰

Article 13 of the Press law provides for a *droit de réponse* (right to respond), which consists in the right for anyone cited to publish within short delays a focused response to critical statement made in the press, which only addresses the original statement and does not

⁵²⁴BICC 1 November 2000, 3.

⁵²⁵Civ. 1ere, 10 April 2013, Legipress 2013.III. 425.

⁵²⁶Eg. Civ. 5 Feb 1992 D. 1993 (case concerning the book written by the doctor of late President Mitterand).

⁵²⁷Civ., 2eme, 5 Feb 1992.

⁵²⁸Wachsman, above 26460, 497.

⁵²⁹TGI Brest, ref. , 7 June 2010 Legipress 2006 2010. III. 296. CA Rennes, 25 January 2011 Legipress 2011. III. 182.

⁵³⁰Article 9-1 Of the Civil Code, as resulting from the Law of 9 Jan 1993 on criminal reform. The *référé* judge can order the publication of statement restoring the innocence of someone.

bring any new elements. The *Front national* was refused such *droit de réponse* to press statements which qualified it as an extreme-right movement.⁵³¹

The Press Law provides for stronger sentences when these are committed against persons by reasons of their origins or their belonging to a determined ethnical group, nation, race or religion, or against a person or a group of persons because of their sex, sexual orientation or identify, or disability, or would have incited to discriminate against these person.⁵³² The concept of racial insult is widely defined: for example, assimilating Jews to a sect or a fraud, amounts to racial insult, the repression of which is a necessary restriction in a democratic society (reference was made to restrictions allowed by Article 10 ECHR).⁵³³ In 2012, Jean-Paul Guerlain, the perfume-maker, was condemned to a 6000 EUR fine for racial insult for saying he was 'working like a negro'.⁵³⁴ In July 2014, an NGOs brought an action against Anne-Sophie Leclère, FN candidate in local elections, to 9 months imprisonment, subject to a 50000 EUR fine, and 5 years of ineligibility for having compared the Justice Ministry to a monkey. However, on 22 June 2015, the Appeal Court overruled the decision, considering that the action was inadmissible, for according to the NGO statute, its mission to defend the memory of slaves and the honor of their descendants or to combat racism did not go back at least 5 years before the facts, as required by the law.⁵³⁵

The protection of private life

Freedom of expression can be limited to protect private life, which is also constitutionally protected.⁵³⁶ As is well known, France has strong privacy laws. The Law of 17 July 1970 on the individual rights of the citizen created the offense of interference with private life, which is frequently invoked against the press and media. Article 9 of the Civil Code, as it results

⁵³¹Crim., 3 November 1999.

⁵³² Articles 32 and 33

⁵³³ Ass. Plen., 16 February 2007, *Ligue internationale contre le et l'antisémitisme et le Consistoire central union des communautés juives de France* No 06-81.785.

⁵³⁴ TGI Paris, Crim., 17th ch., Paris, 29 March 2012.

⁵³⁵ See 'Taubira comparée à un singe: la cour d'appel de Cayenne annule la condamnation d'une ex-candidate FN', 22 June 2015, http://www.huffingtonpost.fr/2015/06/22/taubira-comparee-singe-cour-appel-cayenne-annule-condamnation-ex-candidate-fn-anne-sophie-leclere_n_7639076.html .

⁵³⁶ Decision No 94-352 DC [security law]; Decision No 99-416 DC [universal medical cover]; Decision No 99-419, 9 November 1999 [Civil Union Pact].

from Article 22 of the 1970 Law, provides that 'everyone has the right to respect of his/her private life. Action may be brought before civil courts, which may prescribe all measures, including receivership proceedings, seizure and others,⁵³⁷ necessary to prevent or stop an intrusion with the intimacy of private life. These may also be imposed in the context of emergency proceedings.

Despite this strong protection afforded to private life, courts have been reluctant to resort to restrictive measures such as seizures. Considering freedom of the press as the rule, they established that emergency seizure should only occur in exceptional circumstances (ie intolerable intrusion, risk of damage that could not be latter compensated).⁵³⁸

Privacy protects one's image, sentimental and sexual life, family relations, health situations, and intimacy. However, the line between public and private must be assessed taking into account specific circumstances, and bearing in mind the right to freedom of expression. In 1997, a court deciding in emergency proceedings imposed a ban on the publication of a book by the former doctor of late President Mitterrand for violation of medical secrecy.⁵³⁹ The solution was later confirmed on the merits.⁵⁴⁰ The case was brought before the ECtHR, which considered the ban as a disproportionate measure, considering that the state of health of the Head of State was a matter of public interest and that the restriction on freedom of the expression was not justified by an imperious social need.⁵⁴¹

For severe intrusions into privacy, criminal law provides for additional sanctions. Article 226-1 of the Criminal Code sanctions by one-year jail sentence and 45 000 EUR fine the intercepting, recording and transmission, without the author's consent, of words expressed in private or confidential settings or photographs taken in a private place, whilst its Article 226-2 imposes similar penalties on those who keep or bring to the knowledge of the public or a third party any recordings or document obtained according to Article 226-1. The *Cour de*

⁵³⁷ E.g Insertion of a statement in a book, blackening of the face of someone on a picture, imposing provisional damages, order the publication of a communication in the next edition of a newspaper, etc.

⁵³⁸ TGI, Paris ref. 1970.

⁵³⁹ Civ. 16 July 1997, *GP* 1 February 1998 panorama CC 25.

⁵⁴⁰ Although the *Cour de cassation* established that the right to respect for privacy ends with the death of the person concerned: Civ 1ere, 14 Dec 1999.

⁵⁴¹ ECtHR, 18 May 2004. *Societe Plon v France*, App. 56148/00.

Cassation refused to refer to the *Conseil Constitutionnel* a question which challenged the compatibility with freedom of expression of Article 226-1 and 2, in that it prohibits the diffusion of words expressed in private and confidential settings without their authors consent.⁵⁴²

Protection of public policy

Protection of public functions

Until recently, (ex) Article 26 of the 1881 law qualified as 'offense to the President of the Republic' (reminiscent of the 'crime of lese-majesté'), offending, although truthful, statements. Its objective was to protect the presidential function. This protection was extended to foreign Head of States (ex-Article 36 of the 1881 Law). In a case brought by three African heads of state who sought the condemnation of the authors of a book which criticized their policy, French courts took the view that (ex)Article 36 of the 1881 Law was incompatible with article 10 ECHR on freedom of expression, as well as Article 6 ECHR on equality of arms.⁵⁴³ This solution was confirmed by Strasbourg in similar cases brought before it.⁵⁴⁴ The offense against foreign head of State was thus eventually abrogated in 2004.⁵⁴⁵

In 2008, an man who had displayed a sign on which was written "Casse toi pov'con" [Fuck-off idiot!] during a visit by President Sarkozy (the poster text made a reference to the statement by the President himself addressed to a citizen who was criticizing him), was charged with offence to the President. The case ended up before the ECtHR, which condemned France for violation of freedom of expression.⁵⁴⁶ The Court placed the statement in its context, and considered that 'satire is a form of artistic expression and social commentary which, through exaggeration and deformation of the reality which

⁵⁴²Civ., 1ere QPC, 5 February 2014, *société Editrice de Médiapart* ECLI:FR:CCASS:2014:C100237

⁵⁴³TGI Paris, 2001, D. 2002, p. 2726.

⁵⁴⁴ECtHR, 25 June 2002, *Colombani v France*, App. 51279/99; ECtHR, 31 Jan 2006 *Giniewski v France*, ECtHR, 15 January 2009, *Orban v France*, 20985/05.

⁵⁴⁵ Law No 2004-204 of 9 March 2004, Article 52, JORF 10 March 2004.

⁵⁴⁶ECtHR, 14 March 2013, *Eon v France*, appl. 26118/10.

characterizes it, aims at provoking and agitating'. The offense against the Head of State was removed in 2013,⁵⁴⁷ to comply with the ruling.

Protection of public order

In January 2014, the *Conseil d'Etat*, acting on appeal in interim proceedings (*référé-liberté*), confirmed the interdiction by local authorities of some of the controversial comedian Dieudonné's shows, for fear that his shows would include statement which would undermine human dignity and thereby disturb public order (of which human dignity is a component).⁵⁴⁸ A year later, and a month after the attacks on Charlie Hebdo's magazine, the *Conseil d'Etat* decided in the opposite way, and ordered the comedian's show to go ahead.⁵⁴⁹

Dieudonné and its production company challenged a mayor's decision to ban his show under a *référé-liberté* procedure before the first instance administrative court, which found in its favour and suspended the ban.⁵⁵⁰ The local authority appealed the decision before the *Conseil d'Etat*. Recalling that freedom of expression is 'one of the conditions of democracy and one of the guarantees of the respect of others' rights and freedoms' which can be limited based on public order requirements, but only to the extent that interference with the exercise of freedom of expression are 'necessary, adapted and proportionate', it examined the particular circumstances of the case, checking whether the statements on which the mayor had based its decision banning the show actually 'featured' in the show, assessed contextual elements and examined whether public order could be safeguard through means other than the show's prohibition. Notably, it noted that comedian's shows in other cities did not lead to particular disorders, complaints or criminal pursuits, and that it was not clear that the statements and acts on which the mayoral ban was based (e.g. 'quenelle' gesture and song, etc) would be included in the show. It considered that the fact

⁵⁴⁷ Law No 2013-711 of 5 Aug 2013, Article 21(V).

⁵⁴⁸ CE, ord. 9 Jan 2014, Minister of the Interior Against Société Les Productions de la Plume and M. Dieudonné M'Bala M'Bala, No 374508; CEU, ord. , 11 Jan 2014, Société les Productions de la Plume and M. Dieudonné M'Bala M'Bala, No 374552.

⁵⁴⁹ CE, ord., 6 February 2015, *Commune de Cournon d'Auvergne*, No No 387726.

⁵⁵⁰ TA Clermont-Ferrant, ord., 5 Feb 2015, No 1500221.

that the comedian was the object of criminal procedures (for 'glorification of terrorism') was not itself constitutive of a threat to public order. It also considered that the national context, following the January 2015 Paris attack, and local actions (support and opposition letters) of local residents, did not suffice to establish such risk. Finally, it considered that public order could be safeguarded through security measures, rather than the ban of the show. It concluded that the circumstances were different from the one which had led to the 2014 decision supporting the bans against the comedian shows, and that banning the 2015 show would amount to a grave and manifestly illegal interference with freedom of expression and assembly.

Protection of public security – prohibition of incitement to crime

The 1881 Press Law prohibits and sanctions incitement to commit a crime or an offence whether it is or not followed by effects. Article 23 of the Press law punishes as *accomplice* of a crime or offence those who through any form of expression have *incited* the author or authors to commit the crime or offence, *if incitement was followed by any effect*. This provision is also applicable when incitement was followed by only an *attempt* to commit a crime or offence.⁵⁵¹ Article 24, in its latest redaction,⁵⁵² punishes with a five year jail sentence and 45000 EUR fine those who have directly incited, *where this incitement is not followed by effects*, to commit the following offences: 1) voluntary manslaughter, attack on the integrity of persons, sexual assault; 2) thefts, extortions and voluntary destructions, degradations and deteriorations, deteriorations which could be dangerous for persons; or a crime or offence undermining the nation's fundamental interests; those who glorified crimes referred to in 1), war crimes, crimes against humanity or crimes and offenses involving collaboration with the enemy. It also provides that those who shout or sing songs inciting to revolt in public places or gatherings will be punished by a 5th class offence fine.

Until January 2015, Article 24 of the 1881 Law also included incitement to terrorism, but this offence is now defined in the Anti-Terrorist Law adopted on 13 November 2014,⁵⁵³ and has

⁵⁵¹ As resulting from Law No 2004-575 of 21 June 2004 (art. 2) JORF 22 June 2004 (own translation).

⁵⁵² Law No 2014-1453 of 13 November 2014, Article 5.

⁵⁵³ Law No 2014-1453 of 13 Nov 2014.

been moved to the Criminal Code with the view to facilitate prosecution and sentencing. The new Article 421-2-5 of the Criminal Code provides that 'the action of directly inciting to acts of terrorism or publicly glorifying such acts is punishable by five year imprisonment and 75 000 EUR fine. When this is done using online communication, the penalties can be extended to seven years in jail and 100 000 EUR fine. This new antiterrorist legislation imposes heavier sentences for incitement or glorification of terrorism, and allows for expedited procedures. On this basis, the controversial comedian Dieudonné was condemned to two years in jail for glorifying terrorism under the new provision, for stating on his Facebook page that he felt like 'Charlie Coulibaly', one of the presumed terrorists who committed the attacks a kosher supermarket in January 2015. The judges stressed the association 'Charlie' – 'Coulibaly' and the 'provocative amalgam' between freedom of expression which had costs journalists lives and the author of a terrorism act to which he identified.⁵⁵⁴ A prisoner was sentenced to one-month additional jail sentence for stating his approval of the terrorist attacks on Charlie Hebdo.⁵⁵⁵ According to the Justice Ministry, within the month that followed the terrorist attacks, 550 cases of glorification of terrorism have been signaled with authors identified in three quarters of them. Action was taken against almost all of them, and in half of the cases, accused were brought up for immediate trial (in particular in cases in which police forces were targeted). 132 were condemned to strict or conditional prison sentences.⁵⁵⁶ Human Rights organizations have condemned the fast track sentences (eg LDH, Amnesty International). Critics consider that this approach show double standards apply.⁵⁵⁷ Amnesty argues, on its website, that 'vaguely-defined

⁵⁵⁴ Paris, 18 March 2015.

⁵⁵⁵ See BFMTV 'Charlie Hebdo, un detenu condamne a un mois de provision pour apologie du terrorism', 12 March 2015, <http://www.bfmtv.com/societe/charlie-hebdo-un-detenu-condamne-a-un-mois-de-prison-pour-apologie-du-terrorisme-868793.html>

⁵⁵⁶ See Gonzales, P. 'Depuis les attentats, la justice a prononce 132 condamnation pour apologie du terrorism' Le Figaro, 18 March 2015, at <http://www.lefigaro.fr/actualite-france/2015/03/18/01016-20150318ARTFIG00007-depuis-les-attentats-la-justice-a-prononce-132-condamnations-pour-apologie-du-terrorisme.php>

⁵⁵⁷ Kirby, P. 'Paris attacks: France grapples with freedom of speech' BBC, 15 January 2015 <http://www.bbc.com/news/blogs-eu-30829005>; Gill, Dieudonné: freedom of expression is no joke in France, Euronews, 2 February 2015; <http://www.euronews.com/2015/02/02/dieudonne-freedom-of-expression-is-no-joke-in-france/>; Stille, A, Why French Law Treats Dieudonné and Charlie Hebdo Differently, The New Yorker, 15 January 2015, at <http://www.newyorker.com/news/news-desk/french-law-treats-dieudonne-charlie-hebdo->

offences such as 'defence of terrorism', risk criminalizing statements or other forms of expression which, while undoubtedly offensive to many, fall well short of inciting others to violence or discrimination.⁵⁵⁸ There is a strong risk of chilling effect.

The new law also allows for the administrative blocking of websites which incite to or glorify terrorism, without the need for judicial validation.⁵⁵⁹ Its implementing decree was adopted on 5 February 2015.⁵⁶⁰ Mid-March 2015, the *Office central de lutte contre la criminalité liée aux technologies de l'information et de la communication* (OCLCTIC), the body in charge of the blocking mechanism, under the supervision of a member of the CNIL, ordered the blocking of five sites which allegedly relayed terrorist propaganda, and this without a judicial order.⁵⁶¹ Affected persons may lodge a complaint with the Office. Such significant curtailing of freedom of expression, without judicial intervention, is particularly problematic (see opinion of the CNDCH).⁵⁶²

Prohibition of incitement to hatred and discrimination

In addition to racial defamation and insult, the 1881 Press Law prohibits and sanctions incitement to hatred and discrimination, whether or not followed by effects.⁵⁶³

Article 24 punishes by a one year jail sentence and 45 000 EUR fine (or only one of those sanctions) those who have incited to discrimination, hatred or violence towards a person or a group of persons by reason of their origin, belonging (or non-belonging) to an determined ethnical group, nation, race or religion,⁵⁶⁴ or their sex, sexual orientation or identify, or

differently

⁵⁵⁸ Amnesty International, January 2015, at <https://www.amnesty.org/en/articles/news/2015/01/france-faces-litmus-test-freedom-expression-dozens-arrested-wake-attacks/>

⁵⁵⁹ Under the new Article 6-1 inserted in the E-Commerce Law (Law 2004-575 of 21 June 2004) by Article 12 of the Law No 2014-1453 of 13 November 2014.

⁵⁶⁰ Decree No 2015-125 of 5 February 2015 related to the blocking of websites inciting to acts of terrorism or condoning terrorism and sites broadcasting images and representations of minors of pornographic nature.

⁵⁶¹ See Bohic, C. 'Terrorisme : le blocage administratif de sites entre en phase opérationnelle,' 17 March 2015, ITespresso, at <http://www.itespresso.fr/terrorisme-blocage-administratif-sites-phase-operationnelle-91163.html#1VIOByQCYw1T4Ue2.99>

⁵⁶² See Opinion of the CNDCH, at

http://www.cncdh.fr/sites/default/files/14.09.25_avis_projet_de_loi_terrorisme_2.pdf

⁵⁶³ Articles 23 and 24.

⁵⁶⁴ Added by the Law of 1 July 1972.

disability'.⁵⁶⁵ At first, courts were reluctant to condemn individuals under these provisions. They ruled that statements against foreigners or immigrants in general,⁵⁶⁶ or racist political campaigning⁵⁶⁷ did not fall under Article 24, as there was no 'direct' incitement to hatred or violence, thereby an additional conditions into the legislative text.⁵⁶⁸ However, the trend is changing. A court condemned J.-M. Le Pen for having in public invited to exclude four Jewish personalities from France, thereby sanctioning 'racism by connotation'.⁵⁶⁹ Brigitte Bardot has been repeatedly condemned for incitement to racial hatred for denouncing the overpopulation of foreigners in French, Islamisation and links to terrorism.⁵⁷⁰ In 2011, a court considered that a statement which explained that coloured people were subject to more frequent police checks because most traffickers were Blacks and Arabs constituted provocation to racial hatred.⁵⁷¹

Critics suggests that the prohibition of incitement to racial hatred has been very broadly interpreted as the right not to be offended or criticised.⁵⁷² Individuals convicted of incitement to racial hatred and incitement to hatred and violence based on the grounds of sexual orientation sought to challenge the relevant section of Article 24 of the 1881 law, through the QPC procedure. However, the *Cour de Cassation*, considering that the restrictions on free speech were necessary, suitable and proportionate to the protection of public order, decided not to refer the cases to the *Conseil Constitutionnel*.⁵⁷³

The new Criminal Code also sanctions racial defamation or incitement to discrimination and hatred done in private contexts;⁵⁷⁴ courts however prefer to rely on the Press law and

⁵⁶⁵ Added by the 2004 Press law.

⁵⁶⁶ Crim., 6 May 1986. Bull. No 153.

⁵⁶⁷ TGI 17 ch, 12 July 1989, Cahiers Lamy Droit de l'informatique, September 1989, 16-17.

⁵⁶⁸ Wachsman above n 26, 644.

⁵⁶⁹ TI Aubervilliers, 11 March 1986, reported in Wachsman above n 26, 644.

⁵⁷⁰ See blogpost by Finck, M., Brigitte Bardot's repeated convictions for inciting racial hatred, <http://freespeechdebate.com/en/case/brigitte-bardots-repeated-convictions-for-inciting-racial-hatred/>

⁵⁷¹ TGI Paris, 18 Feb 2011, *SOS Racisme et a. v E. Zemmour*

⁵⁷² See Index on Censorship, <http://www.indexoncensorship.org/2013/08/france-faces-restrictions-on-free-expression/>.

⁵⁷³ Crim., 16 April 2013 QPC, No 13-90.008; and Crim., 16 April 2013, QPC No 13-90.010.

⁵⁷⁴ New Criminal Code, Article R.624-3 and R-625-7.

sanction discriminatory public statements,insisting on a real diffusion requirement.⁵⁷⁵ Courts have also been careful with convicting persons for incitement not followed by effects. They refused to condemn an article that criticised the practices of Senegalese street-vendors as incitement to discrimination,⁵⁷⁶ but sanctioned the repetitive mention of the father's name of a lawyer to signify that his views are influenced by its belonging to the Jewish community as incitement to discrimination.⁵⁷⁷

Protection of values

Denial of historical crimes

Article 24 bis of the 1881 Press law, as it results from the 1990 Gayssot Act against racist, anti-semitic and xenophobic acts, punishes by one year jail sentence and 45000 EUR fine those have contested the existence of one or more crime against humanity, as defined by Article 6 of the statute of the Nuremberg Tribunal.⁵⁷⁸ Courts imposed sanctions against the author of an article entitled 'the myth of extermination of Jews'.⁵⁷⁹ They approved the withdrawal of his chair from an historian who talked about 'alleged gas chambers'.⁵⁸⁰ The *Cour de Cassation* however annulled the condemnation a politician who did not contest the existence of gas chambers but said it was for historians to debate the victims number.⁵⁸¹ Despite its controversial nature, the genocide denial provision will remain in place. The ECtHR considered the Gayssot act compatible with the ECHR, as 'necessary in a democratic society'.⁵⁸² The *Cour de Cassation* refused to refer the prohibition of negationism clause of the Gayssot act to the *Conseil Constitutionnel*.⁵⁸³

⁵⁷⁵ Contrast *Crim.*, 25 June 2002, No 01-86026, and TGI Paris 18 February 2011, *SOS Racism et a. v E. Zemmour*.

⁵⁷⁶ *Crim.*, 17 February 1998, No 96-85.567.

⁵⁷⁷ *Crim.*, 3 March 1980. No 78-91949.

⁵⁷⁸ As defined in Article of the International Military tribunal annexed to the London agreement of 8 August 1945, and which have been committed either by members of an organisation considered as criminal under Article 9 of this statute, or by a person recognised as guilty of such crime by a French or international court. Law No 90-615 of 13 July 1990, sanctioning racist, anti-Semitic or xenophobic acts.

⁵⁷⁹ TGI Paris, 31 October 1990, confirmed by *Civ.*, 25 October 1992, No 91-10832.

⁵⁸⁰ Paris, 11th ch., 9 December 1992, *Boizeau et Faurisson*.

⁵⁸¹ *Crim.*, 23 June 2009, M. *Bruno X. Federation departementale du Rhone du MRAP et a.*, No 08-82521.

⁵⁸² ECtHR, 24 June 2003 *Garaudy v France*, App. 65831/01.

⁵⁸³ *Crim.*, 7 May 2010, No 09-80.774 and *Crim.*, 5 December 2012, No 12-86.382.

France also has 'memorial laws', which officially acknowledges the existence of a historical event. In 2005, a law was adopted which required that school curricula recognise the positive role of French presence in North Africa and the sacrifice of French soldiers.⁵⁸⁴ It was heavily criticised, and eventually, the government, in an original manner, asked the *Conseil Constitutionnel* to deny it legislative value,⁵⁸⁵ so that it could later abrogate it by decree.⁵⁸⁶

In 2001, France adopted a law which publically recognized Armenian genocide.⁵⁸⁷ A few years later, in 2006, the National Assembly proposed a law which criminalized denial of the Armenian genocide, which was blocked by the Senate. In 2011, the National Assembly adopted by a large majority a legislative proposal which criminalized the denial of genocides recognized by the French state,⁵⁸⁸ which the Senate, this time, endorsed on 23 Feb 2012. It was referred to the *Conseil Constitutionnel*, which declared it unconstitutional. It considered that 'by preventing the contestation of the existence and qualification of a crime which it has itself recognized as such, the legislator interfered with the freedom of communication and expression in a manner which is unconstitutional'.⁵⁸⁹

Currently, the Parliament is examining a new legislative proposal recognising the 1915 Assyrian genocide.⁵⁹⁰

Protection of youth

Particularly relevant in light of the free movement of goods, until 2004, there was a strict regime of control over foreign publications, which went back to a pre-war act aiming at

⁵⁸⁴ Law No 205-158 of 23 Feb 2005 on the national recognition and contribution in support of repatriated French.

⁵⁸⁵ Decision No 2006-203 DC of 31 January 2006.

⁵⁸⁶ Decree No 2006-260 of 15 February 2006.

⁵⁸⁷ Law No 2001 of 29 January 2001, relating to the recognition of the Armenian genocide of 1915.

⁵⁸⁸ Legislative proposal of 18 October 2011, relating to the transposition of Community law on the fight against racism and sanctioning the denial of the Armenian genocide.

⁵⁸⁹ Decision No 2012-647 DC of 28 February 2012 [law criminalising the denial of the Armenian genocide].

⁵⁹⁰ Legislative proposal No 2642 of 11 March 2015, relating to the recognition of the 1915 Assyrian genocide, , available at <http://www.assemblee-nationale.fr/14/propositions/pion2642.asp>. The proposal made the headline for plagiarizing the Wikipedia page on the Assyrian genocide. Marechal, E. De, 'Des deputes plagient Wikipedia dans une proposition de loi', Le Figaro, 31 March 2015, at <http://www.lefigaro.fr/politique/le-scan/couacs/2015/03/31/25005-20150331ARTFIG00197-des-deputes-ump-plagient-wikipedia-dans-une-proposition-de-loi.php>

preventing enemy propaganda (Article 14 of the 1881 Law).⁵⁹¹ It was abrogated in 2004, following an adverse decision by the ECtHR and recommendation by the ombudsman (*Mediateur de la Republic*).⁵⁹²

The offence of indecency (*outrage aux bonnes moeurs*) was abolished back in 1939.⁵⁹³ It has somehow been partially reinstated, under the guise of the protection of youth.⁵⁹⁴

Article 14 of the Law of 16 July 1949 allows the Minister of the Interior, based on a proposal of the Committee, or on its own initiative, to *prohibit the sale to minors of publications which 'present a threat for the youth because of their licentious or pornographic character, or the place given to crime, racism, racial discrimination or hatred, incitement to, usage, detention, trafficking of drugs'*. The Minister can also prohibit posters or the advertising of such publications. Publishing houses which have been subject to three such interdictions fall under a priori censorship regime. This regime could be used by the government to ban certain publications, without having to bring criminal proceedings. For example, the sale of an issue of the predecessor of Charlie Hebdo, Hara-Kiri, on the day following the death of General De Gaulle, which feature as a headline '*Bal Tragique a Colombey, un mort*') had been prohibited on the basis of this provision. As is now well-known, the editors of the journal terminated it, and restarted it under the name of Charlie Hebdo (in reference to the General).

Article 227-24 of the Criminal Code, in its latest version, sanctions the fabrication, transportation and broadcasting by any means of violent or pornographic messages or inciting to terrorism, or of a nature which is likely to seriously undermine human dignity, or to incite minors to play games which place them in physical danger, or to trade such messages. Violations are punished by a three year jail sentence and 75 000 EUR fine.⁵⁹⁵ This provision may have a chilling effect as testified by the reluctance displayed by bookshops to feature in

⁵⁹¹As resulting from the Law-Decree of 6 May 1939.

⁵⁹²Decree No 2004-1044 of 4 Oct 2004, JO 5 October 2004, p. 17032.

⁵⁹³ Decree-law of 29 July 1939, Article 129, JORF 3 August 1939.

⁵⁹⁴Wachsman above n 26, 642.

⁵⁹⁵ Law No 2014—1353 of 13 November 2014, Article 7.

their windows a book which had as a cover the painting by Courbet, already mentioned, called 'The Origin of the World'.⁵⁹⁶

Film broadcasting is subject to an authorization regime. Since its origins, considered as entertainment, films were subject to prior authorization.⁵⁹⁷ However, over the years, films have been recognised as 'instruments of freedom of expression'.⁵⁹⁸ This recognition first came from the *Conseil d'Etat*.⁵⁹⁹ Still, cinematographic broadcasting remains subject to a demanding authorization regime, regulated through a series of governmental regulations.⁶⁰⁰ Such authorization regimes are considered compatible with the ECHR, which expressly allows them (Article 10 para 1 ECHR). It is for the Ministry of Culture to issue administrative authorization certificates, called the '*visa d'exploitation*'. It is issued following the advice of a special committee (Classification Committee), which can attribute five types of exploitation licences (*visas d'exploitation*): All publics' authorization, Prohibited to minors under 12, Prohibited to minors under 16, Prohibited to minors under 18, General and Absolute Prohibition). Moreover, films may be classified as 'pornographic or inciting to violence'; in such case, they cannot receive financial support. The most demanding classification can only be imposed by a 2/3 majority in the Committee, in which industry professional are well-represented, thus limited moralising trends.

Other public interest objectives

Protection of the environment

Article L.585.1 of the Environmental Code provides that 'everyone has the right to express and broadcast information and ideas, whatever their nature, through advertising or signs, in conformity with the law in force'. However, Article L.585.1 explains that external advertising and signs must be regulated to protect the (living) environment.⁶⁰¹ Commercial advertising (eg posters, billboards) is regulated for the purpose of protecting the environment. Those

⁵⁹⁶Wachsman above n 26, 642.

⁵⁹⁷Decrees of 25 May 1919 and 7 May 1936.

⁵⁹⁸Colliard and Letteron, above n 464, 480.

⁵⁹⁹CE Ass., 24 January 1975, *Ministre de l'information c. Soc. Rome Paris Films*, RDP 1975, p. 286.

⁶⁰⁰Cinema and animated picture code, Article L 211-1 and L211-2; Decree No 90-174 of 23 Feb 1990 on the classification of cinematographic works.

⁶⁰¹As resulting from Ordinance 2004-1199 2004-11-12, Article 1 1o, JORF 14 November 2004.

who wish to put up, or change an advertising support whether on public or private law, must make a prior declaration. Moreover, large size and luminous advertising are subject to prior authorization. Depending on whether local regulation exist or not, it is either the prefect or the mayor which are in charge of enforcing the rules.⁶⁰²

Public health protection

There are also various limitation on tobacco and alcohol advertising for the purpose of protecting public health. The Veil Law of 1974 already prohibited direct tobacco advertising. In the 1970s, French law on advertising discriminated against foreign products. This led Scotch whisky producers to take France to the European Court of Justice, which found a breach of internal market rules. Eventually, the Evin Law was adopted in 2001, which restricts the advertising of tobacco and alcoholic beverages.⁶⁰³ It prohibits direct and indirect propaganda and advertising of tobacco products, the free distribution of tobacco products (except in tobacco shops) and smoking in public spaces. Regarding alcohol advertising, the Evin Law prohibits advertising in the youth press or advertising messages on the radio on Wednesday, and other days between 17.00 and 24.00; advertising on television and at the cinema; distribution to minors of documents or objects which represents or promote alcoholic beverages; the sale, distribution and introduction of alcoholic drinks in all sports and fitness centers (although a drink-station may be authorized at sporting events). It also limits the scope of advertising alcoholic beverages and imposes warning message on alcohol abuse.⁶⁰⁴ Online advertising was not explicitly mentioned, until the 2011 Bachelot law, which allows advertising for alcohol online, as long as it is not 'intrusive and interstitial'.

The 'positive representation of drugs' and 'incitement to their consumption' is punished with up to five years in prison and fines up to 76000 EUR.⁶⁰⁵ Sentences can be extended to

⁶⁰² Instructions from the government relating to the national regulation of advertising and signs (NOR: DEVL1401980J).

⁶⁰³ Evin Law of 10 January 1991 relating to the fight against tobacco addiction and alcoholism.

⁶⁰⁴ Article L3323-2 of the Code of Public Health.

⁶⁰⁵ Ex-Article L. 630 of the Health Code Abrogated by Ordinance 2000-548 2000-06-15, Article 4 JORF 22 June 2000, now Article L 3421-4.

seven year jail sentence and 100000 EUR when carried out in educational institutions and administrative buildings.

In 2008, a legislative proposal, adopted by the National Assembly, proposed to sentence to two years in jail and 30 000 EUR fine incitation to persistent food deprivation in order to lose weight in an excessive manner which could expose someone to a death threat or undermine his or her health. If the incitement resulted in the death of the person, the sentence would be expended to three years in jail and 45000 EUR fine.⁶⁰⁶ It however was not approved by the Senate. A recent amending proposal suggest the creation of a new criminal offence consisting in 'promoting excessive thinness'. It seeks to target notably websites which glorify anorexia (eg by promoting the 'tigh-gap' for example).

Protection of Intellectual Property Rights

The *Conseil Constitutionnel* found that a law which enabled an administrative authority (HADOPI) to restrict or even prevent Internet access in case of violation of IP rights conflicted with, inter alia, freedom of expression.⁶⁰⁷

Based on the HADOPI law, professional unions representing video producers, editors and distributors brought proceedings against Internet providers and search engines, to request the blocking of access to streaming website, such as Allostreaming. The Paris TGI ordered them to adopt all necessary measures to block access to 16 streaming websites, but it refused to directly instruct the blocking of potential future mirror-sites. It suggested to the plaintiffs to bring emergency proceedings against those mirror-sites. It however allowed some kind of 'private censoring' through the use of detection software which could be used to block and de-reference mirror-sites of those to which access has been blocked in the order, without another judicial decision being necessary.⁶⁰⁸

⁶⁰⁶ Legislative proposal No 791 of 3 April 2008 aiming at fighting against inciting to anorexia. <http://www.assemblee-nationale.fr/13/propositions/pion0781.asp>.

⁶⁰⁷ Decision No 2009-580 DC of 10 June 2009 [Law promoting the diffusion and protection of creation on the Internet]

⁶⁰⁸ TGI Paris (réf.), 28 Novembre 2013, *Allostreaming*.

The Paris TGI, seized by the music industry, recently ordered intermediaries to block access to the Pirat bay website from the French territory, based on the HADOPI law.⁶⁰⁹ It justified its decision the fact that the site itself acknowledge its illegal character, and rejected arguments based on the ineffective character of the blockage.

Restriction on political campaign communication, opinions polls

The law prohibits the use of means of communication advertising through the press or audiovisual media for the purpose of electoral propaganda,⁶¹⁰ as well as the distribution, on voting day, of any bulletin, circulars or other documents, from the previous day 00.00, the broadcasting or transmission to the public by means of electronic communication, of any message constituting electoral propaganda.⁶¹¹

The Law of 19 July 1977 prohibits the publication of opinion polls in a week preceding each electoral rounds. Judicial courts considered it pointless, and incompatible with Article 10 ECHR, given the availability of such polls abroad and online,⁶¹² but the *Conseil d'Etat* sought to enforce it.⁶¹³

Further restrictions

French legislation also considers it a criminal offence to insult the flag or the national anthem (article 433-5-1 Criminal Code). The *Conseil Constitutionnel* validated this restriction to free speech, as justified on grounds of the protection of public order.⁶¹⁴

2.2 FREEDOM OF RELIGION - FOCUS ON THE FREEDOM TO EXPRESS ONE'S RELIGION.

Religion remains an important feature of European societies, although its position, role and function have evolved over time, and vary from country to country, and even region to region. The diversification of religious beliefs (eg development of sects) and the growth of

⁶⁰⁹TGI Paris, 4 December 2014, *SCPP c/ Orange, Bouygues, SFR et Free* ('The Pirate Bay ').

⁶¹⁰ Article L. 51 of the Electoral Code As resulting from amending Law No 2011-412 of 14 April 2011, Article 6.

⁶¹¹ Article I.49.

⁶¹²TGI Paris 15 Dec 1998, Legipress 1999.III. 15; Crim. 4 Sept 2001 Legipress 2001. III. 183.

⁶¹³CE sect., 2 June 1999, *M. Meyet*.

⁶¹⁴Decision No 2003-467 DC of 13 March 2003 [Law on internal security]

certain religions (e.g Islam as the second religion of/in France) as they result, to some extent, from both intra- and extra-European migration, pose new challenges for public authorities as well as private actors (eg employers, landlords, etc.). They also call into question certain European values, which draw heavily on Christian traditions. Further, trends towards religion-based communitarism in many member states in the EU challenges the national and unitary basis of citizenship.

Against this background, significant divergences in the effective protection of freedom of religion between member states raise important questions as to the values on which EU citizenship is based, in particular when taking into account its multilayered dimension, and the confrontation between different understandings of freedom of religion, at both conceptual and practical level. Moreover, on the European level, variations in the regulation of the exercise of freedom of religion could be a consideration which may prevent EU citizens and their families from exercising their EU citizenship right to move and reside in another member state, or render integration in the host society particularly challenging.

Like other freedoms, freedom of religion, in particular in its exteriorization, may be restricted to pursue constitutional objectives (eg public policy) or the protection of others' rights.

French law conceptually distinguishes between *liberté religieuse*, as the *individual* freedom, based on the freedom of thought and conscience, to believe (or not) in a particular religion, and the *liberté des cultes*, which could be (not so easily) translated into freedom of worship and practice, and which concerns the collective, and where relevant institutional and organizational, dimensions. Both are protected under European and French law, although to different extents.⁶¹⁵

Moreover, the exercise of freedom of religion in France is carried out within a legal framework which results from intense interactions between constitutional instruments and case law, legislative provisions and the jurisprudence of administrative and judicial courts. It is very much infused, and influenced, by the nature of State-Church relation, and the

⁶¹⁵ See Letteron above n39, 504.

principles of religious neutrality of the state and *laïcité*, and has generated many heated controversies in the political and media spheres.⁶¹⁶ These have been partially fuelled by legal ambiguities and confusions, which this report seeks to clarify.

Freedom of religion and its limits under European human rights law

All important international human rights instrument protect freedom of religion. It is recognised and defined in Article 18 ICCPR.⁶¹⁷ In the European context, Article 9 ECHR stipulates that '(1) everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance (2). Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.' Article 2 of Protocol 1 guarantees the right of parents to provide the education of their children in line with their religious convictions. Moreover, Article 14 ECHR and prohibits discrimination based on religion.⁶¹⁸

The ECtHR recognizes freedom of religion as one of 'the foundations of a democratic society', and as including a right to believe in any religion or not to believe.⁶¹⁹ One can therefore not be forced to participate against his or her will in religious activities.⁶²⁰ The case

⁶¹⁶Hebrard, G., 'Liberté de religion : Conseil d'État et Défenseur de droits : l'éclairage du conseil d'État sur les obscurités de l'exigence de neutralité religieuse'. *Revue des droits de l'Homme*, January 2014.

⁶¹⁷ Article 18 ICCPR: (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. (3). Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. (4) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

⁶¹⁸ As confirmed in ECtHR, 23 June 1993, Hoffmann, A 255.

⁶¹⁹ ECtHR, 25 May 1993, *Kokkinakis v Greece*, App. 14307/88.

⁶²⁰ ECtHR, 23 October 1990, *Darby v Sweden*, App. 11581/85; ECtHR, 18 February 1999, *Buscarini et a. c/ Saint-Marin*, App. No 24645/94.

law of the ECHR however grants a broad margin of appreciation to the state parties in the regulation of religious expression.⁶²¹

One remembers the debates which surrounded reference to Europe's religious heritage in the preamble of the Treaty establishing a Constitution for Europe.⁶²² This inclusion was apparently the result of lobbying efforts from the Bavarian CDU; it was however removed following the French Prime Minister's intervention.⁶²³ EU law, in particular free movement law, is not neutral with regard to the regulation of religious matters.⁶²⁴ In the 1974 Van Duyn case, the plaintiff tried, without success in that case, to rely on the Treaty free movement provision to contest the British government's denial of an entry permit based on the ground that she was a member of the Scientology Church.⁶²⁵ In 2000, the Church of Scientology, this time successfully, relied on the free movement of capital provisions to challenge a prior authorization requirement for foreign money transfer.⁶²⁶

Governments, perhaps under the influence of dominant religions lobbies wary of the EU's influence towards a liberalized religious market,⁶²⁷ agreed to include a Declaration 11 to the 1997 Treaty of Amsterdam which stated that EU law would not interfere with 'the status under national law of churches and religious associations or communities'. This attempt to partially shield religious matters from the influence of EU law was reinforced by the introduction in the Treaty of Article 17 TFEU, which provides that the EU 'respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States, ... equally respects the status under national law of philosophical and non-confessional organizations, and 'recognising their identity and their

⁶²¹ European Commission on Human Rights, 3 May 1993, *Karaduman v. Turkey* No 16278/9; ECtHR, 4 December 2003 *Dogru* (App. 27058/05) and *Kervanci*(App. 31645/04) v France; ECtHR, 10 November 2005, *Sahin v Turkey*, App. 44774/98.

⁶²² Document on the Charter, No 4470/00, Convent. 47, Brussels, 14 September 2000.

⁶²³ de Charentenay, P., 'La Charte européenne et la laïcité', *Études* 9/2001 (Tome 395), p. 153-164.

⁶²⁴ McCrea, R. *Religion and the Public Order of the European Union* (Oxford, Oxford University Press, 2010).

⁶²⁵ C-41/74 *Van Duyn v Home Office* ECLI:EU:C:1974:133.

⁶²⁶ C-54/99 *Association Eglise de scientologie de Paris et Scientology International Reserves Trust v Prime Minister* ECLI:EU:C:2000:124.

⁶²⁷ Ventura, M 'Law and Religion Issues in the Case Law of Strasbourg and Luxembourg: The Virtues of European Courts', EUI Robert Schuman Center for Advanced Studies, Conference Paper (November 2011), available <http://www.eui.eu/Projects/ReligioWest/Documents/events/conferencePapers/Ventura.pdf>, 5.

specific contribution, ...shall maintain an open, transparent and regular dialogue with these churches and organisations".

Article 10 TFEU provides a legal basis for the adoption of EU-level anti-discrimination legislation, including on religious grounds. The 2000 Equal Treatment Directive precludes discrimination in employment based on religious beliefs,⁶²⁸ and an EU legislative proposal seeks to extend this protection beyond the workplace.⁶²⁹

The EU Charter of Fundamental Rights, binding since the coming into force of the Lisbon Treaty, protects freedom of thought, conscience and religion in similar terms to the Article 9 ECHR (Article 10 CFR),⁶³⁰ and prohibits discrimination based on, inter alia, religious grounds (Article 21 CFR). These provisions are applicable to EU institutions and member states when they implement EU law.

Since the introduction of the Charter, the CJEU's case law seems to afford a strong protection to freedom of religion. In 2012, in a case concerning the interpretation of one of the EU asylum policy directives, the Qualification Directive, which sets out general conditions for the determination of who qualifies for refugee status,⁶³¹ it considered that a 'severe violation' of the freedom of religion can be regarded as constituting persecution for the purpose of claiming asylum. Such a violation would be severe where the applicant would run the genuine risk of being prosecuted or subject to inhuman and degrading

⁶²⁸Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303, 2.12.2000, 16–22.

⁶²⁹Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation [SEC(2008) 2180], [SEC(2008) 2181] [COM/2008/0426 final - CNS 2008/0140].

⁶³⁰ Article 10 EU Charter of Fundamental Right on Freedom of thought, conscience and religion, provides: 1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. 2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

⁶³¹Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304 p. 12); addendum (OJ 2005 L 204 p. 24). Article 10 of the Directive defines religion as including the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief.

treatment when exercising their freedom of religion, taking into account both objective and subjective factors. Quite significantly, the Court refused to distinguish between the internal (*forum internum*) (or 'core') and external (*forum externum*) dimension of the freedom of religion, considering that, in some cases, even restrictions on the public manifestation of religion could amount to persecution, taking into account both objective and subjective factors, including the importance to an individual's faith to be able to practice his or her religion in public. Furthermore, it made clear that applicants for asylum should not be expected to refrain from practicing their religion in public in order not to be subject to persecution.⁶³²

Protection of religious freedom under French constitutional law

French constitutional law protects freedom of religion. Article 10 of the 1789 Declaration provides that 'no one should feel threatened because of his opinions, *even religious ones*, provided that their expression does not undermine the public order defined by law'. Based on this provision, the *Conseil Constitutionnel* conferred constitutional status to the principle of freedom of conscience and opinion, which includes the freedom to hold religious beliefs, first as a general principle recognized by the laws of the Republic,⁶³³ and later on the basis of Article 10 of the 1789 Declaration.⁶³⁴ The *Conseil d'Etat* recognizes the 'freedom of religious expression' as a 'constitutional principle'.⁶³⁵ The freedom of worship (*liberté du culte*)⁶³⁶ and the right to manifest one's religion in an appropriate manner⁶³⁷ are considered 'fundamental freedoms' which can be invoked to stop undue state interference via interim proceedings (Article L. 521-2 *référé-liberté*). As for the principle of equality, and non-discrimination based on religious ground, they are guaranteed by the 1946 preamble, and more generally Article 2 of the 1958 Constitution. However, the exercise of freedom of religion in France operates

⁶³²Cases C-71/11 and C99/11, *Bundesrepublik Deutschland v. Y and Z*, ECLI:EU:C:2012:518.

⁶³³ Decision No 77-87 DC of 23 November 1977 [Liberté d'enseignement].

⁶³⁴ Decision No2010-613 DC of 7 Oct 2010 [law prohibiting the dissimulation of one's face in public spaces].

⁶³⁵ CE, 27 June 2008, Mme M., No 286798.

⁶³⁶ CE (ref.), 16 Feb 2004 *Benaissa*, Lebon No 264314. p. 826.

⁶³⁷ CE (ref), 7 April 2004, *Kilicokesen*, Lebon p. 164.

within a particular framework of State-Church relations based on a model of strict separation.⁶³⁸

Separation of State and Church framework

The State Church separation framework, established in the early years of the XXth century, is facing new challenges with the transformation of the religious landscape in France and beyond (eg rise of Islam, growth of sectarian movements, etc).⁶³⁹

Separation of State and Church

The well-known Law of 9 December 1905 on the separation of State and Church establishes the principle of State neutrality and independence vis-a-vis religion.⁶⁴⁰ It provides that 'the Republic guarantees the *liberté des cultes*', but does not recognize, or subsidize any.⁶⁴¹ State neutrality has both a negative and positive dimension.⁶⁴² It prevents State's interference with religious matters, and imposes on the state an obligation to ensure the freedom of worship (*liberté des cultes*).

Churches autonomy

The counterpart of state neutrality is that churches are, in principle, free to organize themselves. Like any private bodies however, religious organizations are subject to common law rules and requirements. Yet, in practice, the most established religions benefits from more favourable conditions.

State recognition of churches

⁶³⁸ Like in the Netherlands. This model should be contrasted with the State church system in England or Denmark or 'the soft' separation in Spain, Germany, Belgium, Italy.

⁶³⁹ Robert, J. 'La liberte de religion, de pensee et de croyance (Section 5)' in Remy Cabrillac (ed.) *Libertes et droits fondamentaux* (Daloz, 20th ed., 2014) 457-481, 462, for a criticism of the current interpretation of laicite, see Hennette-Vauchez, S. et Valentin, V. 'L'affaire Baby-Loup ou la Nouvelle Laïcité' L.G.D.J. (2014).

⁶⁴⁰ For an institutional summary of the administrative judge protection of the expression of religious conviction, see *Conseil d'Etat*, 'Le juge administrative et l'expression des convictions religieuses' (Dossiers Thematiques, L'Etat du Droit, November 2014).

⁶⁴¹ Article 2 of the law provides that '[t]he Republic does not recognize, pay or subsidize any cults'.

⁶⁴² State neutrality, interesting, applies belong the religious sphere to the 'political and philosophical sphere.' CE, No 2013-353 QPC, 18 October 2012, *M. Franck M and others*.

Although the State does not recognize any religion, it does grant certain religions organizations the status of 'religious associations' (*associations cultuelles*). Articles 1, 18 and 19 of the 1905 Law sets the conditions to qualify for this status. This recognition, which takes the form of a ministerial decree granting administrative authorisation, can be refused to organizations which constitute a threat to public order. Obtaining such status is important, as it confers a number of fiscal advantages (eg exoneration from the property tax, exoneration of tax on donations, tax rebates for donors, etc.). Associations which have been granted such status must however submit their accounts to the prefecture (local State office) every three years.

The *Conseil d'Etat* exercises control over the granting or denial of such status.⁶⁴³ For example, it confirmed the refusal to grant religious association status to the movement '*Varja Triomphant*' because of criminal proceedings pending against the founding member and related organizations.⁶⁴⁴

State financial support to religious organizations, practices, and buildings

As indicated above, Article 2 of the 1905 Law, applicable to most of France (see below), prohibits public authorities from granting financial subsidies to religious associations. This applies even where these carry out other (ie social, cultural) activities. However, in practice, the State does support religious activities. There are, indeed, a number of lawful exceptions to the prohibition.

First of all, Article 2 of the 1905 Law allows public authorities to finance religious services in public institutions such as primary and secondary schools, retirement homes, hospitals, mental health institutions and prisons, for otherwise those in these institutions would not be in a position to exercise their freedom to worship and practice their religion.⁶⁴⁵ As it

⁶⁴³ CE, Ass. 1 February 1985, *Association chretienne Les Temois de Jehovah de France*, No 46488.

⁶⁴⁴ CE, 28 April 2004. *Association cultuelle du Vajra Triomphant* No 248467; see also CE, 3 March 2003, *Minister of the Interior v M. Rakhimov*, AJDA 2003, 343.

⁶⁴⁵ See also Decree No 2008-1524 of 30 December 2008.

corresponds to a State duty, failure to do so would engage the State liability.⁶⁴⁶ This possibility is, in fact, used against Islamist radicalization in prison.⁶⁴⁷

The state can also finance equipments which indirectly help ensure the freedom of worship and practice. For example, in order to ensure public health, public authorities can contribute to the building of a slaughter-house which enable ritual slaughtering, provided that it respects the principle of state neutrality (fee-payment requirement).⁶⁴⁸

The state may also subsidize religious groups, by providing financial support to activities of general interest, carried out by religious organizations (eg. crèches, retirement homes, clinics, conferences, etc). They can also remunerate religious personalities when these offer a service (eg national religious ceremonies, *gardiennage*, etc.).⁶⁴⁹ Public authorities can however not finance religious ceremonies (eg processions), even if these also have a cultural or historical interest.⁶⁵⁰

When it comes to places of worship, the general principle is that the State, including local authorities, cannot subsidize the construction of religious buildings. Administrative courts control its respect, and sanction abuse.⁶⁵¹ However, there are still lawful ways for the State to support the development and maintenance of religious buildings.

Article 13 of the 1905 Law allows local authorities or the State to financially contribute to the maintenance and renovation of religious buildings which they own. This is the case for all religious building, mostly catholic churches, but also protestant temples and synagogues, which were confiscated following the French revolution and existed before the 2 January 1907 law, which confirmed the confiscation. They are placed for free at the disposal of religious associations and are maintained by the state. This is not the case for mosques,

⁶⁴⁶ CE, 16 October 2013, *Garde des Sceaux v M.F. and others*, No 351115.

⁶⁴⁷ Robert above n 639, 478.

⁶⁴⁸ CE 19 July 2011, *Communaute urbaine du Mans – Le Mans Metropole*, No 309161.

⁶⁴⁹ CE 6 January 1922, *Com. De Perquie*, CE, 26 June 1914, *Préfet des Hautes Pyrénées*, Rec . 775

⁶⁵⁰ CE, 15 February 2014, *Association Grande Confrerie de Saint Martial and Others*, No 347049.

⁶⁵¹ TA Grenoble, 31 December 1991, *Fourel* (pretending reparation when it is acquisition), TA Orleans, 16 March 2004, *Federation d'Indre et Loire de la libre pensee* (selling of land a low price to a religious organization), CE ass., 19 July 2011, *Commune de Montpellier* (building a communal room to hand it over to a muslim association).

which did not exist. This indirectly discriminates against religions which have to financially support the construction and maintenance of their religious buildings through (sometimes obscure) private donations from the faithful or from abroad.⁶⁵²

Public authorities and courts have sought to partially redress this historical inequality by enabling public authorities' support for the maintenance and even, indirectly, the construction of religious buildings.

First, public authorities can participate in the development or maintenance of religious building. For example, they can subsidize equipment, such as a lift enabling disabled persons access to religious monuments which have cultural or touristic appeal, providing that the equipment is not destined to the exercise of the cult, that the recipient of the fund is not a 'religious association' and that the funding is limited to the project (contractual requirement).⁶⁵³

Second, nothing prevents the construction of dual purpose-buildings, which serves both religious and non-religious functions. The *Conseil d'Etat* validated the building permit for the construction by a local authority of an Islamic cultural centre which hosted a mosque, since it qualified as public equipment and was part of a local renovation plan.⁶⁵⁴ In another case however, the *Conseil d'Etat* invalidated the granting of subsidies to a religious association for the building of an hindu religious center.⁶⁵⁵

Third, the state grants 'religious associations' tax benefits, which can be used for the purpose of building or maintaining religious building.⁶⁵⁶

Fourth, local authorities can use long term lease (*Baux emphyéatiques*) to make land available to religious association for the construction of a religious building.⁶⁵⁷ This possibility is widely used for the construction of mosques.⁶⁵⁸

⁶⁵² See Letteron above n39, 518.

⁶⁵³ CE, 19 July 2011, *Federation de la libre pensee et de l'action social du Rhone et P.*, No 308817; see also CE, 26 November 2012, *ADEME*, No 344379

⁶⁵⁴ CE, 12 February 1988, *Association des presidents des quartiers Portugal-Italie* JCP 1989.

⁶⁵⁵ CE, Sect., 9 October 1992, *Commune de Saint Louis v Association 'Siva Souprammanien de Saint Louis'*, No 95555.

⁶⁵⁶ Law of 23 July 1987.

Regulation of religious activities (religious police) and the problem of sects

Generally speaking, the regime is a liberal one which imposes few restrictions. Both administrative and judicial courts have been weary to review too closely the way churches are organized and administered, thereby affording a great degree of autonomy to established churches.⁶⁵⁹ However, in order to address the challenges posed by the growth of Islam, including its radical dimension and external support, the State has actively supported the organization of the representation of Islam in France. These efforts resulted in the creation, in 2003, of the *Conseil Français du Culte Musulman*.⁶⁶⁰

Originally, the 1905 law provided for a restrictive framework for the organization of religious ceremonies, which were subject to prior authorization requirements. This regime was soon abrogated with the 28 March 1907 Law. Still, it was quite common for mayors to prohibit religious ceremonies in the name of public order, and at first, the *Conseil d'Etat* endorsed these interdictions.⁶⁶¹ It however changed its position and considered that such ceremonies could neither be subject to prior authorization nor to general and absolute interdiction.⁶⁶²

A *Décret-Loi* (legislative measure adopted by the executive) of 23 October 1935 distinguished between 'traditional' ceremonies which can be freely organized, and 'non-traditional' ones, subject to prior declaration. This distinction places religions such as Islam, the presence of which in France is recent, in a disadvantageous position. The administrative judge nonetheless carries out a strict review of prohibition orders. In the case of traditional ceremonies, it systematically invalidates prohibition decisions which are not based on the strict necessity to protect public order.⁶⁶³ For non-traditional ones, *the Conseil d'Etat* at first

⁶⁵⁷ Ordinance No 2006-460 of 22 April 2006, General Code of Local Authority, Article 1311-2.

⁶⁵⁸ CAA Versailles, 3 July 2008. *Commune de Montreuil-sous-Bois*.

⁶⁵⁹ CE, 8 February 1908, *Abbe Deliard*, Lebon 128; Cass., 6 February 1923, *Association Presbyteral de l'Eglise reformee*, Lebon 115; CE, 25 January 1943, *Eglise reformee de Marseille* Rec. Lebon 116; TGI Paris 29 October 1976 *Sovevoca et Ass. Constitoriale Israelite de Paris*, JCP 1977 No 18664; all cited in Robert above n 639, 459.

⁶⁶⁰ Robert above n 639, 475-476.

⁶⁶¹ CE, 19 Feb 1909, *Abbe Olivier*, No 27355.

⁶⁶² CE, 29 July 1950, *Abbe Portes*, Rec. p. 483

⁶⁶³ CE, 19 Mars 1909 *Deguill,e* Rec p. 311; CE, 23 March 1923, *Abbe Duval*, Rec p 279; CE 26 March 1950 *Abbe Boutheux*.

limited itself to verifying that these interdictions were motivated by public order requirements,⁶⁶⁴ before enquiring more critically into the motivations, so as to limit undue interference with freedom to worship and practice religion.⁶⁶⁵

Local mayors have the power to regulate ceremonies, processions and other external manifestations, such as bell-ringing (note that the muezzin calls for prayer have not yet led to litigation). Administrative police authorities may also regulate the religious slaughtering of animals (eg authorization of religious bodies which can approve slaughter [sacrificieurs']).⁶⁶⁶ Administrative courts allowed that animals could be slaughter without prior stunning.⁶⁶⁷

Any restrictions on freedom of expression of religion must be strictly necessary to the maintenance of public order. Administrative courts annulled a mayor's decision which had prohibited priests in religious robes from taking part in funeral march,⁶⁶⁸ or a prefect decision which disallowed any ceremony or religious offices in a residential building.⁶⁶⁹ The refusal to rent a 'communal' room to a religious association, in particular where repeated and already previous annulled by administrative courts, constitutes a 'manifest and grave violation to freedom of reunion' where the local authority did not invoke public order considerations, administrative necessities or the functioning of the services, but based its decision on the sectarian nature of the association.⁶⁷⁰

The State does not recognize any religion, but there have been numerous attempts to prevent the development of organisations which are considered as sects (and not religions), by adopting preventive and information measures, identifying such organizations as sects, criminalizing sect-like behaviour and taxing their lucrative activities.

Various parliamentary reports examined sectarian trends and identified particular organizations as sects,⁶⁷¹ thus compiling a list of organizations considered as sects. This

⁶⁶⁴ CE, 5 May 1928, Abbé Rerolle, Rec p. 566,

⁶⁶⁵ CE, 18 January 1929, *sieur Richard*, Rec p. 66,

⁶⁶⁶ CE, 25 November 1994, *association culturelle Israelite Cha'are Shalom Ve-Tsedek*, No 110002.

⁶⁶⁷ CE 5 July 2013 *Oeuvre d'Assistance aux bêtes d'abattoirs*.

⁶⁶⁸ CE, 19 February 1909, Abbe Oliver No 27355,

⁶⁶⁹ CE, 14 May 1982, *Association internationale pour la consciences de Krisna*, No 31102.

⁶⁷⁰ CE (ref.), 30 March 2007, *Ville de Lyon*, No 304053.

⁶⁷¹ Report No 2468 by the Enquiry Committee on Sects (presided by A. Gest) of 22 December 1995.

listing was not meant to amount to listed organization constituting as such a threat on public order.⁶⁷² However, the *Conseil d'Etat* conferred informative value to that list.⁶⁷³ Eventually, a ministerial circular abrogated the list of sects,⁶⁷⁴ for actually focus on harmful and fraudulent sectarian activities.

Further, practices often associated with sectarian organizations have been criminalized. Obviously, leaders and members of sects can be charged with various recognized criminal offences, such as non-assistance to person in distress, kidnapping, breach of trust, etc. Moreover, on 12 June 2001 a new law (Law About-Picard) was passed after long and controversial discussions, which criminalized the 'fraudulent abuse of someone's state of ignorance or weak situation' (the original version envisaged the creation of a new offence: 'mental manipulation', which would have been - even more - difficult to define and apply).⁶⁷⁵ It was first applied in 2004, to condemn to three years jail sentence, 90000 EUR damages and 100000 EUR fine the leader of the apocalyptic sect '*Néophare*' after the suicide of its adepts.⁶⁷⁶ The Church of Scientology has also been subject to numerous proceedings. It was condemned in 2012 for 'fraudulent practices which had misled the victims through the systematic use of non-scientific personality tests analyzed with the view to sell particular products or services.'⁶⁷⁷

There were issues with the taxation of manual donations to religious organizations. Following an audit, which 'revealed' that the Jehova witnesses association had not declared donations collected over four years, it was asked to pay back a significant amount in unpaid taxes (23 Million EUR), and condemned to a fine and interest (22 million EUR). The association asked the tax administration for a revision of the decision, arguing that they did not know that the tax rules on manual donation was applicable to legal (and not physical)

⁶⁷² Circular of 20 December 1999, related to illegal acts of sectarian movements, Bulletin officiel du ministère de l'intérieur No 99/4, 48-49 .

⁶⁷³ CE, 18 May 2005, *Assoc. spirituelle de l'église de scientologie d'Île-de-France, Assoc. spirituelle de scientologie Celebrity Centre*, No 259982.

⁶⁷⁴ Circular of 27 May 2005 relating to the fight against sectarian abuses, JORF n°126, 1 June 2005, 9751.

⁶⁷⁵ Law n° 2001-504 of 12 June 2001 aiming at reinforcing the prevention and repression of sectarian movements which undermine human rights and fundamental freedoms.

⁶⁷⁶ CA Rennes, 12 July 2005, *Neophar*.

⁶⁷⁷ CA Paris, 2 February 2012, No 10/00510.

persons. They challenged the application of a 60% tax rate to their donations by the tax administration before judicial courts, without success. Eventually, they took their case to the ECtHR, which found that French decisions, in that they cut vital financial supply to the association, threatened its survival or at least seriously interfered with its internal functioning and religious activities, restricting religious freedom. The law which provided with this restriction was not predictable enough, and thus incompatible with Article 9 ECHR.⁶⁷⁸ In 2012, the ECtHR ordered France to pay back 6.4 millions EUR to the association. Other religions organizations, such as a local Evangelical Church, have also been subjected to high tax pressure, which have led to condemnation by the ECHR.⁶⁷⁹ However, at other times, the ECtHR found that the imposition of the tax, in that it only affected some of the resources of the organization, did not amount to such a serious interference with freedom of religion.⁶⁸⁰ Eventually, the *Cour de Cassation* aligned with the position of the ECtHR and reversed its earlier position. It rejects the tax administration interpretation that the presentation by the tax-payer, in the course of an audit, of its accounts amounts to a 'revelation' of manual donations under provisions of the Tax Code.⁶⁸¹

Geographical limitations

The State-Church separation regime is not applicable in the departments of High-Rhine, Low-Rhine and Moselle, which as they were part of Germany at the time of the 1905 Law, have remained subject to an 1801 Concordat agreed between Napoleon I. and Pope Pie VII, and which recognized Catholicism as the majority religion, as well as other cults (reformist, Calvinist, Judaism). This special regime, which provides for religious officers to be remunerated by the State, was recently challenged before the *Conseil Constitutionnel* in the form of a QPC. It nonetheless considered that it was compatible with the principle of *laïcité*.⁶⁸²

Protection of the freedom to hold religious beliefs

⁶⁷⁸ ECtHR, 21 September 2010, *Association les Témoins de Jéhovah v France*, App. 8916/05.

⁶⁷⁹ ECtHR, 31 January 2013, *Église Évangélique Missionnaire et Salaün v France*, App. 25502/07.

⁶⁸⁰ ECtHR, 8 January 2013, *Sukyo Mahikari France v. France*, App.41729/09.

⁶⁸¹ Com., 15 January 2013, No 12-11.642.

⁶⁸² Decision No 2012-297 QPC, 21 February 2013, *Association pour le promotion et l'expansion de la laïcité*.

Under Article 1 of the 1905 Law, the State must guarantee everyone the right to hold and express one's religious beliefs.

The State must sanction discriminatory or threatening behaviour based on religious grounds (Article 10 of the 1789 Declaration, Preamble of the 1946 Constitution).

In private matters (civil law), a spouse cannot invoke the other's spouse religious beliefs as such as a ground for divorce.⁶⁸³ However, if religious practice becomes 'excessive', for example where someone stops to care for their family as a result, or seek to impose it on its family members, then it can become a valid ground for divorce.⁶⁸⁴ Courts increasingly take account of the interests of the child in such case. In 2007, the ECtHR endorsed the position of French courts which had considered that sect membership of the parents was a threat on the development of the child (in this case, the child had been cut off the world and physically harmed).⁶⁸⁵

Furthermore, the 1905 Law provides for criminal sanctions against those who through acts, violence or threats against an individual, or through threatening someone with the loss of his or her job, or through causing harm to him or her or his and her family or property, would have forced that person to exercise or refrain from exercising their cult (Article 31).

Article 225-1 Criminal Code prohibits discrimination based on religious grounds. French law however does not particularly cater for the protection of religious feelings. It does not prohibit blasphemy, but allows the use of defamation to sanction injury to religious feelings, where the allegations are without factual basis.⁶⁸⁶

Protection of the freedom to worship

The State must also ensure that freedom of worship is respected by public authorities except where restrictions are necessary to maintain public order.

⁶⁸³ Civ. 2eme, 25 January 1978; TGI Grenoble, 4 June 1991, G.... v G..., JCP 1991, II 21744.

⁶⁸⁴ Civ 2eme, 9 October, 1996 No 00002260/94; TGI Lyon, 13 Oct 1998, App. 9704594.

⁶⁸⁵ ECtHR, 26 July 2007, *Schmidt v France*, App.No 35109/02.

⁶⁸⁶ Crim., 6 May 1008, No 07-82250, Crim., 10 November 2009, *M. Gilles X*, No 09-80542; TGI Paris 3 June 1997.

The *Conseil d'Etat* considers that persons in detention should be able to exercise their cult, which requires that even when placed in disciplinary cell, they should have access to a priest (aumonier) without the presence of a guard and to objects of religious practice and necessary books.⁶⁸⁷ It nonetheless endorsed the closing of a room used for prayer in a student dorm, as it found it necessary for security reasons and since the public administration was willing to provide an alternative space.⁶⁸⁸

The right to express one's religion and its confrontation with the organizational principle of *laïcité*.

Article 1 of the 1958 Constitution reaffirmed that France is a secular (*laïque*) republic, which ensures 'the equality of all citizens before the law, without distinction based on origins, race or religion' and 'respects all beliefs'. The principle of *laïcité* is the result of a process of 'administrative secularization.'⁶⁸⁹ The *Conseil d'Etat* confirmed *laïcité* as a fundamental principles recognized by the laws of the Republic, notably the 1905 law, and as such has constitutional value.⁶⁹⁰ *Laïcité* is distinct from the principle of state neutrality,⁶⁹¹ and implies a separation of civil and religious society.⁶⁹²

Administrative courts are meant to act as the 'regulator[s] of *laïcité*','⁶⁹³ however, the legislator increasingly steps in to impose particular interpretations or applications. Moreover, one observes a tendency towards a transformation of its meaning gearing towards the neutralization of all forms of religious expression outside of the private sphere.

Freedom of thought and Expression of religion in public sector employment

Civil servants enjoy freedom of thought, including religious beliefs.⁶⁹⁴ They cannot be discriminated based on their religious beliefs.⁶⁹⁵ Their recruitment and career development

⁶⁸⁷ CE, 11 June 2014, *M.S.*, No 365237.

⁶⁸⁸ CE (ref.), 6 May 2008, *M.M.*, No 315631.

⁶⁸⁹ Letteron above n 39, 485.

⁶⁹⁰ CE, 6 April 2001, *Syndicat national des enseignants du second degree*, No 219379.

⁶⁹¹ Decision No 2013-353 QPC of 18 October 2012 *M. Franck and others*.

⁶⁹² Letteron above n 39, 484.

⁶⁹³ Conseil d'Etat, above n 640, 1.

⁶⁹⁴ Law 13 July 1983 on the rights and obligations of civil servants, Article 6.

cannot be adversely affected on ground of believing or practicing their religion.⁶⁹⁶ Furthermore, specific working time arrangements to enable religious practice may be allowed as long as they are compatible with the good functioning of public services,⁶⁹⁷ but they can be refused.⁶⁹⁸ Schools are increasingly taking into account the needs of religious practices, such as Ramadan, as long as it does not interfere with the good functioning of the service.⁶⁹⁹

Civil servants may invoke a clause of conscience to avoid performing certain acts, which are against their conscience. Doctors, for example, can invoke this clause to refuse to perform abortion; public hospitals must nonetheless guarantee that there is always one doctor who is willing to perform this act on their premises.⁷⁰⁰ Following the adoption of the Law which legalized same-sex marriages,⁷⁰¹ some mayors refused to celebrate same-sex marriages, despite a ministerial circular reminding them of their duty to celebrate such marriage (a failure would constitute a *voie de fait*).⁷⁰² Using a *référé* procedure, the administrative judge can force a mayor to celebrate the marriage, and the mayor may be liable to pay damages. Mayors or substitutes who refuse to celebrate a marriage because of the sexual orientation of the future spouses face criminal sanctions (5 years imprisonment and 75000 EUR fine, under Article L. 432-7 of the Criminal Code). They are also exposed to disciplinary proceedings.

⁶⁹⁵ CE, ass., Opinion, 21 September 1972, No 309354, which reversed an old decision in which it had validated the refusal to admit a priest to the habilitation to become a philosophy teacher (CE 10 May 1912, Abbe Bouteyre, no 46027).

⁶⁹⁶ CE, 25 July 1939, *Demoiselle Beis*, Rec p. 524; CE, 3 May 1950, *Demoiselle Jamet*, No 98.284 Rec. p. 247; CE, 16 June 1982 *Epoux Z*, No 23277; CE, 28 April 1938, *Demoiselle Weiss*, Rec p. 379; CE, July 1943, *Ferrand D.* 1944. 150; CE, 8 December 1948, *Demoiselle Pasteau*; CE, 3 March 1975, *Guy Ferchault c Marcelle Bascot Epouse Ferchaud D.*

⁶⁹⁷ CE (ref.), 16 Feb 2004, *M.B.*, No 264314.; CE, 12 February 1997, *Melle H.*, No 125893.

⁶⁹⁸ CE, 16 December 1992, *Melle Gillot*; this solution is accepted by the ECtHR, 12 March 1981, *X v United Kingdom*, App. No 8160/78.

⁶⁹⁹ Robert above n 639, 477.

⁷⁰⁰ Law of 15 January 1975 Veil Law, Article 4.

⁷⁰¹ Law No 2013-404 of 17 May 2013 opening marriage to same sex couples, JORF N°0114 of 18 May 2013, 8253. Note, in passing, that the law makes special provisions for French persons living in a country in which same-sex marriages is not allowed and can thus not be celebrated by consular authorities to get married in their birth place, their latest place of residence or failing this, the place of their choice (Art. 171-9).

⁷⁰² Circular from the Ministry of Interior Manuel Valls of 13 June 2013, 'Consequence of the refusal by a mayor to celebrate a marriage', at http://circulaires.legifrance.gouv.fr/pdf/2013/06/cir_37118.pdf

Mayors sought to contest these sanctions by invoking the conscience clause. The *Conseil d'Etat* accepted to send a QPC to the *Conseil Constitutionnel*. The CC however refused to acknowledge the need for a clause de conscience for civil officers.⁷⁰³ It considered that by not providing for the application of such clause, the legislator sought to ensure the application of the law by its agents and guarantee the good functioning and neutrality of public services. It recalled that, in their capacity as civil officers, mayor are agents of the state and must respect and enforce the law. Mayors will challenge the CC decision before the ECtHR for violation of the freedom of thought and opinion and the right to a fair trial.⁷⁰⁴

Civil servants, whilst they enjoy a right to freedom of religious beliefs, must nonetheless respect the principle of *laïcité* and state neutrality. The definition of the scope of the freedom to express one's religious beliefs, as a component of freedom of expression and freedom of religion, has always been, and continues to be, a particular difficult exercise in the French secular system.

The principle of *laïcité*, as defined and applied by relevant authorities, prohibits civil servants or private persons delivering a public service from displaying their religion in their function.⁷⁰⁵ The sanctions for the violation of this requirement depends on the nature of the expression of religious beliefs, hierarchical position, functions exercised, previous warnings, etc; they should also be proportionate.⁷⁰⁶ The education sector is particularly scrutinized to avoid proselytism.⁷⁰⁷

There is however a gradual extension of the scope of application of the principle of *laïcité*.

Expression of religion in private sector employment

⁷⁰³ Decision No 2013-353 QPC of 18 October 2013 [marriage celebration – absence of a 'conscience clause' for civil officer].

⁷⁰⁴ See '14 maires contre le mariage gay vont saisir la Cour européenne des droits de l'homme', *Le Monde*, 21 February 2014, http://www.lemonde.fr/societe/article/2014/02/21/14-maires-contre-le-mariage-gay-vont-saisir-la-cour-europeenne-des-droits-de-l-homme_4371439_3224.html

⁷⁰⁵ CE, Opinion, 3 May 2000, *Melle Marteaux*; this position is confirmed by the ECtHR, 23 February 2010, *Ahmet Arslan v Turkey*, App. 41135/98; ECtHR, 30 June 2009, *Aktas v France*, App. 43563/08.

⁷⁰⁶ The *Conseil d'Etat* confirmed a sanction against a civil servant who had agreed to his professional e-mail address being posted on a religious website; CE 19 Feb 2009, M.B. No 311633

⁷⁰⁷ CE, 8 December 1948, *Demoiselle Pasteau*, No 91406; CE, 3 May 1950 *Demoiselle Jamet*, No 98.284; CE Ass., Opinion, 21 September 1972, No 309354.

Although initially limited to the (quasi)public sector, the question of whether employees can display their religious belonging through the particular items of clothing has been raised in controversial manner in the context of private employment as well. First of all, employees of private bodies which are in charge of a mission of public service (eg trash collection) may be subject to the same *laïcité* requirement as public servants.⁷⁰⁸ The limits of *laïcité* have been tested in the context of private childcare facilities, in highly mediatized BabyLoup judicial saga.

The case, which made the front page and prime time news more than once over four years, epitomize the difficult regulation of *laïcité*. It concerned the Muslim employee of a private crèche called Baby-Loup. The crèche adopted in 2003 a new internal regulation, which prohibited employees from wearing the Islamic veil. The employee was on maternity leave at the time, but was informed about the change. When she returned to work in 2008, she came wearing a veil. She was asked to remove it, but continued to come to work with the veil. After a number of discussions between her and the crèche direction, she was eventually dismissed for *faute grave* (serious fault), for lack of discipline and violation of the internal regulation. The employee complained to the anti-discrimination body (HALDE), and challenged the dismissal before the employment court (*tribunal des prud'hommes*).

The anti-discrimination body found, in March 2010, that the dismissal was in breach of the principle of non-discrimination. A month later, a new director, Jeannette Bougrab, is appointed at the head of the anti-discrimination body. A supporter of the *laïcité* principle, she requests a new examination of the case. On 9 November 2010, the legal service of HALDE nonetheless confirmed the illegality of the dismissal.

A month later, however, the employment tribunal judged that the dismissal was legal, based on 'characterized and repeated lack of discipline'. This ruling was confirmed on appeal in October 2011.⁷⁰⁹ However, on 19 March 2013, the *Cour de Cassation*, having exceptionally received amicus curiae briefs and heard the politologist Gilles Kepel on the matter, disagreed and considered that the dismissal, in that it amounted to discrimination based on

⁷⁰⁸ Soc., 19 March 2013, CPAM (*Sécurité sociale*) de Seine-Saint-Denis, ECLI:FR:CCASS:2013:SO00537.

⁷⁰⁹ CA Versailles, 27 October 2011, No 10/05642.

religious beliefs, was illegal and void.⁷¹⁰ It considered the principle of *laïcité* did not apply to a private body not entrusted with a mission of public service. It added that restrictions to religious freedoms 'should be justified by the nature of the tasks to be accomplished, address a professional requirement which is essential, determining and proportionate to the objective sought', which was not the case here. It indeed considered that the provision of the internal regulation of the crèche, which provided that 'the principle of freedom of conscience and religion of every staff member could not undermine the principle of *laïcité* and neutrality which are applicable in the exercise of all activities carried out on the premises of the crèche or its annexes as well as external activities organized for the children placed in the care of the crèche' introduced a too general and vague restriction. The case was sent back to the Paris Appeal Court.

In the meanwhile, in March 2013, the Rights Defender, D. Baudis, who had taken over the mission of the fight against discrimination from HALDE, deplored the uncertainty surrounding the application of *laïcité* requirement in the private sector. Considering that it was difficult for employees to 'figure out whether their activities fell under a public service mission or a mission of general interest, thus 'feeding misunderstanding and conflicts' which are 'damaging for republican cohesion' and 'fuelling litigation'. He called for a clarification of the law on *laïcité*, following a wide consultation. On 20 September 2013, the French human rights body, concerned about the lack of clarity of the legal framework, and eager to prevent further conflicts, requested the *Conseil d'Etat* to provide an analysis of the protection of freedom of religion, and in particular to clarify the distinction between a 'mission of public service' and a 'mission of general interest', and between 'participants to the public service' or 'collaborators to the public service', and the applicability of the religious neutrality requirement.⁷¹¹ On October 2013, the *Observatoire de la Laïcité* released an opinion against legislating on the matter, considering that the law in force was adequate.⁷¹²

⁷¹⁰ Cha Soc., 19 March 2013, *CPAM (Sécurité sociale) de Seine-Saint-Denis*, ECLI:FR:CCASS:2013:SO00537.

⁷¹¹ The Rights Defender acted under Article 19 of organic law of 29 March 2011.

⁷¹² Communication from the *Observatoire de la laïcité*, 25 June 2014 :

http://www.gouvernement.fr/sites/default/files/fichiers/communiqu_e_25_juin_2014.pdf

On 17 October 2013, the State prosecutor of the Paris Appeal Court contested the finding of the *Cour de Cassation*, considering that the crèche children, aged between 2 months and 3 years, 'could be easily influenced, because they came from families which are socially fragile, which made them even more receptive to models' offered by the crèche staff. On 27 November 2013, the Paris Appeal Court confirmed the dismissal, considering that it did not undermine religious freedom and was not discriminatory. It also qualified the crèche as an *entreprise de conviction*, to which the principle of *laïcité* could apply.⁷¹³

In April 2014, a legislative proposal calling for the application of the principle of *laïcité* to private bodies.⁷¹⁴ It however did not pass.

On 25 June 2014, the *Cour de Cassation* rejected the last instance appeal (cassation), and confirmed the legality of the dismissal.⁷¹⁵ It reasoned within Articles L. 1121-1 and L. 1321-3 of the Labour Code, which require any restrictions on an employee's freedom of religion to be proportionate and justified by the nature of the employment. This time, it considered that the inclusion of the principle of *laïcité* in the internal regulation of the private crèche, was sufficiently precise and justified by the nature of the tasks to be carried out by the staff and proportionate to the objective of protection of children and promotion of gender equality.⁷¹⁶ It emphasized the small size of the organization, and the direct relationship with parents and children, to support its assessment. The *Cour de Cassation* nonetheless rejected the qualification of the crèche as an 'entreprise de conviction' and limited the scope of application of the principle of *laïcité*, specifying that the principle was not applicable to all

⁷¹³ CA Paris, 27 November 2013, No 13/02981.

⁷¹⁴ Draft law relating to religious neutrality in companies and associations, 24 April 2014, No 998, 998, <http://www.assemblee-nationale.fr/14/propositions/pion0998.asp>

⁷¹⁵ Ass. Plen., 25 June 2014, No 13-28.369. For a presentation and discussion of the case in English, see <http://www.ejiltalk.org/eroding-religious-freedom-step-by-step-france-and-the-baby-loup-case/>

⁷¹⁶ Faure, S., 'La présence de la religion est désormais jugée insupportable', 28 November 2014, Liberation, at http://www.liberation.fr/societe/2014/11/28/la-presence-de-la-religion-est-desormais-jugee-insupportable_1152826

employees of private companies, but only to those which carried out public service mission.⁷¹⁷

Still, this expansive interpretation does not appear to be fully in line with the ECHR,⁷¹⁸ although the recent *SAS v France* decision by the ECtHR suggests that it is within the state's margin of appreciation.⁷¹⁹

The expression by citizens of their religious beliefs, whether in their relationship with public services or in other contexts, may be limited to protect public order. These restrictions are nonetheless subject to judicial control.

Users of public services and freedom to express one's religion

Users of public services are, in principle, able to express their religion freely. There are however limits imposed by legislative provisions, or based on the maintenance of public order.

One well-known question is whether pupils in public schools should be allowed to wear the Islamic veil in public schools. Asked for its opinion on the matter by the national Education Ministry, the *Conseil d'Etat* considered that there should be no discrimination in access to education based on religious beliefs of the pupils. However, it argued that pupils should not be allowed 'to wear signs of religious belonging which, by their nature, the conditions in which they are worn, individually or collectively, or by their ostentatious or revendicative character, would constitute an act of pressure, provocation, proselytism or propaganda, would undermine human dignity or the freedom of the pupils or other members of the educational community, threaten their health or security, disturb the functioning of educational activities or the educative role of the teachers, or finally disturb order in the establishment or the normal functioning of the service.'⁷²⁰ Soon after, the *Conseil d'Etat* further clarified its position in a case before it. It considered as illegal the provisions of a

⁷¹⁷ For a summary of the saga in French, see *Le Monde*, 27 November 2013, 'L'affaire Baby Loup en quatre questions' at http://www.lemonde.fr/societe/article/2013/11/27/l-affaire-baby-loup-en-quatre-questions_3520954_3224.html#CeggGqKEEOg4jh7P.99

⁷¹⁸ ECtHR, 15 January 2013, *Eweida v United-Kingdom*, No 48420/10.

⁷¹⁹ ECtHR, 1 July 2014, *S.A.S v France*, Appl. 43835/11.

⁷²⁰ CE Opinion 27 November 1989, No 346.89.

school's internal regulation which stipulated that 'the wearing of all distinctive signs, clothing or other, of a religious, political or philosophical nature was strictly prohibited'. Indeed, such a general and absolute prohibition to carry out distinctive signs violated freedom of expression recognized within the regime of *laïcité* and neutrality of public education. It thus invalidated an expulsion decision based on an internal school regulation issued against female pupils who had come to school wearing the veil, since one could not 'consider the wearing of the veil by the interested persons as an act of pressure, provocation, proselytism, or propaganda, or to disturb order in the establishment or the functioning of education activities'.⁷²¹ A ministerial circular confirmed the *Conseil d'Etat's* interpretation, and suggested that schools management should prohibit the wearing of signs which are 'so ostentatious that their meaning is precisely to separate certain pupils from the school's common rules', without however clarifying what was meant by 'ostentatious'.⁷²² These decisions and measures called for a case-by-case approach.

However, disputes between students, parents and school management, which resulted in contradictory decisions by administrative courts, led the legislator to clear the confusion by imposing a wide-ranging prohibition. Article L.141.5.1 of the Education Code imposed an interpretation of the principle of *laïcité* which prohibits pupils from wearing signs or clothing which express ostensibly religious belonging. School internal rules provide for disciplinary sanctions preceded by a dialogue with the pupil. A circular further specifies that are prohibited 'signs and clothes the wearing of which of which leads immediately to one being recognized for his/her religious belonging, such as the Jewish kippa, Islamic veil, or an excessively large (!) cross'.⁷²³ This ministerial circular was challenged but the *Conseil d'Etat* considered it was compatible with the 2004 Law as well as the ECHR, in that 'it did not

⁷²¹ CE, 2 November 1992, *M. Kheroua, et Mme Kachour, M. Balo and Mme Kizic*.

⁷²² Circular of the Minister of National Education, 20 September 1994; See 'Laïcité et caractère ostentatoire du port d'insignes religieux' concl. Remy Schwartz on CE 10 July 1995, *Assoc. Sysiphe et Min de l'Education Nationale v. Melle Saglamer*, AJDA 1995. 644.

⁷²³ Circular No 2004/084 of 18 May 2004 on the wearing of signs r clothes displaying religious belonging in schools and high schools.

excessively undermine [freedom of conscience and religion] given the objective of general interest pursued aiming at ensuring the respect of *laïcité* in public schools'.⁷²⁴

The case law thereby validated sanctions for wearing religious signs which, even if not ostensible, are visible such as the kippa, veil, keshi etc.⁷²⁵ It also prohibits the wearing of signs or clothes (eg bandana) which, by reason of the pupil's behavior, express ostensibly religious belonging.⁷²⁶ The *Conseil d'Etat*, constrained by the legislator's will, considered that the refusal to remove a bandana led to its characterization as a sign expressing in an ostensible manner religious belonging. The ECtHR of human rights has validated the French position.⁷²⁷

Users of private facilities

Judicial institutions, as well as the Rights Defender, took a firm position against attempts to extend the prohibition to wear religious clothing to clients of private bodies. For example, they condemn managers of gym clubs who had prevented access to women wearing a veil.⁷²⁸

Restrictions based on human dignity, gender equality, or public order

Laïcité prevents anyone from invoking religious beliefs to not respect common rules which regulate the relationship between public authorities and individuals.⁷²⁹ Therefore, individuals cannot object to the requirement of not wearing head-covering items on ID

⁷²⁴ CE, 8 October 2004, *Union Française pour la cohésion nationale*.

⁷²⁵ CAA Paris, 19 July 2005 *MR J and B. Singh*; CE, 5 December 2007, *M.S.*, No 285394.

⁷²⁶ CE, 5 December 2007, *M. and Mme G.*, No 295671; CE 6 Mars 2009, *Melle Myriam*.

⁷²⁷ ECtHR, 4 December 2003 *Dogru* (App. 27058/05) and *Kervanci* (App. 31645/04) v France; ECtHR, 27 June 2000, *Cha'ra Shalom ve Tsedek v France*, App. 27417/95; ECtHR 17 July 2009 *Aktas et al. v France*, App. 27561/08.

⁷²⁸ Rights Defender, Decision MLD-2014-084 of 6 June 2014, followed by a decision of Thionville Tribunal Correctionnel of 17 June 2014, which 6 years after the manager of a fitness club had refused access to the facilities to a Muslim woman wearing a veil to the fitness club he managed, eventually condemned the owner of a fitness club to a 500 EUR fine and 250 EUR damages for discrimination (the State Prosecutor had requested a 2000 EUR fine). See also a later decision by the Rights Defender, which refers to the court decision to condemn a similar act MLD-2014-204 of 22 December 2014).

⁷²⁹ CC, No 2004-505 DC, 19 November 2004, Treaty establishing a Constitution for Europe.

picture destined to the national identity card.⁷³⁰ This approach has been confirmed by the ECtHR.⁷³¹

The *Conseil d'Etat* admitted that public administration could take into account *radical religious practices* in making administrative decisions, such as opposing placement of a child in a Jehova witness family which had express its opposition to blood transfer.⁷³² It also considers that such practices such as the wearing of the niqab/burqa (integral veil) can amount to 'lack of assimilation' (Art. 21-4 Civil Code), as these practices are 'incompatible with essential values of the French community and equality between sexes' and could thus be invoked by public authorities to oppose the granting of nationality to the spouse of a French citizen.⁷³³ The wearing of the veil as such, however, cannot be characterized as a lack of assimilation.⁷³⁴

It is worth noting that the *Conseil d'Etat*, referring to the ECHR case law,⁷³⁵ had considered that neither *laïcité*, nor human dignity or gender equality, could be used as a basis for a general restriction on the freedom to express one's religious conviction in public places (ie ban on the burka). It agreed that such restriction could be grounded on public security requirements, but only in specific temporal and spatial circumstances.⁷³⁶ This position notwithstanding, in 2010, the legislator passed a law which imposed a general ban on the dissimulation of the face in public spaces.⁷³⁷ The *Conseil Constitutionnel* approved it, considering that the law responded to growing trends in women wearing the burka and dissimulating their face, which in its view constituted a threat on public security and undermined basic rules of life in society, and that it placed women in inferior and exclusion

⁷³⁰ CE, 15 December 2006, *Association United Sikhs and Man Singh*, No 289946; CE, 27 July 2001, *Fonds de défense des Musulmans en justice*. No 216903.

⁷³¹ ECtHR, 11 January 2005, *Suku Phull v France*, App. 37753/03; ECtHR, 4 March 2008, *Fatima el Morsli v France*, App. 15585/06.

⁷³² CE, 24 April 1992, *Département du Doubs v Epoux F.*, No 110178

⁷³³ CE, 27 2008 June, Mme M.

⁷³⁴ CE, 19 Nov 1997, *B.H.*, No 169368; CE 3 Feb 1999, *Mme E.Y.*, No 161251.

⁷³⁵ ECtHR, 23 February 2010, *Ahmet Aaslan v Turkey*, No 41135/98.

⁷³⁶ Conseil d'Etat, Report 25 March 2010, 'Etudes relative aux possibilités juridiques d'interdiction du port du voile intégral', at <http://www.conseil-etat.fr/Decisions-Avis-Publications/Etudes-Publications/Rapports-Etudes/Etude-relative-aux-possibilites-juridiques-d-interdiction-du-port-du-voile-integral>

⁷³⁷ Law No 2010-1192 prohibiting the dissimulation of the face in public spaces, JO 12 October 2010.

situation, in a manner incompatible with the constitutional principles of freedom and equality, thereby confirmed the public order justification.⁷³⁸ In a case brought before it, which concerned a woman bearing a niqab in a freedom protest in Front of the President's Office, the *Cour de Cassation* found the condemnation of the woman, based on the 2010 law, compatible with Article 9 ECHR. This position has since been confirmed by Strasbourg, which endorsed the French argument that the right to express one's religion may be restricted on the ground of 'respect for the minimum requirements of living together in society'.⁷³⁹ Between the coming into force of the law in 2011 and November 2014, 700 women have been condemned.⁷⁴⁰

This gradual limitation of external expression of religious beliefs in the name of *laïcité*, human dignity, human rights, or public security, promoted by successive legislators, and partially endorsed by judicial institutions, is however strongly criticized by human rights groups and even by governmental human rights bodies. In an opinion of 2013, the CNCDH criticized interpretations of *laïcité* which confine religious expression to the private sphere,⁷⁴¹ and in a recent report, condemn the discriminatory use of the concept.⁷⁴² It deplores that 'the notion of *laïcité* is too often perceived as a fortified wall, a form a defense against the expression of the religious, in particular Islam, towards which an hostile ambient climate is developing', and warns against the 'misunderstanding of the concept as it is defined by the law in France', stressing the multiplication of conceptions of *laïcité* 'which is deformed to the point of rejecting any religious sign in the public sphere'.⁷⁴³ For that reason, it criticizes the *Charte de la laïcité à l'école* (The School Laïcité Charter), in that it emphasize abstraction and prevent the expression of religious beliefs, and took position against the recent legislative

⁷³⁸ Decision 2010-613 DC Law of 11 October 2010 [law prohibiting the dissimulation of the face in public spaces].

⁷³⁹ ECtHR, 1 July 2014, *S.A.S v France*, App. 43835/11. For a critical analysis, see blog post by Berry, S. 'Does anything remain of the right to manifest one's religion' (2 July 2014), EJIL. <http://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/>

⁷⁴⁰ See Faure, above n 716.

⁷⁴¹ CNCDH, *Opinion on Laïcité* [Avis sur la laïcité] 20 September 2013.

⁷⁴² CNCDH, Report 'La lutte contre le racism, l'antisemitisme et la xenophobie – Année 2014', 46.

⁷⁴³ *Ibid.*, 565

proposal which seeks to prohibit 'any expression of political or religious belonging within the school walls'.⁷⁴⁴

As for accompanying parent (eg in school trips), there were serious discussions as to whether they too should comply with *laïcité* requirement. In 2011, a local court considered that accompanying parents, as 'occasional collaborators' of the public service and protected if anything happened to them during school outings, should not wear religious signs.⁷⁴⁵ However, in a report on the matter, the *Conseil d'Etat* adopted a different line. Considering them as users of a public service, they are thus not subject to the principle of neutrality, and their right to manifest their religion can be limited only for the proper functioning of the service or the protection of public order, and in a proportionate manner.⁷⁴⁶ Last month, the administrative court, applying the *Conseil d'Etat* guidelines, declared a school decision refusing to an accompanying mother the right to wear a veil invalid.⁷⁴⁷

Religious expression and French society

Going beyond the institutional and civil society dimension, to look into societal beliefs and practices, one observes a significant decline of religious tolerance, fuelled by what the President of the Commission Consultative Nationale calls 'laic ignorance'.⁷⁴⁸ 49 % condemn the wearing of the Islamic veil (non-full), 49% daily prayers, and 40% believe that the non-consumption of pork or alcohol poses societal problems! 63% believe that Jews have a special relationship to money or power, and 56 % consider that they have only a remote link with the republic. Furthermore, 72% believe they are too many immigrants in France, more than 70% consider the origins and religious cohabitation creates tensions, 90% think it is essential that immigrants adopt a French life style, and 64% feel that they no longer feel at home in France life before. Interestingly, whilst 75% support the principle of *laïcité*, 72%

⁷⁴⁴ Draft Law No 2430, registered by the National Assembly Presidency on 9 December 2014, presented by M. Leroy.

⁷⁴⁵ TA Montreuil, 22 November 2011.

⁷⁴⁶ *Conseil d'Etat*, Study 'Étude demandée par le Défenseur des droits le 20 septembre 2013' 19 December 2013, 29-35.

⁷⁴⁷ TA Nice, 9 June 2015, *Madame D.* No 1305386.

⁷⁴⁸ President of the CNCDH, 'Lettre au Président de la République', 6 March 2015, at http://www.cncdh.fr/sites/default/files/lettre_au_president_de_la_republique_.pdf

affirm that France must remain a Christian country!⁷⁴⁹

2.3 RIGHT TO REGISTRATION IN CIVIL STATUS REGISTRATION AND ACCESS TO NATIONALITY DOCUMENTS

In this section, we will examine the right to access civil status and nationality documents of children born abroad through surrogacy agreements.⁷⁵⁰ The right of access to civil documents stating nationality are essential rights of EU citizens, since their EU citizenship, and rights derived from it, are dependent on the nationality of one of the member states. Moreover, in that it concerns the recognition of paternity and maternity, it also affects the right to family life of EU citizens, who have sought abroad the possibility to form a family through surrogacy agreements, where such option is not available in their own country. Allegedly, it is also relevant from a free movement of services' point of view, if one considers surrogacy as a service. Denying the legal consequences of the use of such 'service' could amount to an obstruction to the freedom of EU citizens to receive services abroad. For all these reasons, this examination of this right, which was problematic until very recently, deserves closer examination.

Medically assisted procreation is prohibited in France since 1991, following a landmark decision of the *Cour de Cassation*.⁷⁵¹ This case law was codified in the 1994 law on bioethics. As couples travelled abroad to countries in which it was allowed, the question of the recognition of children born through surrogacy agreements came before the courts.

Relevant domestic provisions

Sections 310-1 *et seq* of the French Civil Code provide that filiation is established in particular when the father and the mother recognize the child. Motherhood can be

⁷⁴⁹ CNCDH above n 742, 25-40.

⁷⁵⁰ See 'Enfants nés de mère porteuse à l'étranger (GPA): la CEDH condamne la France pour refus de reconnaissance de la filiation', The Huffington Post, 26 June 2014, at http://www.huffingtonpost.fr/2014/06/26/mere-porteuse-etranger-gpa-france-condamne_n_5532335.html

⁷⁵¹ Ass. Plén., 31 May 1991, No 90-20.105.

challenged by the prosecution department by bringing evidence that the mother did not give birth to the child; fatherhood can be challenged by establishing that the author of the acknowledgement of paternity is not the actual father.

Section 18 of the French Civil Code provides that a child who has at least one French parent is French.

Section 47 of the French Civil Code states that faith must be given to the civil status certificate of a French citizen, drawn up in a foreign country in the forms used in the said country, unless the certificate is unlawful or forged or the facts declared therein do not correspond to reality.

Sections 16-7 and 16-9 of the French Civil Code states that any agreement related to surrogate motherhood is null and void, and such nullity is of public order.

Decree of August 3, 1962 provides that a French citizen whose civil status certificate was drawn up abroad can have it transcribed into French civil status registers.

On 25 January 2013, a circular from the Justice Ministry instructed competent authorities to facilitate the issuance of French nationality certificates to children born through surrogacy abroad. It specified that suspicion of surrogacy was not sufficient to refuse the issuance of a French nationality certificate, when foreign civil status documents testified as to the filiation link.⁷⁵²

Case law

On 6 April 2011, the *Cour de Cassation* denied the French parents of children born in the US through medically assisted procreation, the right for their children's to be registered on the French birth registry. This position was confirmed in later cases.⁷⁵³ The Court found surrogate motherhood agreement to be null and void as a matter of public order, as they conflicted with an essential principle of French law, the principle of the unavailability of personal

⁷⁵²Circular of 25 January 2013 relating to the issuance of French nationality certificates – surrogacy agreement – Foreign civil status [délivrance des certificats de nationalité française – convention de mère porteuse - Etat civil étranger], NOR : JUSC1301528C

⁷⁵³Civ. 1, 13 September 2013, No 12-18.315, et No 12-30.138, Civ. 1, 19 March 2014, No 13-50.005.

status. Therefore, the foreign birth certificate of a child born under a surrogate motherhood agreement could not be recognized and transcribed in French birth register, even where the father and the mother, mentioned on the birth certificate, were the biological father and the woman who gave birth. The matter was referred to the ECtHR.

Civil society organization opposed to medically assisted procreation, and lawyers' organizations, challenged this 2013 circular in judicial review proceedings before the *Conseil d'Etat* (REP).⁷⁵⁴ They invoked legal fraud, in that the circular allowed circumventing the legislative prohibition on medically assisted procreation.

On 26 June 2014, in the *Menesson and Labassie* case, the ECtHR condemned France for not issuing nationality certificate to children born abroad through medically assisted procreation and surrogacy. It approached the case from the perspective of the right to privacy and superior interest of the child and found a violation of Article 8. It considered that depriving them of citizenship 'undermined their identity within French society'. It also noted that the refusal precluded the establishment of a legal relationship between children born as a result of – lawful – surrogacy treatment abroad and their biological father, and that this overstepped the wide margin of appreciation left to States in the sphere of decisions relating to surrogacy.⁷⁵⁵

The Secretary of State for family affairs declared that France would not contest the ruling. Once the three months appeal delay, families were able to request the registration of their children on the French civil registry. 2000 children were concerned, according to civil society organization.⁷⁵⁶

On 12 December 2014, the *Conseil d'Etat*, following the ECtHR, rejected civil society organization which challenge the circular. Nonetheless acknowledging the position of the *Cour de Cassation*, it recalled that surrogacy agreements are prohibited by the Civil Code, as

⁷⁵⁴ Gonzales, P., 'GPA : la circulaire Taubira attaquée en justice,' *Le Figaro*, 20 November 2013, <http://www.lefigaro.fr/actualite-france/2013/11/20/01016-20131120ARTFIG00555-gpala-circulaire-taubira-attaquee-en-justice.php>

⁷⁵⁵ ECtHR, 26 June 2014, *Menesson v. France*, App. 65192/11, and *Labassee v. France*, App. 65941/11.

⁷⁵⁶ Dupont, G., GPA, PMA : quel sera l'impact de la décision de la CEDH sur le droit français ?, *Le Monde*, 27 June 2014, at http://www.lemonde.fr/societe/article/2014/06/27/gpa-pma-quel-sera-l-impact-de-la-decision-de-la-cedh-sur-le-droit-francais_4446718_3224.html

a matter of public order. However, it found that the only fact that a child was born abroad as a consequence of surrogacy agreement, even if this agreement is null and void under French law, cannot result in depriving the child of French nationality. This child is entitled to French citizenship, whenever his or her filiation with a French person has been established abroad, by virtue of Article 18 of the Civil Code and under judicial control. The refusal to recognize him or her French citizenship would constitute a disproportionate interference with the right to private life of the child protected under Article 8 ECHR.⁷⁵⁷

On 3 July 2015, the *Cour de Cassation* aligned its position on the Strasbourg court's one.⁷⁵⁸ It agreed that surrogate motherhood alone cannot justify the refusal to transcribe into French birth registers the foreign birth certificate of a child who has one French parent. The case concerned a French citizen acknowledged as the father of an unborn child in Russia. The birth certificates the recognition of which was requested, mentioned as the father the man who had acknowledged being the father to the child, and as the mother the woman who had given birth. The Public Prosecutor opposed the transcription, suspecting the use of a surrogate mother.

The *Cour de Cassation* found that the rules pertaining to transcription into French civil status registers, construed in the light of Article 8 ECHR, should apply to this case. As a consequence, the suspicion of fraud cannot hinder the recognition of a birth certificate. It quashed and reversed the lower court decision which had rejected the request for registration, based on the sole fact that the birth resulted from a process involving surrogate motherhood. The appeal against the second decision, which ordered the transcription notwithstanding the existence of a surrogate motherhood agreement, was dismissed.

The way is now cleared for the transcription on French birth certificate of children born abroad from French parents through surrogacy agreement, but the use of surrogacy remain prohibited, even if courts show some leniency, as testified by the recent case exposed below.

⁷⁵⁷CE, 12 December 2014, *Association Juristes pour l'enfance et autres*, No 367324,366989,366710,365779, 367317, 368861.

⁷⁵⁸ Ass. Plen., 3 July 2015, No 14-21.323, ECLI:FR:CCASS:2015:AP00619.

On 1 July 2015, the criminal court of Bordeaux condemned two fathers who had used a surrogate mother to a 7500 EUR suspended fine for the criminal offence of 'provoking, through donation, promise, threat or abuse of authority, the abandonment of a born or to-be-born child'. In this case, the surrogate mother was a Bulgarian woman who lived in Cyprus. The parents did not mention the name of the biological mother on the birth certificate, which the authorities found suspicious. The prosecution requested the annulment of the fraudulent acquisition of paternity.⁷⁵⁹ The French court found itself competent, since the biological mother had given birth in France. It recognized the biological mother as the parent of the child, and refused to recognize the paternity of the fathers. The child was however allowed to remain with the fathers. Moreover, it did not register the sentence on their criminal records, as they accepted that the fathers' core motivation was not to incite to abandonment but to bring up a family.

⁷⁵⁹ Moraud, F., 'Deux pères condamnés à Bordeaux après avoir eu recours à une mère porteuse', 1 July 2015, at http://www.lemonde.fr/famille-vie-privee/article/2015/07/01/deux-peres-condamnes-a-bordeaux-apres-avoir-eu-recours-a-une-mere-porteuse_4666345_1654468.html .



REPORT ON HUNGARY

Deliverable 7.2 Mechanisms for enforcing civil rights- Questionnaire for Country report

Author: Orsolya Salát

Extract from the Description of Work

Task 7.2: An identification of modes of transposition and mechanisms available at European and national levels for granting and enforcing civil rights, with a view to identifying institutional, legal, procedural and practical barriers that EU citizens and third-country nationals face in gaining (cross-border) access to justice.

D7.2 Report exploring the mechanisms for enforcing civil rights with a view to identifying the barriers

Report exploring the mechanisms to transpose and enforce civil rights with a view to identifying the barriers that EU citizens and third-country nationals face in gaining (cross-border) access to justice in selected Member States of the EU. Report containing identification of enforcement mechanisms for civil rights in the following Member States: United Kingdom, Denmark, Belgium, Hungary, Italy, Spain, the Netherlands, Germany, France, the Czech Republic and/or Croatia.

Introduction

In the EU legal context, fundamental rights, including civil rights, have gained not only visibility but also, arguably, significance, now that the Lisbon Treaty has made the Charter of Fundamental Rights legally binding. However, already before the Treaty of Lisbon, certain civil rights of EU citizens, in particular that of free movement and non-discrimination, had gained strong legal recognition in EU law through EU provisions, EU legislation and the case law of the Court of Justice of the European Union (CJEU). Moreover, general principles for the protection of fundamental rights, developed by the Court, conferred protection to a range of civil rights, including due process, rights, freedom of religion, right to property etc. These had to be respected by EU institutions and Member States acting within the scope of application of EU law.

The objective of WP7 is to study, from the perspective of EU citizenship, specific problems EU citizens and third country nationals (TCN) face in exercising civil rights and liberties in areas which fall within as well as beyond the scope of EU law, as the border-line between these two areas of jurisdiction is contested and constantly evolving due to EU legislative activities as well as other legal developments.

Direct or indirect EU level remedies exist before the courts composing the Court of Justice of the European Union (Court of Justice, General Court, EU Civil Service Tribunal) against violations of civil rights conferred upon individuals by EU law, by EU institutions and member states, when they act under the scope of EU law. They are, however, limited, and the day-to-day application and enforcement of EU law relies on domestic systems of judicial and non-judicial remedies, provided these comply with the principles of effectiveness and equivalence, and respect the general principle of effective judicial protection.¹ For that reason, it is important to study the mechanisms available in the member states for implementing and enforcing civil rights, whether these are derived from international instruments, EU law and member states' legal systems, and identify possible institutional, legal, procedural and practical impediments to their full operation.

¹Cases C-33/76 *Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 01989; Case C-45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR I-02043; Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-2271. EU law (case law, legislation) sometimes imposes particular types of remedies (eg State liability for violation of EU law; public procurement...).

Practical information and guidelines

Task leaders: Marie-Pierre Granger, Orsolya Salat & Sybe de Vries

Please structure the country report based on the questionnaire below (including headings). Make sure to include precise references to constitutional, legislative and regulatory provisions, cases and other relevant policy and legal documents. Try, as far as possible, to use the European Case Law Identifier (ECLI), which aims at providing a uniform citation format for national and European case law. https://e-justice.europa.eu/content_european_case_law_identifier_ecli-175-en.do?init=true. While it is still a work in progress, some countries have already introduced this citation format, and some are planning to introduce it in the (near or not so near) future.

We would like to encourage you, to the extent possible, to look for and identify relevant empirical evidence of specific obstacles to civil rights implementation and enforcement in the EU (NGO reports, statistics, press extracts, testimonies, interviews, surveys, etc.).

Please note that there may be a degree of overlap between the answers given in the context of the first task (country reports for Deliverable 7.1), and those sought in this second questionnaire focused on implementation, application and enforcement (in particular in countries where the recognition of civil rights is largely case law based). In such case, we suggest that you to copy/edit the relevant sections of the first country report and to fit them into this second country report focused on implementation and enforcement, with a reference to the original source.

The country as well as final reports should be written in English. The text of country reports should give a general overview, and should be clear, easily accessible and easy to read. If certain concepts or notions do not translate well in English, try to use both the original language as well as the most appropriate English translation the first time a concept is referred to. Later mention may be in either language. Language editing is the responsibility of each author.

Please use the Kluwer author guidelines for references and citations:<http://www.kluwerlawonline.com/files/COLA/COLAHOUSERUL2013.pdf>.

[Deadline for the report: 30April, 2015](#)

The deadline is a very strict one. In case of delay, we will not be able to submit the deliverable to the Commission on time.

[1. The \(legislative\) transposition, \(executive/administrative\) implementation and \(judicial\) application of EU legislative instruments which provide protection for specific civil rights²](#)

In this part, which adopts a *top-down* approach, the idea is to study the impact of different sets of EU legislative measures on the civil rights of EU citizens and third country nationals. EU legislation has sometimes been adopted to specifically confer protection to civil rights on EU citizens (Victims Rights Directive, e-Privacy Directive, etc), whilst other EU legislative measures have, on the contrary, the potential to undermine them (the most notorious probably being the European Arrest Warrant and the –now defunct- Data Retention Directive)

For each of the instruments identified below, answer the following set of questions.

Question 1 – Transposition of the above EU instruments protecting or potential affecting civil rights

- ✓ How are the EU instruments listed below transposed in the country of study? Have there been notorious failure or defect in the national transposition? Is the national legislative transposition of these EU instruments reinforcing or on the contrary threatening civil rights norms?

²The author wishes to thank Adrienn Nyírcsák for gathering data for the first part of the report.

Question 2 – Executive/administrative implementation of EU instruments affecting civil rights

- ✓ How are the EU instruments below and their national transposition measures implemented through regulatory/executive or administrative measures? Have these EU instruments been implemented in ways which affords further protection or potentially undermine civil rights norms?

Question 3 – Judicial interpretation and application of EU instruments affecting civil rights

- ✓ How are the EU instruments listed below and their transposition and implementation measures, interpreted and applied by courts? Is the judicial interpretation and application of these instruments and their domestic transposition and implementation measures furthering civil rights protection or, on the contrary, raising concerns in that respect?

Note: comparative data available on national judicial mechanisms at http://ec.europa.eu/civiljustice/index_en.htm

1 EU legislation affording protection or potentially undermining civil rights in judicial proceedings

1.1.1. Protection of rights in civil proceedings (mutual recognition instruments)

The EU has adopted a number of instruments enabling the mutual recognition of judgments in civil rights matters. Whilst these should respect EU fundamental rights norms and often include safeguard provisions, they may also undermine the civil rights of EU citizens, their families and affected third country nationals.

Transposition and implementation

- Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Regulation') – in particular articles 1, 2, 3, 4, 5, 6, 7, 31, 32-56 ; 57-58, 61.

Act LIII of 1994 on Judicial Enforcement: [1994. évi LIII. törvény a bírósági végrehajtásról](#)

Newest version of law has entered into force on 1st March 2015, but the modifications did not affect provisions implementing Regulation (EC) No 44/2001

Act LXV of 2004 on the Amendment of Certain Acts Containing Regulations Pertaining to the Service of Official Documents and the Amendment of Act LIII of 1994 on Judicial Execution for the Purpose of Approximation: [2004. évi LXV. Törvény a hivatalos iratok kézbesítésére vonatkozó szabályokat tartalmazó egyes törvények módosításáról, illetve a bírósági végrehajtásról szóló 1994. évi LIII. törvény jogharmonizációs célú módosításáról](#)

This law contained amendments to Act LIII of 1994, and was repealed by Act LXXXII of 2007. The transposition measures are incorporated in Act LIII of 1994.

Act XXXIX of 2008 on the Amendment of Act LIII of 1994 on Judicial Execution and other related acts [2008. évi XXXIX. törvény a bírósági végrehajtásról szóló 1994. évi LIII. törvény és egyéb kapcsolódó törvények módosításáról](#) – hatályon kívül helyezi a [2012. évi LXXVI. tv.](#) Repealed by Act LXXVI of 2012. Transposition measures are incorporated in Act LIII of 1994.

- Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ('Brussels IIa Regulation'). All provisions.

Decree of the Ministry of Interior no. 6 of 2003 on Registries, Marriage Procedures and Bearing Name

[6/2003 \(III. 6.\) BM rendelet az anyakönyvekről, a házasságkötési eljárásról és a névviselésről](#)

This decree, amended by decree no. 2. of 2006, implemented the specific provisions of Regulation 2001/2003 and was repealed by Decree of the Ministry of Justice and Public Administration no. 32. of 2014.

Decree of the Ministry of Interior no. 2. of 2006 on the Amendment of Decree no. 6. of 2003 on Registries, Marriage Procedure and Bearing Name (?)

[2/2006. \(I. 13.\) BM rendelet az anyakönyvekről, a házasságkötési eljárásról és a névviselésről szóló 6/2003. \(III. 7.\) BM rendelet módosításáról](#)

This act contained amendments to Decree of the Ministry of Interior no. 6. of 2003 on Registries, Marriage Procedure and Bearing Name and was repealed by by Decree No. 10/2007 (III. 6.) of the Minister of Justice and Law Enforcement on the Amendment of Decree No. 2/2006.

Decree of the Ministry of Justice and Public Administration no. 32. of 2014 on the Detailed Rules of Fulfilment of Registry Requirements

[32/2014 KIM rendelet az anyakönyvezési feladatok ellátásának részletes szabályairól](#)

Act XLI of 2005 on the Amendment of Act LIII of 1994 on Judicial Enforcement
[2005. évi XLI. tv. a bírósági végrehajtásról szóló 1994. évi LIII. tv. módosításáról](#) –

hatályon kívül helyezi a [2012. évi LXXVI. tv.](#)
Repealed by Act LXXVI of 2012

[2008. évi XXXIX. törvény a bírósági végrehajtásról szóló 1994. évi LIII. törvény és egyéb kapcsolódó törvények módosításáról](#) – hatályon kívül helyezi a [2012. évi LXXVI. tv.](#)

Act XXXIX of 2008 on the Amendment of Act LIII of 1994 on Judicial Execution and other related acts

Repealed by Act LXXVI of 2012

Act LIII of 1994 on Judicial Enforcement: [1994. évi LIII. törvény a bírósági végrehajtásról](#)

Government Decree No.149/1997 (IX.10.) on Guardianship Authority and on Child Protection and Guardianship Procedures
[149/1997. \(IX. 10.\) Korm. Rendelet a gyámhatóságokról, valamint a gyermekvédelmi és gyámügyi eljárásról](#)

Government Decree No. 315/2005 on the Amendment of Government Decree on Guardianship Authority and on Child Protection and Guardianship Procedures

[315/2005. \(XII. 25.\) Korm. rendelet a gyámhatóságokról, valamint a gyermekvédelmi és gyámügyi eljárásról szóló 149/1997. \(IX. 10.\) Korm. rendelet módosításáról](#)

Paragraphs on the actual amendments have been repealed by various acts. (But they remain incorporated in Decree No. 149/1997.)

- Regulation No 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters. All provisions.

Act XCIII of 1990 on Duties

[1990. évi XCIII. tv. az illetékekről](#)

Act LXXII of 2009 Concerning Restraining Orders Applicable Because of Violence Between Related Persons

[2009. évi LXXII tv. a hozzátartozók közötti erőszak miatt alkalmazható távollétéről](#)

Act LXXIII of 2014 on the Amendment of Certain Acts Related to Judicial and Private Law Matters

[2014. évi LXXIII. törvény egyes igazságügyi és magánjogi tárgyú törvények módosításáról](#)

Contains amendments to Act XCIII of 1990 and to Act LXXII of 2009 implementing Regulation no. 606/2013

Judicial interpretation

There are reported cases which include references to the regulations, but they do not seem to have raised exceptional problems. For instance, the Kúria approved lower court's judgment on dismissing request to keep children in Hungary whose usual residence was in Germany.³ This was understood to apply in a case where usual residence was in Italy, independent of the fact that the mother resides in Hungary.⁴ In terms of jurisdiction the (earlier) Supreme Court in 2009 found that lower courts erred when denying Germany's jurisdiction on coverage for costs in a case where the jurisdiction on the main issue (right of parent to have contact with the child) was clearly with the German courts.⁵ Since then, the Kúria regularly confirmed the application of Brussels IIa by the lower courts, and there does not seem to be any longer major problems in this regard.⁶

There has not been any litigation related to protection measures in civil matters yet.

1.1.2 Protection of rights in criminal proceedings (due process, right to a fair trial, etc.)

The EU has adopted numerous legislative instruments enhancing judicial cooperation and imposing mutual recognition in criminal matters. These have led to concerns regarding the protection of individuals in criminal proceedings across the member states of the EU, which led to the adoption of approximation/minimum harmonization of

³Kúria Pfv. II. 20.461/2013.

⁴Kúria Pfv. II. 20.769/2013.

⁵ Supreme Court: Legf. Bír. Kfv. II. 39.412/2007.

⁶See notes 2 and 3, and also eg, *Kúria Pfv. II. 22.065/2012, or Kúria Pfv. II. 20.799/2012.*

aspects of national criminal law and procedures. To what extent do these measures affect the civil rights of EU citizens, and their ability to exercise them?

Background instrument on judicial cooperation

- Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.

1.1.2.1. Mutual recognition instruments in criminal matters

1.1.2.1.1. European arrest warrant

- Framework Decision 2002/584/JHA of 13 June 2002 on the *European arrest warrant* and the surrender procedure between member state: all provisions potentially relevant.

Transposition and implementation

Act No CXXX of 2003 on cooperation in criminal matters with the Member States of the European Union of 30 November 2012 [2003. évi CXXX. törvény az Európai Unió tagállamaival folytatott bűnügyi együttműködésről](#) → no longer in effect (replaced by Act No CLXXX of 2012)

Act No CLXXX of 2012 on cooperation in criminal matters with the Member States of the European Union of 30 November 2012

[2012. évi CLXXX tv. az Európai Unió tagállamaival folytatott bűnügyi együttműködésről](#)

Note: An important feature of both the 2003 and 2012 acts is that they do not allow the execution of the EAW in case the requested person is a Hungarian national *having a permanent residence in Hungary*, unless the issuing state provides sufficient guarantee

that in case of condemnation to a custodial sentence, the requested person will be – at his or her request – transferred back to Hungary to serve the sentence.⁷

Act No CV of 2007 on the cooperation and information exchange in the framework of the Schengen Convention

[2007. évi CV. törvény a Schengeni Végrehajtási Egyezmény keretében történő együttműködésről és információcseréről](#) → no longer in effect

Government Decree No 242 of 2007 on the appointment of the organ dealing with tasks of information centre of N.SIS and rules of keyboarding and implementation of SIS as well as of detailed rules on the administrative and technical tasks of N.SIS Agency and SIRENE Office (SIS Decree)

[242/2007. \(IX. 21.\) Korm. Rendelet az N.SIS informatikai központ feladatait ellátó szerv kijelöléséről, a SIS-be történő adatbevitel elrendelésének és végrehajtásának, valamint az N.SIS Hivatal és a SIRENE Iroda technikai és adminisztratív feladatai ellátásának részletes szabályairól](#)

Repealed because of the implementation of the second generation Schengen Information System.

Judicial interpretation

In Hungary, the European Arrest Warrant has not caused a constitutional turmoil similar to other countries. During the transposition, no preliminary norm control was initiated. The Court in 2008 handed down a decision on the law transforming the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway (EUN agreement).⁸ The President of the Republic initiated preliminary

⁷With regard to the 2003 act, see the analysis of Zsuzsanna Deen-Racsmány and Judge Rob Blekxtoon: "The Decline of the Nationality Exception in European Extradition? The Impact of the Regulation of (Non-)Surrender of Nationals and Dual Criminality under the European Arrest Warrant" http://www.asser.nl/upload/euowarrant-webroot/documents/cms_eaw_id702_1_Deen-RacsmanyBlekxtoon%20mod.doc

⁸32/2008. (III. 12.) AB határozat.

norm control as he was of the view that the EAW violates the *nullum crimen* principle. Notably, as the obligation of surrender is based on the condition of double criminality, but it does not require the conduct that forms the basis of the arrest warrant to be a criminal offence with the same constituent elements both in the law of the issuing State and the executing State.⁹The President explicitly argued that this case only involves international law, and does not raise issues of conflict between European Union law and Hungarian law. The Court has not shared this view completely, and discussed the underlying EAW framework, but at the end decided the case solely as relating to the issue of a Hungarian law transposing an international treaty. There is a part in which questionable dicta seems to suggest a total prevalence of constitutional rights over European Union law:

“There are more and more norms under international law and the European law accepted by the Hungarian State due to the intensifying cooperation between the States in the fields of criminal law and justice, and these norms need to comply with the requirements of the Hungarian Constitution, in particular the requirements of legality in criminal law, the paramount importance of which has been pointed out by the Constitutional Court in several decisions, emphasizing their constituent elements and the indispensable conditions for their fulfilment.”¹⁰

The literature however maintains that this paragraph – uttered *not* in the context of a European Union norm – is incompatible with previous and later jurisprudence.¹¹ The jurisprudence of the Court in this regard is in any case generally incoherent, nonetheless so far without practical relevance. (See report d7.1). In harmony with this approach, in 2013,¹²in a constitutional complaint procedure, the Constitutional Court declined to pronounce constitutional objections regarding the EAW. In the case, the Court confirmed the constitutionality of the rule (section 5.c) of the Act CLXXX of 2012 on cooperation in criminal matters with the Member States of the European Union) transposing Art 4 para. 4 of the EAW. According to this rule, the executing judicial authority refuses¹³ to execute

⁹Translation of the judgment including the summary of the presidential arguments, available on the website of the Constitutional Court: http://www.mkab.hu/letoltesek/en_0032_2008.pdf.

¹⁰Id. At p 8, V.3.

¹¹Flóra Fazekas, *A magyar alkotmánybíróság viszonya a közösségi jog elsőbbségéhez egyes tagállami alkotmánybíróságok esetjogának tükrében*, doctoral dissertation, Debrecen, 2009, available at <https://dea.lib.unideb.hu/dea/bitstream/handle/2437/97185/ertekezes.pdf?sequence=4>

¹²3144/2013. (VII. 16.) AB határozat.

¹³The Hungarian law uses here “refuses”, instead of “may refuse” in the EAW Framework decision, logically.

the EAW “where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law”. The complainant found that this rule gave total control for the issuing state over the determination of the date when the crime was allegedly committed, and thus, violates principle of due process and legal certainty. The Constitutional Court rejected this argument by referring to the mutual cooperation and trust between member states’ authorities, and maintaining that the Hungarian court is able and entitled to acquire – if necessary, in cooperation with the ministry – all information on the basis of which it can get a fair assessment of whether the determination of the date of the committal of the issuing state is correct.

The second claim of the complainant related to the norm transposing Art 24 EAW on postponed surrender. Art 22 of the Act CLXXX of 2012 states that the court *may* postpone surrender so that the requested person may be prosecuted in Hungary (...). The fact that Art 22 this way only allows, but does not guarantee that the person be present in Hungary during the criminal proceedings was not considered unconstitutional as the issuing court – just as in other cases -- is able and competent to reasonably decide if a trial in absentia fulfilled constitutional requirements in a given case or not. Thus, the Hungarian Constitutional Court has so far not taken an activist stance vis-à-vis the rules on EAW, although that might be due to the rather weak arguments in the complaint.

A 2014 case of the Constitutional Court, on judicial referral, faced an interesting situation. The referring judge claimed that the norm transposing the EAW might be unconstitutional, although not violating the EAW Framework Decision (ie again no conflict with EU law was conceptualized). Notably, Hungarian courts do not have the choice between different measures deprivative of liberty in some cases under the law transposing the EAW, while they have that choice – and obligation under constitutional proportionality standards – of less restrictive means in general criminal procedure when they decide on a case not involving EAW. (Eg, in Art 15 (3), the act foresees interim custody, whereas maybe a less restrictive measure, such as house arrest or electronic surveillance, etc. would suffice.) The EAW Framework decision does not prescribe such – in fact, lowered – standards, only the transposing act. Still, the majority

of the Constitutional Court found the act did not violate the constitution (either the right to liberty nor equal treatment).

Ordinary courts also appear to consider the interpretation of the EAW regime a fairly non-problematic endeavour.¹⁴ The Supreme Court in 2005 issued a decision unifying the law (ie a mandatory guidance on interpretation) according to which issuing an EAW interrupts the prescription period, except if it was issued because previously an international arrest warrant had been issued by the Hungarian authorities and the requested person was found in the territory of jurisdiction of a Member State, and therefore, a European Arrest Warrant was *also* issued.¹⁵

In another case, the Győr General Court of Appeals reviewed and confirmed interpretation of double criminality regarding crimes common in Hungarian, German, and Slovakian law.¹⁶

In more recent cases, the Debrecen General Court rectified interpretation by the district court by counting into the time of pre-trial detention – which needs to be discounted from the final duration of the deprivation of liberty -- the duration of detention executed abroad in the context of an EAW (section 26 of EAW Framework Decision).¹⁷ In another case, the Metropolitan Court ruled similarly by counting in the time spent in transit detention in Romania.¹⁸

While the general interpretation of the norms transposing EAW do not seem to raise unsurmountable problems, at times the *application* to a given case appears to be problematic. For instance, a politically delicate case involved the head of MOL, the Hungarian oil company which owned the Croatian oil company INA. Ivo Sanader, previous prime minister of Croatia was condemned to 10 years in prison on corruption charges for having accepted bribe from the Hungarian MOL leaders in exchange of selling INA to MOL. Zsolt Hernádi, the CEO of MOL was requested by Croatia in an EAW. The court – in a final decision, as neither the prosecution, nor (understandably) Mr Hernádi's lawyer launched an appeal – denied the request reasoning that there had been

¹⁴Eg Kúria, Bfv.II.994/2011/7, or Metropolitan General Court of Appeals, 5.Bf.236/2010/12, Szeged General Court of Appeals, Bf.II.78/2013/13, Metropolitan General Court of Appeals, 2.Pf.22.145/2010/3, Debrecen General Court of Appeals, Bf.II.477/2013/12.

¹⁵1/2005 BJE (decision on unity in criminal law interpretation), English summary available http://www.law.uj.edu.pl/~kpk/eaw/judicial_decisions/Hungary_Supreme_Court.pdf

¹⁶ Győr General Court of Appeals, Bf.107/2012/51., judgment of 14 February 2014.

¹⁷ Debrecen General Court, 18.Bf.95/2013/20., judgment of 17 September 2013.

¹⁸ Metropolitan Court, 5.B.777/2014/29., judgment of 14 October 2014.

a procedure against him in Hungary and that was closed (by the prosecution, for lack of a criminal act). Note however that as the procedure was not closed at the judicial phase, i.e. no independent court has ruled on the guilt or not of Mr Hernádi, other Member States are free to execute the EAW should Mr Hernádi be present outside Hungary.¹⁹

1.1.2.1.2. Custodial sentences or measures involving deprivation of liberty

- Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition for judgments imposing custodial sentences or measures involving deprivation of liberty, in particular Arts 1, 2, 3, 6, 7, 8, 9, 10, 11, 14, 18, 19, 29

Act No CLXXX of 2012 on cooperation in criminal matters with the Member States of the European Union of 30 November 2012

[2012. évi CLXXX tv. az Európai Unió tagállamaival folytatott bűnügyi együttműködésről](#)

1.1.2.1.3. Probation decisions and alternative sanctions

- Framework Decision 2008/947/JHA of 27 November 2008 on probation decisions and alternative sanctions, in particular Arts 1, 2, 3, 4, 10, 11, 19

Implemented by Act No CLXXX of 2012 on cooperation in criminal matters with the Member States of the European Union of 30 November 2012

[2012. évi CLXXX tv. az Európai Unió tagállamaival folytatott bűnügyi együttműködésről](#)

No judicial interpretation could be found.

1.1.2.1.4. European evidence warrant

- Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in criminal proceedings, in particular Arts 1-19.

¹⁹ <http://www.jogiforum.hu/hirek/30504>

According to the [European Judicial Network Database](#), it has not been implemented, (last update: 19 May 2015).

1.1.2.1.5. Orders freezing property or evidence

- Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence, in particular Arts 1-2-3, 7,8, 10, 11.

Act No CXXI of 2001 on the Amendment of Act No IV of 1978 on the Criminal Code

[2001. évi CXXI. törvény a Büntető Törvénykönyvről szóló 1978. évi IV. törvény módosításáról](#)

Act No CXXX of 2003 on cooperation in criminal matters with the Member States of the European Union of 30 November 2012
[2003. évi CXXX. törvény az Európai Unió tagállamaival folytatott bűnügyi együttműködésről](#) → no longer in effect (replaced by Act No CLXXX of 2012)

Act No CLXXX of 2012 on cooperation in criminal matters with the Member States of the European Union of 30 November 2012

[2012. évi CLXXX tv. az Európai Unió tagállamaival folytatott bűnügyi együttműködésről](#)

No judicial interpretation could be found.

1.1.2.1.6. Confiscation orders

- Framework Decision 2006/783/JHA on the application of the principle of mutual recognition for confiscation orders, in particular Arts 1,2,6,7,8,9, 11, 14, 18.

Act No CXXX of 2003 on cooperation in criminal matters with the Member States of the European Union of 30 November 2012
[2003. évi CXXX. törvény az Európai Unió tagállamaival folytatott bűnügyi együttműködésről](#) → no longer in effect (replaced by Act No CLXXX of 2012)

Act No CLXXX of 2012 on cooperation in criminal matters with the Member States of the European Union of 30 November 2012

[2012. évi CLXXX tv. az Európai Unió tagállamaival folytatott bűnügyi együttműködésről](#)

No judicial interpretation could be found.

1.1.2.2 'Approximation' measures

1.1.2.2.1. Victims' rights

Transposition and implementation

- (Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings).

Act No IV of 1978 on the Criminal Code

[1978. évi IV. törvény a büntető törvénykönyvről](#)

Repealed by [Act No C of 2012 on the Criminal Code](#)

Act No XIX of 1998 on Criminal Procedure – in force until 14 April 2015

[1998. évi XIX. törvény a büntetőeljárásról](#)

Act CXXXV of 2005 on the Support of Victims of Crime and State Compensation

[2005. évi CXXXV. törvény a bűncselekmények áldozatainak segítéséről és az állami kárenyhítésről](#)

Act No CXXIII of 2006 on Mediation Activity Applicable in Criminal Cases

[2006. évi CXXIII. törvény a büntető ügyekben alkalmazható közvetítői tevékenységről](#)

Act CCXL of 2013 on the execution of the sanctions, the measures, some compulsory provisions and the misdemeanor closing (Penal Execution Code)

[2013. évi CCXL. törvény a a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás végrehajtásáról](#)

- Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

Act No XIX of 1998 on Criminal Procedure

[1998. évi XIX. törvény a büntetőeljárásról](#)

Act CCXL of 2013 on the execution of the sanctions, the measures, some compulsory provisions and the misdemeanor closing (Penal Execution Code)

[2013. évi CCXL. törvény a a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás végrehajtásáról](#)

Act No LXXII of 2014 on the Amendment of Act No CCXL of 2013 on the execution of the sanctions, the measures, some compulsory provisions and the misdemeanor closing and other related acts

[2014. évi LXXII. Törvény a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás végrehajtásáról szóló 2013. évi CCXL. törvény és ehhez kapcsolódóan más törvények módosításáról](#)

- Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims
Act CXXXV of 2005 on the Support of Victims of Crime and State Compensation
[2005. évi CXXXV. törvény a bűncselekmények áldozatainak segítéséről és az állami kárenyhítésről](#)

Decree No I of 2006 of the Ministry of Justice on the Detailed Rules of the Use of Victim Assistance Support

[1/2006. \(I. 6.\) IM rendelet az áldozatsegítő támogatások igénybevételének részletes szabályairól](#)

- Directive 2011/99/EU on 13 December 2011 on the European Protection Order
Act No CLXXX of 2012 on cooperation in criminal matters with the Member States of the European Union of 30 November 2012
[2012. évi CLXXX tv. az Európai Unió tagállamaival folytatott bűnügyi együttműködésről](#)

There has been no significant litigation which would show particular barriers regarding victims' rights.

The FRA found that the definition of victim in the Act CXXV of 2005 is too narrow: "To comply with its obligations under the Framework Decision after becoming an EU Member State, Hungary adopted a Victim Support Act in 2005. The act and implementing practice therefore generally fulfil the requirements of the Framework

Decision. However, legislation covering criminal procedure which determines the position of the victim still uses a narrow concept of 'aggrieved party' which focuses only on the most direct victims of crime. Hungary will therefore need to make further changes to comply with the Victims' Directive's new requirements, such as ensuring that family members of the victim are also included in the definition."²⁰

The FRA also found that "Hungary does not offer courses dedicated specifically to victim support but, if requested, victim support officers hold training sessions for police officers."²¹

"Governments are required to respect the independence and diversity of NGOs working in victim support and to avoid discriminating against organisations on whatever ground. In this respect, FRA has noted with concern that the Hungarian government has publicly branded some of the well-known support services as "left leaning".²² Caution, sensitivity and tact should characterise relations between the government and NGOs to avoid the impression that government officials do not respect NGOs as equals or that these are not dealt with on a level playing field."²³

On the up-side, the FRA also found "encouraging volunteerism" in Hungary: "In the framework of the ACT programme (TEtt Program az Áldozatokért és a Tettesekért),²⁴ implemented within the national development plan with the support of the European Social Fund, one key initiative was the organisation of volunteer networks to assist victims of crime. The ACT programme has recruited 200 volunteers since February 2011, including two in each sub-region situated in the nine counties ACT covers. Based on the Hungarian National Social Inclusion Strategy for 2012 to 2014, additional Roma volunteers were recruited into the network.²⁵ Victim support officers participate as mentors to volunteers and provide training."²⁶

²⁰ Fundamental Rights Agency, *Victims of Crime in the EU: The extent and nature of support for victims*, 2014, http://fra.europa.eu/sites/default/files/fra-2015-victims-crime-eu-support_en_0.pdf at 35

²¹Id at 50.

²² See the press release by Transparency International at: www.transparency.org/news/pressrelease/transparency_international_calls_for_an_immediate_end_to_intimidation_.

²³FRA Report, above n 17 at 64.

²⁴ See: www.tamop.irm.gov.hu/.

²⁵ Information is available at: <http://romagov.kormany.hu/hungarian-national-social-inclusion-strategy-deeppoverity-child-poverty-and-the-roma>

²⁶FRA Report, above n 17 at 67.

1.1.2.2.2. Rights of suspects and accused persons

Transposition and implementation

- Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings

Act No XIX of 1998 on Criminal Procedure

[1998. évi XIX. törvény a büntetőeljárásról](#)

Act No CLXXX of 2012 on Cooperation in Criminal Matters with the Member States of the European Union of 30 November 2012

[2012. évi CLXXX tv. az Európai Unió tagállamaival folytatott bűnügyi együttműködésről](#)

Act No II of 2012 on the Administrative Offences, and the Procedure relevant in case of administrative offence, and Registry System

[2012. évi II. törvény a szabálysértésekről, a szabálysértési eljárásról és a szabálysértési nyilvántartási rendszerről](#)

Act No CLXXXVI of 2013 on the Amendment of Certain Acts on Criminal Matters and Other Related Acts

[2013. évi CLXXXVI. törvény egyes büntetőjogi tárgyú és ehhez kapcsolódó más törvények módosításáról](#)

Act CCXL of 2013 on the execution of criminal sanctions, criminal measures, compulsory measures and on administrative detention (Penal Execution Code)

[2013. évi CCXL. törvény a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési elzárás végrehajtásáról](#)

Joint Decree of the Ministry of Interior and the Ministry of Justice No 23/2003 on the Detailed Rules of Investigating Authorities under the Authority of the Ministry of the Interior and on the Rules of Recording investigatory actions other than in the form of minutes

[23/2003. \(VI. 24.\) BM-IM együttes rendelet a belügyminiszter irányítása alá tartozó nyomozó hatóságok nyomozásának részletes szabályairól és a nyomozási cselekmények jegyzőkönyv helyett más módon való rögzítésének szabályairól](#)

Decree No 24/1986 of the Council of Ministers on Technical Translation and Interpretation

[24/1986. \(VI. 26.\) MT rendelet a szakfordításról és tolmácsolásról](#)

- Directive 2012/13/EU of 22 May 2012 on the Right to Information in Criminal Proceedings

Act No XIX of 1998 on Criminal Procedure

[1998. évi XIX. törvény a büntetőeljárásról](#)

Act No II of 2012 on the Violation of Administrative Rules, Procedures and Registry System

[2012. évi II. törvény a szabálysértésekről, a szabálysértési eljárásról és a szabálysértési nyilvántartási rendszerről](#)

Act CCXL of 2013 on the execution of the sanctions, the measures, some compulsory provisions and the misdemeanor closing (Penal Execution Code)

[2013. évi CCXL. törvény a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési eljárás végrehajtásáról](#)

Act No LXXII of 2014 on the Amendment of Act No CCXL of 2013 on the execution of criminal sanctions, criminal measures, compulsory measures and on administrative detention (Penal Execution Code) and other related acts

[2014. évi LXXII. Törvény a büntetések, az intézkedések, egyes kényszerintézkedések és a szabálysértési eljárás végrehajtásáról szóló 2013. évi CCXL. törvény és ehhez kapcsolódóan más törvények módosításáról](#)

Decree 19/1995 of the Ministry of interior on the Regulation of Police Jails

[19/1995 BM rendelet a rendőrségi fogdák rendjéről](#)

Decree No 22/2012 of the Ministry of Interior on Measures Related to the Execution of Act No II of 2012 on the Violation of Administrative Rules,

Procedures and Registry System and the Amendment of Certain Related Decrees

[22/2012. BM rendelet a szabálysértésekről, a szabálysértési eljárásról és a szabálysértési nyilvántartási rendszerről szóló 2012. évi II. törvény végrehajtásával kapcsolatos rendelkezésekről, valamint ahhoz kapcsolódó egyes rendeletek módosításáról](#)

Decree No 35/2013 of the Ministry of Justice and Public Administration on the Amendment of Certain Decrees on Judicial Matters Related to the Amendment of Act No CLXXXVI of 2013 on the Amendment of Certain Acts on Criminal Matters and Other Related Acts

[35/2013. \(XII. 23.\) KIM rendelet egyes igazságügyi tárgyú rendeleteknek az egyes büntetőjogi tárgyú és ehhez kapcsolódó más törvények módosításáról szóló 2013. évi CLXXXVI. törvénnyel összefüggő módosításáról](#)

Decree No 23/2014 of the Ministry of Justice and Public Administration on the Amendment of Certain Decrees on Criminal Matters in Relation to the Entry into Force of Act No V of 2013 on the Civil Code

[23/2014. \(III. 14.\) KIM rendelet egyes büntetőjogi tárgyú igazságügyi rendeleteknek a Polgári Törvénykönyvről szóló 2013. évi V. törvény hatálybalépésével összefüggő módosításáról](#)

Decree No 56/2014 of the Ministry of Interior on the Regulation of Police Jails

[56/2014. \(XII. 5.\) BM rendelet a rendőrségi fogdák rendjéről](#)

The rights of suspects and accused persons are formally, at the legislative level and in general highly guaranteed in Hungary. In practice, there have been a few notorious cases of police violence – such as abuses during the 2006 riots and protests, or in a case where a Romanian citizen of Hungarian origin was beaten to death by Hungarian police officers. An anti-Roma bias in policing is also often apparent. Prison conditions do not meet the standards of European Principles on Prisons, especially overcrowdedness is a problem. Pre-trial detention is used too often and too long.

1.2. EU legislation related to the protection of personal data

Transposition and implementation

- Directive 95/46 on the protection of individuals with regard to processing of personal data and on the free movement of such data (Data Protection Directive) [1995] OJ L281/31.

Act LXVIII of 1992 on the Protection of Personal Data and the Disclosure of Information of Public Interest

[1992. évi LXIII. Törvény a személyes adatok védelméről és a közérdekű adatok nyilvánosságáról](#)

Act No CXII of 2011 on the Right of Informational Self-Determination and the Freedom of Information

[2011. évi CXII. törvény az információs önrendelkezési jogról és az információszabadságról](#)

- Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector (ePrivacy Directive) [2002] OJ L201/37.

Act No C of 2003 on Electronic Communication

[2003. évi C törvény az elektronikus hírközlésről](#)

Government Decree No. 226/2003. (XII. 13.) Korm. on the Special Conditions of Data Management by Electronic Communications Service Providers, the Data Security of Electronic Communications Services, and the Rules of Identifier Presentation and Call Diversion

[226/2003. \(XII. 13.\) Korm. rendelet az elektronikus hírközlési szolgáltató adatkezelésének különös feltételeiről, az elektronikus hírközlési szolgáltatások adatbiztonságáról, valamint az azonosítókijelzés és hívásátirányítás szabályairól](#)

[4/2012. \(I. 24.\) NMHH rendelet a nyilvános elektronikus hírközlési szolgáltatáshoz kapcsolódó adatvédelmi és titoktartási kötelezettségre, az adatkezelés és a titokvédelem különleges feltételeire, a hálózatok és a szolgáltatások biztonságára és integritására, a](#)

[forgalmi és számlázási adatok kezelésére, valamint az azonosítókijelzésre és hívásátírányításra vonatkozó szabályokról](#)

Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive (Data Retention Directive) [2006] OJ L105/54. [annulled]

Act No C of 2003 on Electronic Communication
[2003. évi C törvény az elektronikus hírközlésről](#)

Judicial interpretation

In principle, the right to data protection has been highly protected in Hungary under the 1989 constitution.

It used to be a particularly important – and in the view of many, well-developed – field of human rights law in Hungary after the regime change. There was a separate ombudsman with strong competences overseeing data protection and freedom of information. The HCC also had a remarkable jurisprudence, starting with the annulment of the general personal number, which would allow the government to connect different databases, and thereby establish a full profile of anyone including their health and other data.²⁷ The Court in essence transposed the German doctrine²⁸ of informational self-determination. This means that the right to the protection of personal data goes beyond a simple protective right (*status negativus*), and extends to the protection of the “active side” (*status activus*) as well, thus being in fact about informational self-determination. Informational self-determination means first of all that personal data can be acquired, stored, disseminated (or in any way “handled”) in general only with the consent of the person. Exceptionally, a law ordering the collection and handling of personal data might be constitutional if it conforms to standards of rights restriction, i.e. it is provided by

²⁷15/1991. (IV. 13.) AB határozat.

²⁸E.g. BVerfGE 100, 313.

law, and is necessary and proportionate to the pursuance of the protection of another right or constitutional value.²⁹

The collection and procession of personal data have to be transparent. Everyone has a right to control each step of such a process (thus also being informed of the steps), and withdraw consent at any time, requesting eventually the deletion of her personal data.³⁰

Furthermore, processing of personal data shall always be connected to a purpose (to which the data subject consents), i.e. data processing is only constitutional as long as the purpose originally consented to still applies. The Hungarian law implementing – the now defunct- ³¹ Data Retention Directive (Directive 2006/24/EC) thus might be unconstitutional,³² but the issue is pending since 2008³³ (for reasons also of the change of the competences and procedure of the HCC under the Fundamental Law).

The 2011 law on data protection and freedom of information³⁴abolished the previous function of data protection ombudsman, and its place was given to a so-called independent freedom of information authority (with a head nominated by the prime minister and appointed by the president of the republic for nine years. Note that the president of the republic was elected solely by the votes of the – two-third – governing majority.) The previous ombudsman's term thus prematurely expired, in violation of EU law,³⁵ as it did not conform to the requirement of independence.³⁶ The way the current authority was established thus already raises doubts about its independence, however, the Commission only achieved a change with regard to the powers of removal.

²⁹Jóri, op. cit., 2185., referring to 15/1991. (IV. 13.) AB határozat.

³⁰15/1991. (IV. 13.) AB határozat.

³¹Judgment in Joined Cases C-293/12 and C-594/12, Digital Rights Ireland and Seitlinger and Others [2014] nyr.

³²See <http://tasz.hu/en/data-protection/constitutional-complaint-filed-hclu-against-hungarian-telecom-data-retention>.

³³See <http://tasz.hu/en/freedom-information/state-too-can-access-my-phone-records>.

³⁴ Act CXII/2011.

³⁵ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

³⁶ C-288/12, Commission v. Hungary.

2. Enforcement of selected civil rights

In this second part of the questionnaire, which follows a *bottom up* approach, the idea is to focus on particularly problematic areas for the protection and exercise of particular civil rights. We ask you to identify at least three civil rights, irrespective of their source of protection, which are particularly salient and problematic from the point of view of the ability of EU citizens and other persons in the EU to effectively exercise them in the country under study. In the selection, bear in mind difficulties which may be specific to 'mobile' EU citizens and Third Country Nationals, and those which affect all EU citizens or Third Country Nationals irrespective of whether they have exercised their EU citizenship right to free movement or not. For each 'problematic right' identified, answer the questions set out further below.

Please, do *not* select rights which will be covered in the case studies later in the project:

D7.3. Case study exploring obstacles in exercising core citizenship rights (i.e. right to move and reside),

D7.4. Case study exploring difficulties faced by EU citizens when trying to enjoy the freedom of expression in the context of media law and policies (but freedom of expression outside of the media context can be analyzed in this report).

D7.5. Case study on obstacles that (mobile) EU citizens and their families face in dealing with life events (e.g. recognition of civil status documents), in the context of specific national administrative rules or marital/family legislation.

D7.6. Case study on obstacles that (mobile) EU citizens and their families face in gaining access to travel documents)

2.1 Right 1: right to property

Question 1 – Source of protection

The right to property is guaranteed in Art. XIII of the Fundamental Law as follows:

Article XIII

(1) Everyone shall have the right to property and inheritance. Property shall entail social responsibility.

(2) Property may only be expropriated exceptionally, in the public interest and in the cases and ways provided for by an Act, subject to full, unconditional and immediate compensation.

This provision is not in itself problematic, it is granted at the highest level in the constitution. There are other provisions, e.g., Art 37 para (4), about which there will be discussion in the part on jurisdictional barriers, which significantly alter this picture.

- ✓ What are the sources of protection of each of this right? Do you see any problems in this regard? (eg the right is recognized only in a lower level norm, or multiple sources with different authority and meanings, etc.)

Question 2 – Scope and limits of the right (including balancing with other rights)

Scope of protection of property

The right to property has been among the core rights in the jurisprudence of the HCC before the new constitution, and, especially, before the limitation of its competences on reviewing financial/budget legislation was introduced in 2010, still in the text of the 1989 constitution (see below under jurisdictional issues). According to this jurisprudence, property is understood to guarantee the material bases of personal autonomy, thus it is in essence a freedom right. The “constitutional property protection”³⁷ is a notion different from property in the private law in two senses. Firstly, it includes not only *ius reale/ius in rem*, but might also extend to all kinds of entitlements stemming from contractual and tort relations, and also to public law entitlements.³⁸ Secondly, the constitutional property protection, unlike the real right in private law, is not absolute, and can be limited.

³⁷ Elaborated in 64/1993. (XII. 22.) AB határozat.

³⁸ See Orsolya Salát-Pál Sonnevend, “Commentary to Art. 13 [the right to property]”, in András Jakab ed., *Az Alkotmánykommentárja [Commentary of the Constitution]* (Századvég Kiadó, Budapest, 2009), 451-485.

Finally, under both the old and new jurisprudence, acquisition of property is not included in the scope of constitutional protection. This is one reason why limitations on acquiring land property (e.g. by foreign companies) were ruled constitutional.³⁹

Limits of the right to property

Property is different from other fundamental rights in that the test applicable to its limitations is a looser one: property can be limited also in pursuance of a simple public interest, subject to a proportionality test,⁴⁰ thus suggesting a socially bound concept of property, similarly to the German doctrine.⁴¹

The proportionality test was always understood to fall within the review jurisdiction of the HCC,⁴² but there were uncertainties as to the power of the HCC to review the material existence of a public interest.⁴³

The ("old") HCC, whilst it expanded the scope of protection afforded to constitutional property, also accepted a broader scope of limitations. In the modern regulatory state, more limits are imposed on property owners on the exercise on this right than was previously the case. As mentioned earlier, property can be limited in pursuance of a simple public interest. What is more, the public interest can not only mean an interest or utility for the community, but can also directly benefit individuals, provided that this way it solves specific *social* problems.⁴⁴

Whether a specific restriction is constitutional, depends on all circumstances of the case, thus it is a casuistic inquiry.⁴⁵ Generally, providing compensation will not make a limitation constitutional, but such compensation might be necessary for the measure to be proportionate.⁴⁶

Similarly to international trends, taxation is not perceived in general as a limit on property rights. It was addressed (before the HCC's competence to address tax matters

³⁹35/1994. (VI. 24.) AB határozat.

⁴⁰ 64/1993. (XII. 22.) AB határozat.

⁴¹Drinóczi, op.cit.

⁴²E.g., Pál Sonnevend, "A tulajdonhoz való jog [The right to property]" in Gábor Halmai-Gábor Attila Tóth, eds., *Emberi Jogok [Human Rights]* (Osiris, Budapest 2003).

⁴³ See 42/2006. (X. 5.) AB határozat.

⁴⁴64/1993. (XII. 22.) AB határozat.

⁴⁵Salát-Sonnevend op.cit.

⁴⁶ Id. and Salát-Sonnevend op. cit. [99]

was largely taken away) on the basis of the clause on taxation.⁴⁷For instance, a 98 % retroactive tax was annulled on this basis.⁴⁸

Expropriation is only possible according to both the old and the new constitution if it is exceptional, required by public interest, and accompanied by immediate compensation. If a restriction burdens the enjoyment of property to an extent that its use becomes economically empty, if only *nudum jus* remains with the owner, then such a limitation (according to traditional interpretation) qualifies as expropriation and needs be compensated.⁴⁹

This doctrinal scheme of applicable test and limits is in itself not problematic, and is in line with European jurisprudence. It is formally upheld by the new Court under the Fundamental Law as well. Its application however lately raises many problems, which will be discussed next.

- ✓ What is the scope and what are the limits of this right? Are there any deficiencies in this regard (eg non-compliance with EU or ECHR standards)? How are they balanced against other rights, values or interests?

Question 3 – Interpretation and application

- ✓ How is this right interpreted and applied by courts? Are there any deficiencies in this regard?

On the doctrinal basis outlined above, the old HCC extended the scope of property protection to all kinds of material interests to which a particular subject has a “doubtless entitlement.” This means especially a relation to either one’s own property (wealth) or work which creates value. Social security benefits,⁵⁰ if they are based on

⁴⁷E.g. 61/2006. (XI. 15.) AB határozat.

⁴⁸148/2010. (X. 28.) AB határozat.

⁴⁹Salát-Sonnevend, op. cit.

⁵⁰ The HCC has been criticized for its activist judgments in relation to the 1995 austerity package which affected redistributive systems. In English, see András Sajó, “How the Rule of Law Killed Hungarian Welfare Reform” *East European Constitutional Review* 5 (1), 31-41, András Sajó, “Social Welfare Schemes and Constitutional Adjudication in Hungary” in Jiří Přibáň and James Young eds., *The Rule of Law in Central Europe: The Reconstruction of Legality, Constitutionalism and Civil Society in the Post-Communist Countries* (Ashgate, 1999).

insurance,⁵¹ even if not totally market-based, such as the pension,⁵² are also protected by the property right. Similarly, permits required to practice professions, e.g. architects⁵³ or public notaries,⁵⁴ the so called “practice right” of the family doctor, or concessions qualify as property. Non-insurance based social benefits – i.e. where there is no consideration - do however not fall under property right protection, but are subject to the requirement flowing from the rule of law, i.e. legal certainty, whereby a transitional period is required to allow preparation for the change.⁵⁵ (It can be added, that, in the earlier jurisprudence, after such transitional period is over, the right to human dignity kicks in, as that was – earlier – interpreted to oblige the state to provide for minimum subsistence unconditionally.⁵⁶)

The legislator is entitled, although not required, to compensate for past injustices (e.g. killings or expropriations) by way of ex gratia benefits. These ex gratia benefits do not create a property right. In the selection of the groups of persons to be compensated, the legislator is bound by simple reasonableness standards and not a proportionality test,⁵⁷ this means that as long as the compensated group is not arbitrarily selected, the scheme is constitutional.

A specific question of property protection relates to legitimate expectations. In this regard, the old HCC ruled for instance that maternity benefits cannot be curtailed unless they enter into force more than 9 months (the period of the pregnancy) later than the publication of the law.⁵⁸

In deviation from this earlier, in some segments even quite activist property jurisprudence, the HCC in recent years – especially since members elected solely with the votes of the governing party became the majority – regularly finds no unconstitutionality in cases which earlier could have been easily found violating property rights and/or legitimate expectations or rule of law standards.

⁵¹ 43/1995. (VI. 30.) AB határozat, Orsolya Salát-Pál Sonnevend, “Commentary to Art. 13 [the right to property]”, in András Jakab ed., *Az Alkotmány kommentárja [Commentary of the Constitution]* (Századvég Kiadó, Budapest, 2009), 451-485, 468, [54].

⁵² 56/1995. (IX. 15.) AB határozat.

⁵³ 40/1997. (VII. 1.) AB határozat.

⁵⁴ 27/1999. (IX. 15.) AB határozat.

⁵⁵ 43/1995. (VI. 30.) AB határozat, 56/1995. (IX. 15.) AB határozat.

⁵⁶ 32/1998. (VI. 25.) AB határozat.

⁵⁷ This can be quite dysfunctional for coming into terms with the past, see András Sajó, “*Legal Consequences of Past Collective Wrongdoing after Communism*” 6 German Law Journal 425-437 (2005), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=566>

⁵⁸ 43/1995. (VI. 30.) AB határozat.

When in 2010, still in its balanced composition, the Court found that a 98% retroactive tax was unconstitutional;⁵⁹ the government in turn introduced a limitation of the HCC competence to review budget and tax legislation (discussed under jurisdictional issues). While the annulment of the 98 % tax was the public reason for the curtailment of competence, the move was arguably necessary for making room for the nationalization of the mandatory private pension funds which helped balance the budget as required by the EU.⁶⁰ Even afterwards, however, in 2011, the HCC once again annulled a reformed 98 % tax, this time for violation of human dignity, as that was a ground on which it was allowed to review the legislation after the curbing of its competences.⁶¹ Since then, the ECtHR also found violation of the right to property under the ECHR with regard to the 98 % tax in three repetitive cases.⁶²

In 2013, the HCC found that the government imposed early repayment scheme, by which banks were obliged to allow debtors to pay remaining loans taken in foreign currency at a fixed exchange rate in one sum, did not violate property rights (legitimate expectations) of banks; the HCC argued that the significant drop in the value of the Hungarian forint vis-à-vis the Swiss franc in which many were indebted had not been foreseeable, thereby not creating a property-like legitimate expectation on the part of banks.⁶³ While this case is likely to have been decided similarly under the previous jurisprudence, the following cases testify to a drastic turn-away from that jurisprudence.

Such is another 2013 case involving gambling machines. A law which provided for the immediate termination of the operation of gambling machines elsewhere than in casinos was found constitutional by a divided Constitutional Court. The majority found no property issue involved as the legislator is free to regulate the gambling market (the dissenting judges understood the measure as interfering with acquired rights). The fact that the legislator did not provide any transitional period in which the operators could prepare for the termination of the source of their living could have been “problematic” from the point of view of legal certainty. It was however found justified for reasons of urgency due to national security concerns (which remained unrevealed by

⁵⁹ 184/2010. (X. 28.) AB határozat.

⁶⁰ See Marie-Pierre Granger, *All sisters in tears – my right to be treated equally badly*, January 19, 2015, <http://beucitizen.eu/all-sisters-in-tears-my-right-to-be-treated-equally-badly/>.

⁶¹ 37/2011. (V. 10.) AB határozat.

⁶² N.K.M. v. Hungary, Application No. 66529/11, Judgment of 14 May 2013, Gáll v. Hungary, Application No. 49570/11, Judgment of 25 June 2013, R.Sz. v. Hungary, Application No. 41838/11, Judgment of 2 July 2013.

⁶³ 3048/2013. (II. 28.) AB határozat.

government...).⁶⁴ This is a wholly unusual argumentation, as it basically does not apply any constitutional test. The case came before the CJEU which applied a proportionality test: it declared that while the protection against gambling addiction and criminal activities might be a legitimate aim, the restrictions must pursue those objectives in a consistent and systematic manner (which the issuing of new casino operating licences in 2014 contradict). The CJEU also stated that the reregulation might well violate the principles of legal certainty and the protection of legitimate expectations and the right to property of amusement arcade operators. When the national legislature revokes licences that allow their holders to exercise an economic activity, it must provide a reasonable compensation system or a transitional period of sufficient length to enable that holder to adapt.⁶⁵ In fact, these are exactly the principles and considerations which would have governed the decision of the Constitutional Court under its previous jurisprudence.

The tobacco retail sale was also recently re-regulated. All previously held permits were revoked, and new permits issued under questionable circumstances and based on unclear criteria.⁶⁶ This measure deprived many people from their main source of income. The ombudsman (who only issues recommendations) found that the re-regulation in itself did not violate either the right to property or the freedom of enterprise, as their limitation is justified by the state interest in protecting children. However, he considered that the procedure for issuing the concession was capable of violating the right to fair procedure.⁶⁷ The HCC found otherwise,⁶⁸ basically finding that the regulation was constitutional because it served the legitimate interest of protecting the health of the youth. Thus, the HCC has omitted the second step of constitutional review, i.e. it did not examine whether the interference was necessary and proportionate to the aim pursued. In contrast to the HCC, the ECtHR found the tobacco retail scheme violated the right to property ("peaceful enjoyment of possessions", Art. 1 Protocol 1 ECHR), as "the measure did not offer a realistic prospect to continue the possession because the process of granting of new concessions was verging on

⁶⁴26/2013. (X. 3.) AB határozat.

⁶⁵C-98/14, *Berlington v. Hungary*, Judgment of 11 June 2015.

⁶⁶ The conditions under which the new retail shop would operate were not clearly defined (eg what kind of products they could sell, margin levels, etc); there were serious allegations that licences were attributed based on political affiliation (only to supporters of the governmental party), etc.

⁶⁷ Report of the ombudsman in case AJB-3466/2013, <http://www.ajbh.hu/documents/10180/111959/201303466.pdf>

⁶⁸3194/2014. (VII. 15.) AB határozat.

arbitrariness.”⁶⁹This is a reason which applies to every single concession. Still, of course, in the Strasbourg system, this does not mean that in any one case, not even in that of the applicant, the new concession will be revoked and a new system introduced.

A further strain of massive reregulation affected service pensions and early retirement schemes of civil/public servants. A 2011 law eliminated the service pension in 3 weeks, transforming it into service allowance, which means that it will be subject to personal income tax, and if that tax changes, the allowance changes as well. The reregulation also involved that the affected persons (in the law enforcement, fire brigades, army members, etc.) lost their status of pensioner, and accompanying benefits. The HCC rejected the complaints,⁷⁰ arguing basically that such modifications were necessary to counter the economic crisis and the changed circumstances, and are necessary for the reform of the pension system. The majority simply does not discuss earlier case law related to acquired rights and legitimate expectations (see above under scope of protection and limits), but only echoes government arguments. Dissenters would apply the previous jurisprudence and find violation of rule of law requirements (eg to provide for a transitory period).

In a somewhat reticent decision, the ECtHR declared cases based on this law inadmissible.⁷¹ The Court dismissed that the entitlement to a pension, and not to an allowance, can be seen as ‘legitimate expectation’ for the purposes of the Convention, while it still accepted that there was interference in the right to property. It however found that the legislation struck a fair balance between the interest of the community and the persons affected were not obliged to bear an individual excessive burden. The Court has not replied to the complaint relating to the fact whether pensions which were guaranteed in law specifically and explicitly independent of any future change in legislation (i.e. fixed pensions) can be later still taken away by the stroke of a pen. The Court has not dealt with the issue of discrimination in any serious detail either, even though the complaint raised that, what is more, in two regards. The applicants felt discriminated because it was only the service pensioners, and not general pensioners who were singled out despite their entitlement being based on essentially similar provisions (mandatory pension payments throughout their career, and the entitlement to the pension set in law). Secondly, the applicants also disputed that the loss of status

⁶⁹Vékony v. Hungary, Application No. 65681/13, Judgment of 13 January 2015.

⁷⁰23/2013. (IX. 25.) AB határozat.

⁷¹Markovics et al. v. Hungary, Application No. 77575/11, Decision of inadmissibility of 24 June 2014.

only applied to those born after 1955, but the Court found it was justified by the need to rationalize the pension system.⁷²

In contrast, the ECtHR found the right to property was violated in another recent case⁷³ against Hungary on social welfare benefits, which was again part of a massive overhaul of the previous system, but where the deprivation started already in 2007. This time legislative changes deprived persons living with disability from their disability pension, even though there was no change in the applicant's health. The majority of the ECtHR found that the legislatively once granted and in fact acquired right to a disability pension created a possession in the sense of Art. 1 Protocol 1 of the Convention, and its total loss in result of retrospective legislative changes, without any change in the health condition of applicant, amounted to an excessive and disproportionate individual burden, contrary to the Convention.

Question 4 – Case law protecting civil rights

When the right in question is recognised through case law, how are they enforced? Is there a relevant doctrine of precedent? Can violation of judge-made principle be invoked in courts? Must judges bring up of their own motion civil rights violations? Etc.

In the area of property rights, closest to a judicially constructed "right" appears to be the protection of legitimate expectations as explained above. This is a principle derived from the principle of the rule of law, especially of its component "legal certainty". Judges can rely on this, and it can be invoked before (ordinary) courts. The problem is, of course, that the Constitutional Court's competence to review tax and budget laws is curbed exactly in this regard: it cannot invoke either property or rule of law when reviewing budget legislation. This limitation basically removes constitutional protection against the most egregious sorts of governmental property limitation. See in detail below under jurisdictional issues.

⁷²See the analysis of the Hungarian Helsinki Committee, <http://helsinki.hu/hezagos-strasbourggi-dontes-a-szolgalati-nyugdijrol>.

⁷³ BÉLÁNÉ NAGY v. HUNGARY, *Application no. 53080/13*, Judgment of 10 February 2010.

Question 5 – Judicial enforcement institutions and bodies

- ✓ Which institutions are responsible for the enforcement of this right in your country? Please expose here the structure of the judicial system of the country under study. Indicate, in particular, whether the country under study has a constitutional court or equivalent body. If not, how is compliance with international, European (including EU) and national (constitutional) civil rights guaranteed. Explain the role of other relevant bodies (eg ordinary courts, specialised courts, etc.)

Hungary follows the continental system of constitutional review, ie the constitutional court is separated from the ordinary judiciary and it is only the constitutional court which can annul laws for unconstitutionality.

The ordinary court system's consists of five sorts of courts.

1. The Kúria is at the top of the hierarchy, and functions as the supreme court.
The Kúria is competent to
 - (i) hear appeals from general courts and general courts of appeals in cases specified by law,
 - (ii) hear motions for review ("supervision") which is a review of legal faults (no fact-finding),
 - (iii) review decrees of local self-governments for their compatibility with higher ranking norms,
 - (iv) issue decisions unifying the law (jogegységi határozat) in case lower courts' interpretation contradicts each other
 - (v) issue decisions of legal principle and judgments of legal principle.
2. There are five "general courts of appeals" (ítélőtábla) in the country (in Budapest, Debrecen, Győr, Pécs, and Szeged). These act as appeals courts.
3. There are 20 general courts or tribunals (törvényszék), which decide – as specified by law -- either as first instance or as second instance (from the district courts).

4. There are district courts (járásbíróság) and labour and administrative courts, which decide as first instance in most cases.

- ✓ How are these institutions regulated at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other)

The court system is regulated in a cardinal law,⁷⁴ ie. a law which can only be amended by the two-third of MPs present. It is thus regulated in rather high ranking norms. Still, compared with the 1989 constitution, the 2012 Fundamental Law was criticized for not having included in its text a provision of the basic structure of the court system.

The Constitutional Court is also regulated in a cardinal law.⁷⁵

- ✓ Is the independence of these institutions and organs guaranteed? If so, how? Have there been concerns related to the independence of the judiciary in the country of study, which could undermine the effective enforcement of the selected civil right? Please indicate the different modes and modalities of enforcement of civil right carried out by the different judicial institutions involved.

Formally, independence is guaranteed in both the constitution and relevant laws in that it is postulated. Secondly, there are institutional guarantees of independence. The enhanced majority required for the adoption of the laws in question is one such institutional factor – however, in practice the governing party has had the required majority, and, thus, just as with the constitution, the laws affecting the judiciary etc. were adopted solely with the votes of the governing parties, which undermines their independence (at least the appearance of independence).

The principle of independence and impartiality of justice have suffered several other blows in the last years in Hungary as well, mostly on the occasion of the reorganization of the judiciary.⁷⁶

⁷⁴Act CLXI/2011 on the organization and administration of courts, Act CLXII/2011 on the Legal Status and Remuneration of Judges.

⁷⁵Act CLI/2011 on the Constitutional Court.

The first (which actually contributed to the second) relates to the 2006 riots and protest. In 2011, a law⁷⁷ was introduced which nullified all judicial rulings which brought a condemnation for certain public order offences in relation to the 2006 riots solely on the basis of testimonies of police officers or police reports (so called “nullification act”). 20 judges referred the law to the HCC, claiming that the overwriting of *res iudicata* by the nullification act violated, *inter alia*, the independence of judiciary. The HCC found in a divided opinion that it did not.⁷⁸

A further problematic issue which might undermine the appearance of an independent judiciary, was the premature removal of the chief justice of the Supreme Court (who had previously been a judge of the ECtHR with regard to Hungary for 16 years). András Baka was removed for his critical views on government policy (including the nullification act mentioned above, and the early retirement scheme discussed below) affecting the judiciary, which he was statutorily mandated to voice. This was found violating Art. 10, and also Art. 6 (1) ECHR, for he was denied the right to a court.⁷⁹ Nonetheless, the ECtHR obviously could not pronounce on, let alone provide a remedy for the effect of the removal on the overall independence of judiciary in Hungary.

Another element of the reorganization reaching a (different) European court was the sudden decrease of mandatory retirement age of judges from 70 to 62, thus removing hundreds of mostly senior judges, also acclaimed international attention. After the HCC found it unconstitutional,⁸⁰ the ECJ also found it violated EU law, notably Council Directive 2000/78/EC (equal treatment in employment) as it realized a discrimination based on age.⁸¹ Though as a result of these two findings of illegality, exempted judges can request their reinstatement, nonetheless not to their previous (often leading) position.

Finally, perhaps the element of the reorganization mostly undermining at least the appearance of independent judiciary was the saga of the case reassignment or transfer powers. The HCC struck down a 2011 provision entitling the Supreme Prosecutor in

⁷⁶ See Act CLXI/2011 on the Organisation and Administration of the Courts, and Act CLXII/2011 on the Legal Status and Remuneration of Judges, and the (highly critical) opinions by the Venice Commission: Opinion on the Legal Status and Remuneration of Judges Act (Act CLXII of 2011) and the Organisation and Administration of the Courts Act (Act CLXI of 2011), adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012, CDL-AD(2012)001).

⁷⁷Act XVI/2011.

⁷⁸24/2013. (X. 4.) AB határozat

⁷⁹Baka v. Hungary, Application No. 20261/12, judgment of 24 May 2014.

⁸⁰33/2012. (VII. 16.) AB határozat.

⁸¹ Case C-286/12, judgment of the CJEU of 6 November 2012.

some cases to select the court for violation of the right to an independent judiciary under the 1989 constitution.⁸² Still, the same power was given to the President of the (newly established) National Judicial Office, which -- together with other extremely wide-ranging powers centralized in the hand of this single person elected by two-third -- was repeatedly strongly criticized by the Venice Commission.⁸³ The transferral powers were even put into the text of the Fundamental Law by the Fourth Amendment. After repeated criticism,⁸⁴ the power of transfer of cases was revoked by the Fifth Amendment.

As to the Constitutional Court, other problems arise. Constitutional Court judges have always been elected by the two-third majority of Parliament. Before 2010, nominations had been made in a committee on the basis of parity, ie governing and opposition parties were forced to agree on the nominee (who then has to acquire the two third vote in the plenary). In 2010 however, this nomination rule was abolished and changed to a quantitative two-third rule, ie if one party has two-third majority, they can nominate and elect constitutional court judges solely on their own. This is what happened 8 times since 2010, also because the number of judges was increased from 11 to 15.

A new study by human rights NGOs show that the judges nominated and elected solely by the governing parties do tend to rule in favour of the government.⁸⁵ This is very visible in the property jurisprudence as well.

⁸²166/2011. (XII. 20.) AB határozat.

⁸³ CDL-AD(2012)001-e, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), and CDL-AD(2012)020-e Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012), [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)020-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)020-e).

⁸⁴ OPINION ON THE FOURTH AMENDMENT TO THE FUNDAMENTAL LAW OF HUNGARY Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013) CDL-AD(2013)012 [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)012-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)012-e)

⁸⁵ Eotvos Karoly Institute, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, *Egypárti alkotmánybírák a kétharmad szolgálatában* http://helsinki.hu/wp-content/uploads/EKINT_TASZ_MHB_Egyparti_alkotmanybirok_2015.pdf, see also Gábor Halmai, In Memoriam magyar alkotmánybíráskodás, *Fundamentum*, 2014/1-2, 30, and Zoltán Sente, *The Decline of Constitutional Review in Hungary: Towards a Partisan Constitutional Court?*

In: Zoltán Sente, Fanni Mandák, Zsuzsanna Fejes (eds.) *Challenges and Pitfalls in the Recent Hungarian Constitutional Development: Discussing the New Fundamental Law of Hungary* (Paris: Éditions L'Harmattan, 2015) 185-210.

- ✓ What are currently the main judicial procedures available to sanction, remedy or compensate for violations of the selected civil right (eg judicial review, damages, emergency measures, etc.). Indicate for each of them important information related in particular to time limits, costs, legal aid availability, length of proceedings, type of actions (eg collective action, class action), admissibility criteria (including standing conditions, delays, etc) as well as merits conditions (acceptable grounds, substantive conditions, degree of control, evidential aspects, burden of proof, etc.). What are the consequences of successful or unsuccessful legal actions under each of the procedures (annulment, compensation, sanctions, etc.)

Civil and administrative procedures

Administrative decisions which affect the merit of a case can be appealed at the second instance administrative authority.⁸⁶ Other decisions (e.g. of a procedural or executive nature) can either be appealed on their own (such as decisions on paying duties), or together with the appeal on the merits.

Against every final administrative decision one can seek judicial review. Judicial review is exercised as a cassatory jurisdiction, except in cases where the law allows for the court to settle the issue finally as to the merits (reformatory jurisdiction – in these cases the court issues the decision instead of the administrative authority).⁸⁷

The administration thus operates all in all in an adequate legal framework.⁸⁸

In the ordinary court system, normally there is again a two-instance procedure (first instance, then appeal on second instance, with a final decision (res iudicata).

Against the “final” decision, a request for “revision” can be initiated at the Kúria. Supervision can only be initiated for legal fault (no fault in fact-finding), and the Kúria either remands the case (cassation), or decides on the basis of available documents (reformatory jurisdiction).⁸⁹

⁸⁶ Sections 96-99 of Act CXL/2004 on Administrative Procedure.

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Section 339. (2) of Act III/1952 on the Code of Civil Procedure.

⁸⁸ Anita Paulovics, “Guarantees of The Legality Of Administration And Administrative Procedure In Hungary”, *DANUBE Law and Economics Review* 2 (2011), 43.

⁸⁹Section 339. (2) of Act III/1952 on the Code of Civil Procedure.

As the revision is an “extraordinary remedy”, with only reaching as to the law, the ECtHR does not require its exhaustion (and does not consider it an effective remedy).

Decisions on the unity of law

The Kúria (earlier Supreme Court), can issue so-called ‘decision on the unity of law’ (‘jogegységi határozat’) in which the highest ordinary court declares which of the competing interpretations of a given legal rule is to be adopted. This is important for equality before the law to prevail in the country. If the resolution by the Kúria is not conform to the interpretation of the Constitutional Court, the latter has the final say, under both the old and new constitution.

Constitutional review

Under the FL, since 1 January 2012, the HCC has a new competence in that it can review and annul ordinary court decisions under the new (so-called “real”) constitutional complaint mechanism. Earlier, it could only annul the underlying legal norm if it itself was unconstitutional, and could only step up against the unconstitutional interpretation of an in itself constitution-conform legal norm if the interpretation was so settled – generally petrified in practice -- that it could be considered “living law” (see analogous doctrine of “diritto vivente”). Thus, no constitutional remedy was open for cases when ordinary courts gave a legal norm an unconstitutional interpretation, unless the norm itself was unconstitutional. Under the FL, complaint is possible also against an alleged unconstitutional interpretation or application of a law (which is in itself not unconstitutional). Such a complaint comes from a private person party to a legal proceeding. The interpretation of the admissibility criteria in this new competence are however widely criticized for being narrow, thus not, or not necessarily providing a suitable remedy for fundamental rights violations.⁹⁰

Apart from parties to a dispute, ordinary courts are obliged to suspend proceedings and refer matters to the HCC if they perceive that applicable laws are unconstitutional. While ordinary courts traditionally hesitate to turn to the Constitutional Court, in some cases it still happens.

⁹⁰See, eg, Bernadette Somody, Újmagyar alkotmánybírászkodás, Fundamentum, 2014/1-2, 77, Beatrix Vissy, Megkötözött szabad kezek, Fundamentum, 2014/1-2, 81.

Furthermore, the Government, a quarter of MPs, the president of the Kúria, the general attorney, and the ombudsman can request abstract a posteriori constitutional control if they perceive any unconstitutionality (Art. 24 (2) e)). The condition of a “quarter of MPs” means in the previous (in which the rule was drafted....) and current parliamentary term that the democratic opposition parties would need to agree with the extreme right wing Jobbik party on such an initiation. This is politically and morally hardly imaginable, thus this power of the opposition is practically without effect. All the rest of those entitled were put into their position solely by the votes of the two-third majority of the governing parties (except for the government itself, of course). The previous ombudsman who was quite active in turning to the HCC, was not reelected upon termination of his mandate. The new ombudsman initiated constitutional review in only a few instances.

Length of proceedings

Judicial procedures are too long in Hungary, manifest in several condemnations under Art 6 by the ECHR. This was the reason for the reorganisation of the judiciary, which, however, might have turned into a pretext for the occupation of the high levels of judiciary by people close to the government or the governing party (see above).

Civil law remedies

In civil law, two main avenues come into play.

1. The general civil law (tort) liability arises in case of wrongfully caused damage. Under general tort liability, in Hungary, any legal subject, including the state is liable to pay compensation for damages occurred by violation of civil rights according, including if the violation occurred by way of legislation.⁹¹ Note however that there is no rule according to which the violation of civil rights in itself amounts to moral damage.
2. The new Civil Code (2013) allows for so-called Schmerzensgeld-type compensation for violation of personality rights.⁹² This means that the claimant only needs to prove violation of the personality right, but not the actual harm.

⁹¹ 1/2014 decision in principle, <http://www.lb.hu/hu/elvdont/12014-szamu-polgari-elvi-dontes>

⁹² Act V/2013 on the Civil Code, § 2:52.

The sum of the damages is decided by the judge with regard to all circumstances of the case. Personality rights are rights related to human dignity, and, thus, their exact scope is unclear and subject to change. The Code lists *only as examples* the following ones:

Section 2:43 [Specific personality rights]⁹³ The following, in particular, shall be construed as violation of personality rights: a) any violation of life, bodily integrity or health; b) any violation of personal liberty or privacy, including trespassing; c) discrimination; d) any breach of integrity, defamation; e) any violation of the right to protection of privacy and personal data; f) any violation of the right to a name; g) any breach of the right to facial likeness and recorded voice.

While the property rights are not personality rights, personality rights have been construed at the example of property rights (*in rem*). In some cases, however, property rights violations might be construed or closely related to personality rights violations, and, thus, remedies for the latter might serve as remedies for the former as well.

While the special protection of personality rights (going back to well before 2010, under slightly different rules) seems to be a welcome development from the perspective of civil rights, it has also been used against journalists by politicians.

If the damages occurred in relation to a crime, the damages can be claimed in the criminal procedure as well.⁹⁴

Temporary measures:

In civil procedure, the court may grant a temporary measure if that is necessary for the prevention of directly threatening damage; or for maintaining the condition which is the reason for the litigation; or for protecting the right of the applicant meriting special protection – and the detriment caused by the measure does not outdo the benefits.⁹⁵

The court decides on the temporary measure in expedited procedure.⁹⁶

⁹³Translation by the ILO:

https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/96512/114273/F720272867/Civil_Code.pdf

⁹⁴Section 54 of Act XIX/1998 on Criminal Procedure.

⁹⁵Section 156 of Act III/1952 on the Code on Civil Procedure.

⁹⁶*Id.*

In administrative procedure, the authority is obliged to ex officio take a temporary measure if otherwise the occurrence of damage, violation of personality rights or danger cannot be averted.⁹⁷

Public interest actions regarding non-discrimination

The Equal Treatment Act 2003 authorizes NGOs working on the field to launch procedures in their own name. However, as it was pointed out above, they can only take the case within the ordinary judiciary, as the Constitutional Court found that they did not have independent standing in the constitutional complaint procedure.

- ✓ Is the judiciary effective and/or trusted to protect civil rights, or do people turn to alternative modes of action in order to protect these rights (ie demonstration, media involvement, social network activities, lobbying, etc)

During the regime change, the ordinary judiciary was considered less able and less willing to protect civil rights, and, in general, to operate in a system upholding constitutional values and human rights. Under the 1989 constitution, there was an immense debate on the ways the constitution could penetrate into the entirety of the legal system (especially in private law litigation, the constitution was understood not to have a direct effect). Judges in general were of the view that the constitution, let alone international or European human rights jurisprudence is not directly applicable (even if the underlying legal rules are binding), but their job is to apply the legal norms of ordinary laws and regulations. Judges were also considered to have been socialized into the Socialist positivist legal thinking which would make them distrustful of constitutional reasoning. In contrast, the Constitutional Court was established with the purpose of creating anew an institution, packed with a few well-selected professors, who can cleanse the postsocialist legal system from the unconstitutional elements.

However, since then, 25 years passed, and ordinary courts slowly started to grow up for the challenge. In addition, the constitutional destruction ongoing since 2010 have

⁹⁷Section 22 (3) of Act CXL/2004 on the Code of Administrative Procedure.

finally taken down the Constitutional Court, which now rubberstamps government decisions, although some notable exceptions remain.⁹⁸

In these changed circumstances, and at least in some areas of law, ordinary courts appear in a better light. As the former (removed) chief justice of the Supreme Court argued, even the introduction of the “real” constitutional complaint, the only novelty in the new system which was positively received in legal academia, is perhaps an attempt to place the ordinary judiciary under the control of the Constitutional Court, this latter being much easier to manipulate than the former.⁹⁹

In general, regarding severe inconsistencies and deficiencies of the constitutional text, it is not clear whether procedures and constitutional remedies ought to be improved at all, or rather ‘the less effect the Fundamental Law has, the better it is for fundamental rights.’

Please indicate particular weaknesses and deficiencies, or on the contrary, elements of good practice, which are worth highlighting in that they are likely to have a particular impact on the enforcement of civil rights in the EU.

Question 6 – Non-judicial enforcement institutions and bodies relevant for the enforcement of the selected civil right

- ✓ Are there non-judicial/administrative procedures available to enforce the selected right against public authorities or private actors involved in public policy activities (eg delivery of public services, quasi-regulatory bodies, etc.) ?
- ✓ Are there non-judicial procedures available to uphold these rights against private actors (eg employers, landlords, etc.)?

⁹⁸ See the study of the three human rights NGOs on the partiality of the majority of the Court: *Egypárti alkotmánybírák a kétharmad szolgálatában*http://helsinki.hu/wp-content/uploads/EKINT_TASZ_MHB_Egyparti_alkotmanybirok_2015.pdf, see also Gábor Halmai, In Memoriam Magyar alkotmánybíráskodás, *Fundamentum*, 2014/1-2, 30, and Zoltán Sente, *The Decline of Constitutional Review in Hungary: Towards a Partisan Constitutional Court?* In: Zoltán Sente, Fanni Mandák, Zsuzsanna Fejes (szerk.) *Challenges and Pitfalls in the Recent Hungarian Constitutional Development: Discussing the New Fundamental Law of Hungary* (Paris: Éditions L'Harmattan, 2015) 185-210.

⁹⁹ On the occasion of a book launch. The video is available here <http://www.ekint.org/ekint/ekint.head.page?nodeid=649#konyvbemutato>.

- ✓ Which organs, institutions, or bodies contribute to promoting and enforcing the selected civil right? (equality body, ombudsperson, governmental supervisory authorities, etc.)

The *ombudspersons* have traditionally been active and well-regarded in Hungary, and even after the restructuring after 2010, there remained important strengths in the system.

After 2010, the earlier system of four (“general”, minority rights, data protection, and environmental rights) independent ombudspersons was abolished. The minority and environmental rights ombudsman’s position was transformed into vice-ombudsmen, ie they were deprived of personnel and managing competences over the cases and enquiries. The previous “general ombudsman” became the only ombudsman, renamed commissioner for fundamental rights. Data protection suffered perhaps the strongest blow, because there the whole portfolio was taken out from the competence of the ombudsman’s office, and a new so-called “independent authority” (see below under freedom of information) was established. The previous “general ombudsman” continued his term as *the* ombudsman, and the ombudsman for minorities as vice-ombudsman for rights of “nationalities”, and the green ombudsman as vice-ombudsman for the rights of future generations. However, the green vice-ombudsman resigned after 8 months, citing deteriorating context for environmental protection.¹⁰⁰The new green vice-ombudsman elected afterwards unsurprisingly finds that the general context of environmental protection improved under the Fundamental Law.¹⁰¹ Unlike the new constitutional judges, his nomination was also supported by the opposition parties.

Since September 2013, a new ombudsman has been in office (supported in the hearing committees by some parts of the opposition, but then not getting other votes than from the governmental parties in the election). He appears to take less of an active stance, but no thorough study has been conducted on that yet.

- ✓ How are procedures before these bodies regulated at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations

¹⁰⁰http://hvg.hu/itthon/20120829_Nagyon_nagyon_borulato_vagyok_a_lemondot

¹⁰¹http://hvg.hu/itthon/20121104_Tetszik_az_alaptorveny_az_uj_zoldombudisma

and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?

The ombudsman's system is spelled out in the Fundamental Law and regulated in a law. The earlier requirement of an enhanced majority (two-third of MPs present, renamed cardinal law in the FL) was abolished.

- ✓ What is their respective mandate? Were/are there discussions as to expanding, or reducing their mandate?

The mandate of the ombudsman was reduced already in that data protection was taken away from their field of enquiry. As the new authority responsible for data protection is not independent, the previous level of data protection severely decreased in that it is currently without independent institutional supervision.

Naturally, the limitation of the constitutional court's competence also affects the mandate of the ombudsman, as he is not able to initiate constitutional review in the area affected by the limitation. *This especially applies to the right to property.*

Finally, the reduction¹⁰² in the number of staff which came together with the abolition of the independent four ombudspersons, and the centralisation of decision-making into the hands of one person naturally limited the reach of the activity of the ombudsman.

- ✓ What are their powers? (eg consultation, information-gathering, reporting, adjudication/decision-making, regulatory powers, etc)? Were there/are there discussions as to expanding, reducing their powers?

The formal powers of the ombudsman remained the same. The FL declares as follows:

The Commissioner for Fundamental Rights

Article 30 (1) The Commissioner for Fundamental Rights shall perform fundamental rights protection activities, his or her proceedings may be initiated by anyone.

¹⁰²The number of employees in the budget law decreased from 187 to 139 (which would primarily affect those working for the data protection ombudsman), but even that is not necessarily fully filled up, or there have been strong fluctuations in recent years since the transformation:
http://www.ajbh.hu/documents/10180/806018/foglalkoztatottak_osszes%C3%ADtett_adatai.pdf/c310f73e-4d53-4c75-8e6d-8fc15bd7fc6b,

(2) The Commissioner for Fundamental Rights shall inquire into any violations related to fundamental rights, that come to his or her knowledge, or have such violations inquired into, and shall initiate general or specific measures to remedy them.

(3) The Commissioner for Fundamental Rights and his or her deputies shall be elected for six years with the votes of two-thirds of the Members of the National Assembly. The deputies shall protect the interests of future generations and the rights of nationalities living in Hungary. The Commissioner for Fundamental Rights and his or her deputies may not be members of political parties or engage in political activities.

(4) The Commissioner for Fundamental Rights shall annually report to the National Assembly on his or her activities.

(5) The detailed rules for the Commissioner for Fundamental Rights and his or her deputies shall be laid down in an Act.

- ✓ How independent are they from government, parliament, stakeholders, others?
Please pay particular attention to powers of appointment, and termination of the mandate of actors, as well as the bodies' decision-making procedures?

Formally, the ombudsman is truly independent if there is no two-third governmental majority in Parliament, in that he is nominated by the President of the Republic, and elected by the two-third of the MPs, and cannot be removed except in cases of incompatibility and other reasons not involving arbitrary decisions. He reports annually to the Parliament, but bears no political responsibility (thus cannot be revoked).

The possibility of re-election for a second term however might weaken this independence, especially if combined with the two-third majority of one party ("you only need to please one side").

Máté Szabó, general ombudsman before 2010 argued for the one-ombudsman system, and, when it was introduced, he became the first to fill that position, although as a continuation of his previous term (he was elected in 2007 for six years as one ombudsman among the four, and in 2011 he became the one single ombudsman, in a new system he suggested).

Again unverifiable anecdotes from legal circles tell that when he learned that he would not be re-elected for a second term after 2013, he started to become activist and bomb the constitutional court with requests.

It is certain that he was largely invisible – apart from the inquiry into the 2006 demonstrations and riots – until 2012. In 2009, he became part of a scandal in that he said that “gipsy criminality” is a duly existing concept of criminology. After this, the three other ombudsmen reduced cooperation with him to a minimum necessary in protest, and the restructuring benefitting him came in this context. After 2012, under the new constitution, however, he became the only channel to the constitutional court, and he lived up to that important role. Thus, one might say, even if earlier he might have appeared to have had lost it, he certainly appears to have “regained” independence.

The data protection ombudsman was removed in violation of EU law, in that case, the violation of independence was established by the CJEU.

The green ombudsman, while first continuing as a degraded vice-ombudsman, left the office prematurely because he felt he lacked any chance to pressure government to withstand industrial lobby which undermines environmental protection.¹⁰³

The current ombudsman was not supported by the opposition parties because they felt he was too close to the governing parties (he was government commissioner for the recodification of the civil law, and delegated expert in relation to international treaties – not especially partisan political mandates).

Question 7 – Access to Justice

- ✓ Are access to justice rights (fair trial, due process, right to an effective remedy...) respected when it comes to the enforcement of the selected right? Are there particular problems in that respect. Please develop.

- ✓ Does the principle have a broad scope of application, or are there exceptions?

FL Article XXIV Right to impartial, fair, and timely process and treatment by authorities

(1) Everyone shall have the right to have his or her affairs handled impartially, fairly and

¹⁰³http://hvg.hu/itthon/20120829_Nagyon_nagyon_borulato_vagyok_a_lemondot.

within a reasonable time by the authorities. Authorities shall be obliged to give reasons for their decisions, as provided for by an Act.

(2) Everyone shall have the right to compensation for any damage unlawfully caused to him or her by the authorities in the performance of their duties, as provided for by an Act.

This provision echoes almost verbatim, though in an abbreviated form, Art. 41 of the Charter of Fundamental Rights of the European Union. As such, Art. XXIV belongs to the few provisions of the FL which merit acclaim and not critique. Art. XXIV is to be delineated from Art. XXVIII in that the latter specifically deals with criminal law guarantees, while the former covers all official processes and measures.

In recent relevant jurisprudence, this provision was interpreted to require that parliament give reasons about its decision on refusing to recognize a church (see above under Art. VII). The HCC attached particular importance to the requirement of reasoned decision because that is the only way to ascertain whether parliament respected its obligation to neutrality and equal treatment flowing from Art. XV (2) as well.¹⁰⁴

Article XXVIII Fair trial rights and other criminal law guarantees

(1) Everyone shall have the right to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act.

(2) No one shall be considered guilty until his or her criminal liability has been established by the final decision of a court.

(3) Persons subject to criminal proceedings shall have the right to defence at all stages of the proceedings. Defence counsels shall not be held liable for their opinion expressed while providing legal defence.

(4) No one shall be held guilty of or be punished for an act which at the time when it was committed did not constitute a criminal offence under Hungarian law or, within the scope specified in an international treaty or a legal act of the European Union, under the law of another State.

¹⁰⁴ 6/2013. (III. 1.) AB határozat.

(5) Paragraph (4) shall not prejudice the prosecution or conviction of any person for any act which, at the time when it was committed, was a criminal offence according to the generally recognised rules of international law.

(6) With the exception of extraordinary cases of legal remedy laid down in an Act, no one shall be prosecuted or convicted for a criminal offence for which he or she has already been finally acquitted or convicted in Hungary or, within the scope specified in an international treaty or a legal act of the European Union, in another State, as provided for by an Act.

(7) Everyone shall have the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests.

Fair trial rights have been at the core of Hungarian fundamental rights protection ever since the regime change. The previous constitution had some lacunae in this regard, but they were filled in by interpretation. For instance, the requirement of reasonable time, or the exception based on international law from *nulla poena/nullum crimen sine lege* were to be found in the jurisprudence only,¹⁰⁵ and the death penalty was also abolished by the HCC in a famous early ruling.¹⁰⁶

Art. XXVIII of the FL has in some regards improved the fair trial and criminal procedure guarantee, in others it has not.¹⁰⁷

Para. (1) contains the right to fair trial: the requirement of reasonable time, of impartial, and independent court established by law, and of a fair and public trial. It omits the previous constitution's proclamation of equality before the court, but that flows from the fairness requirement. These requirements apply to any procedure, be they criminal, private or administrative with no distinction.

Para. (2) spells out the presumption of innocence, and para. (3) the right to defence, though it does not mention legal aid. Para. (4) incorporates the *nullum crimen* principles (including openness to European and international law in this regard). It does not include 'nulla poena' in the sense that only such punishments can be inflicted which were duly legislated at the time of commitment of the crime, but that can be resolved in interpretation. The international law exception from domestic *nullum crimen* is now

¹⁰⁵53/1993. (X. 13.) AB határozat.

¹⁰⁶23/1990. (X. 31.) AB határozat.

¹⁰⁷ Zsolt Szomora, „Büntetőjogi garanciák az Alkotmányban és az Alaptörvényben”
In: Drinóczi Tímea, Jakab András (eds.), *Alkotmányozás Magyarországon 2010–2011.* Pázmány
Press, 2013. pp. 257-274.

included in para. (5). Para. (6) contains *ne bis in idem*, also taking into account international and European law. Para. (7) grants the right to remedy.

In practice, there are several problems with access to justice.

The first one concerns the legal aid scheme, which is ineffective. The main problems include the low fee granted to the lawyers (currently – after an increase in 2015 -- 5000 HUF,¹⁰⁸ ie around 16 euros per hour), who are often not reachable by the clients, or are otherwise less inclined to perform high quality legal aid.¹⁰⁹

Even in these circumstances, legal aid was not available in the procedure most important for the protection of civil rights, i.e. the constitutional complaint mechanism in front of the Constitutional Court, despite the fact that the new system made legal representation mandatory. The ombudsman turned to the Constitutional Court, which declared that that was unconstitutional for violating access to justice.¹¹⁰

In contrast, the Constitutional Court upheld another law which restricts the range of judicial decisions which must be rendered public, even in anonymized form. According to the law on civil procedure, the decision in cases of family status disputes, and in cases concerning state secrets, cannot be rendered public in any form. This is a serious issue because there are therefore areas where the law-seeking public cannot know what the prevailing legal interpretation is.¹¹¹ A piquanterie of the situation is that the law on judicial organization in contrast requires a proactive stance, according to which all judgments must be rendered public after anonymization. Still, the Constitutional Court's majority upheld the current legal situation.

There is a reform process on the civil procedure code in place currently in Hungary. An opposition party argues that the judicial procedures ought to be more public, also in order to avoid that procedures be dragged on for very long time.¹¹²

Question 8 – “Support structures”

¹⁰⁸See on the webpage of the Hungarian Bar Association: <http://www.bpugyvedikamara.hu/az-on-ugyvedje/kirendeles/>.

¹⁰⁹See the ombudsman's report AJB-3141/2012, September 2012.

¹¹⁰42/2012. (XII. 20.) AB határozat.

¹¹¹3056/2015. (III. 31.) AB határozat.

¹¹²http://jog.mandiner.hu/cikk/20150323_schiffer_tobb_nyilvanossagot_a_birosagi_eljarasoknak

- ✓ What is the role of NGO or other civil society actors (eg legal entrepreneurs, etc.) in bringing awareness about modes of enforcement of the selected civil right and in supporting actions to uphold the selected right using judicial or non-judicial means? Please give as many details as possible and identify the most relevant actors

The right to property is somewhat neglected by human rights NGOs which are otherwise very active in Hungary. Interestingly, property rights litigation is done more by individual attorneys.

- ✓ Does the organization and structure of the legal professions support the selected civil right claims? In particular, are there developed legal aid systems or pro bono schemes, or any other relevant support system which purports to enable public interest litigation aimed at promoting/supporting the development and effective enjoyment of the selected civil rights.

The legal aid scheme is ineffective. The main problems include the low fee granted to the lawyers (currently – after an increase in 2015 -- 5000 HUF,¹¹³ ie around 16 euros per hour), who are often not reachable by the clients, or are otherwise less inclined to perform high quality legal aid.¹¹⁴ Even in these circumstances, legal aid was not available in the procedure most important for the protection of civil rights, i.e. the constitutional complaint mechanism in front of the Constitutional Court, despite the fact that the new system made legal representation mandatory. The ombudsman turned to the Constitutional Court, which declared that that was unconstitutional for violating access to justice.¹¹⁵

- ✓ Does legal training contribute or undermine the effective protection of the selected civil rights? Please give evidence based on standard law-school and/or bar-exams curricula?

¹¹³See on the webpage of the Hungarian Bar Association: <http://www.bpugyvedikamara.hu/az-on-ugyvedje/kirendeles/>.

¹¹⁴See the ombudsman's report AJB-3141/2012, September 2012.

¹¹⁵ 42/2012. (XII. 20.) AB határozat.

The right to property is certainly very much embedded in legal training, which is strongly based on Roman law. In constitutional law courses, there is usually at least one session on the right to property. There might be elective courses offered on the right to property, or social-economic rights. ELTE University Social Sciences Faculty's MA in international human rights has a separate course on the right to property.

- ✓ What are the relationship between legal elites, political/governmental elites and civil society organizations? Do they contribute or undermine civil rights litigation and enforcement?

- ✓ What is the role played by academic scholars in promoting and supporting the effective enforcement of the selected civil rights?

Academic scholars do not play an important role in the promotion and support of civil rights in general, either as to the right to property in particular.

Question 9: Further practical barriers to the effective enjoyment of the selected civil rights

- ✓ Can you identify further barriers to an effective enjoyment of the selected civil rights in practice?
Please, include here (or repeat) particularly problematic barriers towards the enforcement of the selected civil rights (such as overbearing costs, judicial corruption, unavailability of legal aid in practice, lack of information about the rights, lack of expertise on the part of attorneys or other legal actors, intimidation towards people who want to enforce their rights, etc.)

Several NGOs confirmed to us on a public stakeholder event that there was an increasing trend of applicants requesting anonymity for fear of reprisals, and an increase in difficulty finding applicants for cases in strategic litigation.

Considering the many special taxes and other burdens for multinational companies and banks introduced in recent years, it is surprising that there is very little litigation on the part of big business either. They must opt to try negotiating in the back.

- ✓ Can you identify linguistic barriers, and/or barriers related to difference between legal and judicial culture and practices which could undermine the effective enforcement of the selected civil rights, in particular for mobile EU citizens/Third Country Nationals?

Please, make sure to point out right-, gender-, or minority-specific differences with regard to an effective enjoyment of the selected civil rights.

Question 10: Jurisdictional issues in practice

- ✓ Personal
 - Is there any de jure or de facto difference in the effective enjoyment of the selected civil rights in your country depending on the status of the person? (differences between natural and legal persons; citizens of that state; EU citizens; third country nationals; refugee; long term resident; family members; tourists; etc.)
- ✓ Territorial
 - Are there any de jure or de facto differences in the effective enjoyment of the selected civil rights in different parts, provinces or territories in your member states?
- ✓ Material
 - Are rights enforced differently in different *policy areas* (e.g. security exceptions, foreign policy exclusion, etc.)? Please, make an assessment on the basis of practice, too (eg more deference accorded in the balancing to the executive when it comes to these policy areas, though the legal

framework – what you described in the response to the D7.1. questionnaire — is itself not different from other areas).

The enjoyment of rights, especially property, are affected by Art. 37(4) about the limitation of the competence of HCC in reviewing tax and budget legislation, which – in a significant area – basically nullifies the protection given to property:

Art. 37 (4)

As long as the state debt exceeds half of the Gross Domestic Product, the Constitutional Court may, within its powers set out in Article 24(2)b) to e), review the Acts on the *central budget, the implementation of the central budget, central taxes, duties and contributions, customs duties and the central conditions for local taxes* for conformity with the Fundamental Law exclusively in connection with the *rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or the rights related to Hungarian citizenship*, and it may annul these Acts only for the violation of these rights. [...] ¹¹⁶

In the quote above, affected legislative topics are highlighted, which cannot be reviewed unless the initiator of constitutional review claims a violation of particular rights (similarly highlighted above). Unsurprisingly, you find neither the right to property, nor legal security on that list, exactly because these two used to be most frequent grounds on which the HCC invalidated such laws. ¹¹⁷

The HCC interprets provisions narrowing its competences in a narrow sense, and the exceptional grounds which allow for review broadly or extensively. ¹¹⁸ For instance it ruled that discrimination is a violation of human dignity, thus it can review fiscal laws for discrimination between natural persons ¹¹⁹ but not between legal persons. (This provision allows the government to levy extra taxes on banks, and the telecom business,

¹¹⁶ The paragraph continues by allowing the HCC to review such legislation for formal unconstitutionality: „The Constitutional Court shall have the unrestricted right to annul also Acts having the above subject matters, if the procedural requirements laid down in the Fundamental Law for the making and promulgation of those Acts have not been met.”

¹¹⁷ See above in relation to the scope of property.

¹¹⁸ 1/2011. (VI. 21.) számú Tü. állásfoglalás (as cited by Tiik)

¹¹⁹ 1132/D/2007. AB határozat.

but also the nationalization of private pension funds which led many such service providers close to economic collapse.)

✓ Temporal

- What is the temporal scope of protection in the enforcement of the selected civil rights? Are there any notorious or systematic deficiencies in how deadlines are determined or related to the length of proceedings in practice? Please, answer this question from the viewpoint of the practical application of the rules on deadlines for both initiating proceedings, reviews, etc., and for the court's duty, if there is any (next to Art 6 ECHR), to complete proceedings.

Please offer details as to how different rights are enforced to different *categories of persons in different location and policy contexts over time?*

Question 11: Systematic or notorious lack or deficient enforcement of the selected civil rights in the country under study?

Please, discuss here in detail any 'revealing' cases of weaknesses in the effective exercise of selected civil rights in your country. Try to identify the reasons (eg political influence, financial hurdles, lack of expertise, etc.). Feel free to either repeat here, or refer back to points elaborated upon in previous replies.

The problem in Hungary with regard to property lies first of all in the legislation: property protection is diminished at the level of legal regulation, which at the level of enforcement cannot be corrected, especially that the Constitutional Court is either formally prevented or is unwilling to keep up the standards elaborated under the 1989 constitution. The Constitutional Court abandoned constitutional review in many cases concerning the right to property: the Court leaves out the most important, because most analytical and most stringent phase of the constitutional test: the examination of the proportionality of the restriction.

Question 12: Good practices

- ✓ Please highlight legal frameworks, policies, instruments or practical tools which facilitate the effective exercise of the selected civil rights in the country under study.

2.2 Right 2: freedom of religion

Question 1 – Source of protection

- ✓ What are the sources of protection of each of this right? Do you see any problems in this regard? (eg the right is recognized only in a lower level norm, or multiple sources with different authority and meanings, etc.)

Freedom of religion has a provision in the text of the constitution, and the law on churches is adopted in a cardinal law, with two-third majority. Thus, there appears to be no problem with the ranking of the relevant norms. The problems become all the more visible when it comes to their content.

Question 2 – Scope and limits of the right (including balancing with other rights)

- ✓ What is the scope and what are the limits of this right? Are there any deficiencies in this regard (eg non-compliance with EU or ECHR standards)? How are they balanced against other rights, values or interests?

Article VII

(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to choose or change one's religion or other belief, and the freedom of everyone to manifest, abstain from manifesting, practise or teach his or her religion or other belief through religious acts, rites or otherwise, either individually or jointly with others, either in public or in private life.

(2)¹²⁰ People sharing the same principles of faith may, for the practice of their religion,

¹²⁰ Supplemented by Article 1(1) of the Fifth Amendment to the Fundamental Law (26 September 2013)

establish religious communities operating in the organisational form specified in a cardinal Act.

(3)¹²¹ The State and religious communities shall operate separately. Religious communities shall be autonomous.

(4)¹²² The State and religious communities may cooperate to achieve community goals. At the request of a religious community, the National Assembly shall decide on such cooperation. The religious communities participating in such cooperation shall operate as established (incorporated -- OS)¹²³ churches. The State shall provide specific privileges to established churches with regard to their participation in the fulfilment of tasks that serve to achieve community goals.

(5)¹²⁴ The common rules relating to religious communities, as well as the conditions of cooperation, the established churches and the detailed rules relating to established churches shall be laid down in a cardinal Act.

The new constitutional regulation of freedom of religion belongs to the most controversial issues of the FL, as it is visible from the long provision and its four amendments.

The first paragraph proclaiming the liberty right (*status negativus*) to freedom of thought, conscience and religion conforms to international standards. It is still different from the previous constitution in that it does not require anymore that the law regulating the individual liberty right be adopted by two-third of MPs present (i.e. in a "cardinal law").

As to the associational aspect (para. 2, 4, 5), recognition rules for churches and religious communities are still required to be regulated in a cardinal law. However, the procedure of recognition is entrenched in the constitution in a very unusual way: it makes parliament responsible for the recognition of churches. With the entering into force of the new constitution and new law¹²⁵ (which was adopted among scandalous circumstances including e.g. when the annulment of the previous bill by the HCC was

¹²¹ Supplemented by Article 1(1) of the Fifth Amendment to the Fundamental Law (26 September 2013)

¹²² Supplemented by Article 4(2) of the Fourth Amendment to the Fundamental Law (25 March 2013), amended by Article 1(1) of the Fifth Amendment to the Fundamental Law (26 September 2013).

¹²³ Legal literature and the ECHR uses the term incorporated when translating this provision.

¹²⁴ Supplemented by Article 1(2) of the Fifth Amendment to the Fundamental Law (26 September 2013).

¹²⁵ Act CCVI/2011 on freedom of conscience and religion, and the legal status of churches, religious congregations, and religious communities. English translation available on the Venice Commission's website [http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2012\)009-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2012)009-e).

leaked, it was withdrawn, and then re-introduced on 23 December, adopted on 31 December 2011, and entered into force on 1 January 2012¹²⁶), around 300 previously recognized churches lost their status and accompanying benefits. Some previously recognized churches which were listed in the appendix of the law continued to be recognized as churches, and others who wished to regain the status had to request parliament to grant it.

The Venice Commission strongly criticized the rules on churches in both its opinion on the church act, and on the Fourth Amendment to the FL.¹²⁷ The latter constitutional amendment was enacted because the HCC found the deregistration and the process of re-registration unconstitutional for violation of due process, right to remedy, equal treatment and freedom of religion.¹²⁸ Thus, this was again an instance of “superconstitutionalization.” Though the constitution-amending power might feel it circumvented the HCC this way, later the ECtHR also found the law – and now implicitly the FL itself – constituted a violation of Art. 9 and Art. 11 ECHR.¹²⁹

Question 3 – Interpretation and application

- ✓ How is this right interpreted and applied by courts? Are there any deficiencies in this regard?

As discussed in the previous section, in relation to religion, the Hungarian Constitutional Court – still sitting in its more or less balanced composition – found violation twice, but was twice overridden by the two-third majority. Since then, the ECtHR confirmed the violation of the Convention, too. Therefore, in this case, it is not so much the courts, but

¹²⁶A detailed description of the turbulent history of the adoption of the law is provided by Renáta Uitz, Hungary's New Constitution and Its New Law on Freedom of Religion and Churches: The Return of the Sovereign, 2012 *BYU L. Rev.* 931 (2012).

¹²⁷ CDL-AD(2012)004-e, Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), [http://www.venice.coe.int/webforms/documents/CDL-AD\(2012\)004-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2012)004-e.aspx),

¹²⁸ 6/2013. (III. 1.) AB határozat.

¹²⁹ Magyar Keresztény Mennonita Egyház And Others V. Hungary (Application nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12) judgment of 8 April 2014.

the legislator which deliberately diminishes the protection, thus again, the law which is to be enforced is in itself disregarding civil rights.

The ECtHR left it for the churches and government to agree on the remedy. Negotiations are still ongoing about the amount of compensation, and amendments to the church law is in preparation in the Ministry of Justice.¹³⁰ There were rumours that the legislator wants to move “in the German direction”, but it is not clarified what they mean by that (or that the previous system would not have been something which is closer to the German cooperative model than either non-establishment or laïcité). The six month deadline already passed.

Question 4 – Case law protecting civil rights

When the right in question is recognised through case law, how are they enforced? Is there a relevant doctrine of precedent? Can violation of judge-made principle be invoked in courts? Must judges bring up of their own motion civil rights violations? Etc.

There is no court-created right in relation to freedom of religion.

Question 5 – Judicial enforcement institutions and bodies

- ✓ Which institutions are responsible for the enforcement of this right in your country? Please expose here the structure of the judicial system of the country under study. Indicate, in particular, whether the country under study has a constitutional court or equivalent body. If not, how is compliance with international, European (including EU) and national (constitutional) civil rights guaranteed. Explain the role of other relevant bodies (eg ordinary courts, specialised courts, etc.)

- ✓ How are these institutions regulated at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other)

¹³⁰ <http://nol.hu/belfold/tobb-milliard-a-kisegyhaziaknak-1521747>

- ✓ Is the independence of these institutions and organs guaranteed? If so, how? Have there been concerns related to the independence of the judiciary in the country of study, which could undermine the effective enforcement of the selected civil right? Please indicate the different modes and modalities of enforcement of civil right carried out by the different judicial institutions involved.

- ✓ What are currently the main judicial procedures available to sanction, remedy or compensate for violations of the selected civil right (eg judicial review, damages, emergency measures, etc.). Indicate for each of them important information related in particular to time limits, costs, legal aid availability, length of proceedings, type of actions (eg collective action, class action), admissibility criteria (including standing conditions, delays, etc) as well as merits conditions (acceptable grounds, substantive conditions, degree of control, evidential aspects, burden of proof, etc.). What are the consequences of successful or unsuccessful legal actions under each of the procedures (annulment, compensation, sanctions, etc.)

- ✓ Is the judiciary effective and/or trusted to protect civil rights, or do people turn to alternative modes of action in order to protect these rights (ie demonstration, media involvement, social network activities, lobbying, etc)

Please indicate particular weaknesses and deficiencies, or on the contrary, elements of good practice, which are worth highlighting in that they are likely to have a particular impact on the enforcement of civil rights in the EU.

See above pages 37-47.

Question 6 – Non-judicial enforcement institutions and bodies relevant for the enforcement of the selected civil right

- ✓ Are there non-judicial/administrative procedures available to enforce the selected right against public authorities or private actors involved in public policy activities (eg delivery of public services, quasi-regulatory bodies, etc.)?
- ✓ Are there non-judicial procedures available to uphold these rights against private actors (eg employers, landlords, etc.)?
- ✓ Which organs, institutions, or bodies contribute to promoting and enforcing the selected civil right? (eg equality body, ombudsperson, governmental supervisory authorities, etc.)
- ✓ How are procedures before these bodies regulated at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?
- ✓ What is their respective mandate? Were/are there discussions as to expanding, or reducing their mandate?
- ✓ What are their powers? (eg consultation, information-gathering, reporting, adjudication/decision-making, regulatory powers, etc)? Were they/are there discussions as to expanding, reducing their powers?
- ✓ How independent are they from government, parliament, stakeholders, others? Please pay particular attention to powers of appointment, and termination of the mandate of actors, as well as the bodies' decision-making procedures?

See above pages 47-51.

Question 7 – Access to Justice

- ✓ Are access to justice rights (fair trial, due process, right to an effective remedy...) respected when it comes to the enforcement of the selected right? Are there particular problems in that respect. Please develop.

- ✓ Does the principle have a broad scope of application, or are there exceptions?

See above pages 51-54.

Question 8 – “Support structures”

- ✓ What is the role of NGO or other civil society actors (eg legal entrepreneurs, etc.) in bringing awareness about modes of enforcement of the selected civil right and in supporting actions to uphold the selected right using judicial or non-judicial means? Please give as many details as possible and identify the most relevant actors

Human rights NGOs are important to mention in the context of freedom of religion.

The general context of civil society actors is quite bad in Hungary. The government notably adopted a Putin-type rhetoric claiming NGOs are foreign agents. The rhetoric is sometimes acted upon: in 2014, as part of a general campaign against foreign funded NGO-s, the police raided a foundation responsible for distributing the funds of the Norway Grants, into which the Governmental Control Office started investigations, despite the lack of its competence, since money handled there is not Hungarian money. Months later the court found the raid was illegal. Typical for the state of affairs in Hungary that the internal minister considered that there is no need for the police to apologize for the illegal raid, and that the whole story only testifies to the strength of the rule of law in Hungary, where independent courts can have different legal views than police or prosecution.¹³¹

Despite the difficulties, NGOs play an extremely important role in the protection of civil rights, but they are very much underfinanced.

- ✓ Does the organization and structure of the legal professions support the selected civil right claims? In particular, are there developed legal aid systems or pro bono

¹³¹

http://index.hu/belfold/2015/03/09/pinter_szerint_a_rendori_torvenytelenseg_a_jogallam_bizonyiteka/

schemes, or any other relevant support system which purports to enable public interest litigation aimed at promoting/supporting the development and effective enjoyment of the selected civil rights.

- ✓ Does legal training contribute or undermine the effective protection of the selected civil rights? Please give evidence based on standard law-school and/or bar-exams curricula?

Freedom of religion is part of the general constitutional law curriculum in law schools. ELTE Social Sciences Faculty's MA program in international human rights has a separate course on freedom of religion.

- ✓ What are the relationship between legal elites, political/governmental elites and civil society organizations? Do they contribute or undermine civil rights litigation and enforcement?
- ✓ What is the role played by academic scholars in promoting and supporting the effective enforcement of the selected civil rights?

Question 9: Further practical barriers to the effective enjoyment of the selected civil rights

- ✓ Can you identify further barriers to an effective enjoyment of the selected civil rights in practice?

Please, include here (or repeat) particularly problematic barriers towards the enforcement of the selected civil rights (such as overbearing costs, judicial corruption, unavailability of legal aid in practice, lack of information about the rights, lack of expertise on the part of attorneys or other legal actors, intimidation towards people who want to enforce their rights, etc.)

- ✓ Can you identify linguistic barriers, and/or barriers related to difference between legal and judicial culture and practices which could undermine the effective enforcement of the selected civil rights, in particular for mobile EU citizens/Third Country Nationals?

Please, make sure to point out right-, gender-, or minority-specific differences with regard to an effective enjoyment of the selected civil rights.

Question 10: Jurisdictional issues in practice

- ✓ Personal
 - Is there any de jure or de facto difference in the effective enjoyment of the selected civil rights in your country depending on the status of the person? (differences between natural and legal persons; citizens of that state; EU citizens; third country nationals; refugee; long term resident; family members; tourists; etc.)
- ✓ Territorial
 - Are there any de jure or de facto differences in the effective enjoyment of the selected civil rights in different parts, provinces or territories in your member states?
- ✓ Material
 - Are rights enforced differently in different *policy areas* (e.g. security exceptions, foreign policy exclusion, etc.)? Please, make an assessment on the basis of practice, too (eg more deference accorded in the balancing to the executive when it comes to these policy areas, though the legal framework – what you described in the response to the D7.1. questionnaire — is itself not different from other areas).
- ✓ Temporal

- What is the temporal scope of protection in the enforcement of the selected civil rights? Are there any notorious or systematic deficiencies in how deadlines are determined or related to the length of proceedings in practice? Please, answer this question from the viewpoint of the practical application of the rules on deadlines for both initiating proceedings, reviews, etc., and for the court's duty, if there is any (next to Art 6 ECHR), to complete proceedings.

Please offer details as to how different rights are enforced to different *categories of persons in different location and policy contexts over time?*

Question 11: Systematic or notorious lack or deficient enforcement of the selected civil rights in the country under study?

Please, discuss here in detail any 'revealing' cases of weaknesses in the effective exercise of selected civil rights in your country. Try to identify the reasons (eg political influence, financial hurdles, lack of expertise, etc.). Feel free to either repeat here, or refer back to points elaborated upon in previous replies.

Question 12: Good practices

- ✓ Please highlight legal frameworks, policies, instruments or practical tools which facilitate the effective exercise of the selected civil rights in the country under study.

2.3 Right 3: freedom of information regarding data of public interest

Question 1 – Source of protection

- ✓ What are the sources of protection of each of this right? Do you see any problems in this regard? (eg the right is recognized only in a lower level norm, or multiple sources with different authority and meanings, etc.)

The Fundamental Law protects freedom of information in the following way:

Article VI

(2) Everyone shall have the right to the protection of his or her personal data, as well as to access and disseminate data of public interest.

(3) The application of the right to the protection of personal data and to access data of public interest shall be supervised by an independent authority established by a cardinal Act.

In 2011 a new law on data protection and freedom of information was adopted.¹³²

Question 2 – Scope and limits of the right (including balancing with other rights)

- ✓ What is the scope and what are the limits of this right? Are there any deficiencies in this regard (eg non-compliance with EU or ECHR standards)? How are they balanced against other rights, values or interests?

Freedom of information used to be a particularly important – and in the view of many, well-developed – field of human rights law in Hungary after the regime change. There was a separate ombudsman with strong competences overseeing data protection and freedom of information. The HCC also had a remarkable jurisprudence, starting with the annulment of the general personal number, which would allow the government to connect different databases, and thereby establish a full profile of anyone including their health and other data.¹³³ The Court in essence transposed the German doctrine¹³⁴ of informational self-determination. This means that the right to the protection of personal data goes beyond a simple protective right (*status negativus*), and extends to the protection of the “active side” (*status activus*) as well, thus being in fact about informational self-determination. Informational self-determination means first of all that personal data can be acquired, stored, disseminated (or in any way “handled”) in general only with the consent of the person. Exceptionally, a law ordering the collection and handling of personal data might be constitutional if it conforms to standards of

¹³² Act CXII/2011.

¹³³ 15/1991. (IV. 13.) AB határozat.

¹³⁴ E.g. BVerfGE 100, 313.

rights restriction, i.e. it is provided by law, and is necessary and proportionate to the pursuance of the protection of another right or constitutional value.¹³⁵

The collection and procession of personal data have to be transparent. Everyone has a right to control each step of such a process (thus also being informed of the steps), and withdraw consent at any time, requesting eventually the deletion of her personal data.¹³⁶

Furthermore, processing of personal data shall always be connected to a purpose (to which the data subject consents), i.e. data processing is only constitutional as long as the purpose originally consented to still applies. The Hungarian law implementing – the now defunct- ¹³⁷ Data Retention Directive (Directive 2006/24/EC) thus might be unconstitutional,¹³⁸ but the issue is pending since 2008¹³⁹ (for reasons also of the change of the competences and procedure of the HCC under the Fundamental Law).

Data which are not personal, are conceptualized as either data of public interest, or data public on grounds of public interest.

In line with the so-called “synoptic view”, freedom of information has two intertwined sides: the right to protection of personal data, with enhanced protection of special or sensitive data, and the freedom of information in the narrow sense, which guarantees the transparency of state life. The life of the private person is invisible or impenetrable for the government, while the government is transparent for the individuals. Exceptions on both side are to be judged in theory by the strictest standards of necessity and proportionality, and this was confirmed even by the new Constitutional Court.¹⁴⁰

There were plans to introduce a very severe limitation to freedom of information in 2013, when the scandal about the procedure of revoking and reissuing tobacco retail sale permits broke out (see on that above in the part related to the right to property). As usual, to avoid consultation requirements, it was put to Parliament in the form of an individual MP’s bill. The modification was to exclude the applicability of the law on

¹³⁵ Jóri, op. cit., 2185., referring to 15/1991. (IV. 13.) AB határozat.

¹³⁶ 15/1991. (IV. 13.) AB határozat.

¹³⁷ Judgment in Joined Cases C-293/12 and C-594/12, Digital Rights Ireland and Seitlinger and Others [2014] nyr.

¹³⁸ See <http://tasz.hu/en/data-protection/constitutional-complaint-filed-hclu-against-hungarian-telecom-data-retention>.

¹³⁹ See <http://tasz.hu/en/freedom-information/state-too-can-access-my-phone-records>.

¹⁴⁰ 21/2013. (VII. 19.) AB határozat.

freedom of information in areas where certain other laws apply, ie to nullify the protection given by the freedom of information law in areas the parliamentary majority finds any time convenient.¹⁴¹ This was to legalize the exclusion of freedom of information requests regarding the evaluation process of tobacco retail applications. The president of the republic exercised political veto, so the bill went back to reconsideration. (Political veto is a weak means in the hands of the president: Parliament can override it without enhanced majority. In fact, as the president in truth had concerns as to the constitutionality of the bill, he was supposed to turn to the Constitutional Court asking for preliminary norm control, which he failed to do.) Amidst strong protest from NGOs, including Transparency International, the bill was withdrawn. In 2015, a similarly problematic modification passed the Parliament (the President this time not even returning to Parliament, let alone Constitutional Court), but one-quarter of MPs, including Jobbik ones, turned to the Constitutional Court in March 2015.

The act on freedom of information differentiates between five sorts of data in Section 3:¹⁴²

Section 3.

...

2. 'personal data' shall mean data relating to the data subject, in particular by reference to the name and identification number of the data subject or one or more factors specific to his physical, physiological, mental, economic, cultural or social identity as well as conclusions drawn from the data in regard to the data subject;

3. 'special data' shall mean:

a) personal data revealing racial origin or nationality, political opinions and any affiliation with political parties, religious or philosophical beliefs or trade-union membership, and personal data concerning sex life,

b) personal data concerning health, pathological addictions, or criminal record;

¹⁴¹Zsuzsa Kerekes, "Az információszabadság kálváriája" [The calvary of freedom of information] *Fundamentum* 2013/2, 97-107.

¹⁴² A (not fully up-to-date) version of the law is available in English here naih.hu/files/Privacy_Act-CXII-of-2011_EN_201310.pdf.

4. 'criminal personal data' shall mean personal data relating to the data subject or that pertain to any prior criminal offense committed by the data subject and that is obtained by organizations authorized to conduct criminal proceedings or investigations or by penal institutions during or prior to criminal proceedings in connection with a crime or criminal proceedings;

5. 'data of public interest' shall mean information or data other than personal data, registered in any mode or form, controlled by the body or individual performing state or local government responsibilities, as well as other public tasks defined by legislation, concerning their activities or generated in the course of performing their public tasks, irrespective of the method or format in which it is recorded, its single or collective nature; in particular data concerning the scope of authority, competence, organisational structure, professional activities and the evaluation of such activities covering various aspects thereof, the type of data held and the regulations governing operations, as well as data concerning financial management and concluded contracts;

6. 'data public on grounds of public interest' shall mean any data, other than public information, that are prescribed by law to be published, made available or otherwise disclosed for the benefit of the general public.

Section 26 and 27 describe the scope and limits of the right (as translated on the webpage of the National Data Protection and Freedom of Information Authority):¹⁴³

Section 26

(1) Any person or body attending to statutory State or municipal government functions or performing other public duties provided for by the relevant legislation (hereinafter referred to collectively as "body with public service functions") shall allow free access to the data of public interest and data public on grounds of public interest under its control to any person, save where otherwise provided for in this Act.

(2) The name of the person undertaking tasks within the scope of responsibilities and authority of the body undertaking public duties, as well as their scope of responsibilities,

¹⁴³ http://www.naih.hu/files/Privacy_Act-CXII-of-2011_EN_201310.pdf

scope of work, executive mandate and other personal data relevant to the provision of their responsibilities to which access must be ensured by law qualify as data public on grounds of public interest. These data may be disseminated in compliance with the principle of purpose limitation. Provisions on the disclosure of data public on the grounds of public interest shall be regulated by Appendix 1 of this Act and the specific laws relating to the status of the person undertaking public duties.

(3) Unless otherwise prescribed by law, any data, other than personal data, that is processed by bodies or persons providing services prescribed mandatory by law or under contract with any governmental agency, central or local, if such services are not available in any other way or form relating to their activities shall be deemed data public on grounds of public interest.

Section 27

(1) Access to data of public interest or data public on grounds of public interest shall be restricted if it has been classified under the Act on the Protection of Classified Information.

(2) Right of access to data of public interest or data public on grounds of public interest may be restricted by law - with the specific type of data indicated - where considered necessary to safeguard:

- a) national defense;
- b) national security;
- c) prevention and prosecution of criminal offenses;
- d) environmental protection and nature preservation;
- e) central financial or foreign exchange policy;
- f) external relations, relations with international organizations;
- g) court proceedings or administrative proceedings;
- h) intellectual property rights.

Para (3) of Section 27 was amended (thus, the translation by the Authority is not up-to-date). The new para. (3) regulates the treatment of business secrets. It declares that those data are not business secrets which relate to the use of support from the central and local state budgets, from the European Union, any allocation or benefit from the public budget, any data relating to the handling, use, other disposition, acquisition etc. of

assets of the state and local self-governments. The publication of these data however must not result in providing access to such data – especially the know-how – whose publicity would cause disproportionate harm from the perspective of business activity, provided that this does not prevent the possibility to get to know the data public on grounds of public interest. (new para (3))¹⁴⁴

Para (3a) declares that any natural or legal person, or organization without legal personhood which enters into a financial or business relationship with any person (organ) belonging to the subsystem of state budget shall also provide access – if requested – to data public on grounds of public interest as defined in para (3).

Para (3b) adds that in case the request on the basis of para. (3a) is denied, the applicant can initiate the procedure of control of legality by the organ overseeing the legality of the person/organ which denied the request.

The rest of paragraphs in Section 27 remained unchanged, and are translated by the Authority as follows:

(4) Access to public information may also be limited by European Union legislation with a view to any important economic or financial interests of the European Union, including monetary, fiscal and tax policies.

(5) Any information compiled or recorded by a body with public service functions as part of, and in support of, a decision-making process for which it is vested with powers and competence, shall not be made available to the public for ten years from the date it was compiled or recorded. Access to these information may be authorized by the head of the body that controls the information in question upon weighing the public interest in allowing or disallowing access to such information.

(6) A request for disclosure of information underlying a decision may be rejected after the decision is adopted, but within the time limit referred to in Subsection (5), if disclosure is likely to jeopardize the legal functioning of the body with public service functions or the discharging of its duties without any undue influence, such as in particular free expression of the position of the body which generated the data during the preliminary stages of the decision-making process.

¹⁴⁴ As amended by Section 2 (1) of Act XCI/2013.

(7) The time limit for restriction of access as defined in Subsection (5) to certain specific information underlying a decision may be reduced by law.

(8) This Chapter shall not apply to the disclosure of information from official records that is subject to the provisions of specific other legislation.

Section 30 describes the way data can be requested. The only problematic provision is para. (7) which limits the accessibility of certain financial data of detail:

Section 30. (7) The requests for data with the purpose of a comprehensive, account level as well as an itemized control of the financial management of the body with public service functions are regulated in specific relevant laws. Should such data request be rejected, the requesting party may initiate an investigation of the Authority pursuant to Section 52.

As it will be seen below, however, courts tend to interpret this provision quite generously.

Question 3 – Interpretation and application

- ✓ How is this right interpreted and applied by courts? Are there any deficiencies in this regard?

As to recent interpretation, freedom of information seems to be an area where litigation abounds. Almost every week there is news about a court process which ended with the victory of the party requesting some information rendered public.

Both the Constitutional Court¹⁴⁵ and ordinary courts¹⁴⁶ appear to take quite a strong stance against governmental instincts for secrecy. Regarding Paks II, a nuclear power plant business contracted to Russian companies, a separate law was adopted qualifying

¹⁴⁵4/2015. (II. 13.) AB határozat.

¹⁴⁶ Eg, http://index.hu/gazdasag/2015/03/08/met_mvm_mszp_gaz_per_masodfok_nyilvanossag/, http://ataszjelenti.blog.hu/2015/03/24/tasz-mlsz_2_1_kozerdeku_adatos_pert_nyertunk_a_kurian, http://index.hu/gazdasag/2015/03/23/a_birosag_dontese_ellenere_sem_adja_ki_titkait_az_allami_oriasceg/, <http://www.direkt36.hu/2015/03/12/lazar-janos-hotelszamlai-masodfok/>, 2.pf.21.145/2013/3.

contract data secret for 30 years. Opposition MPs, this time both from the democratic parties and the extreme right wing Jobbik, turned to the Constitutional Court where the case is pending.¹⁴⁷

Judicial practice seems even to correct to some extent the weaknesses of the freedom of information act. For instance, the court obliged to reveal the specific hotel bills of a secretary of state who spent significantly more on accommodation abroad than other high-ranking government employees. This is a very rights-friendly interpretation of para (7) Section 30 of the Freedom of Information Act whose text – as reproduced above – might exclude such an interpretation. Although the Metropolitan Court gave a final decision (*res iudicata*), the politician whose travel costs are in question, turns to the Kúria for revision.¹⁴⁸

Question 4 – Case law protecting civil rights

When the right in question is recognised through case law, how are they enforced? Is there a relevant doctrine of precedent? Can violation of judge-made principle be invoked in courts? Must judges bring up of their own motion civil rights violations? Etc.

Informational self-determination is a right derived from the right to human dignity in the jurisprudence of the (old) Constitutional Court.

Question 5 – Judicial enforcement institutions and bodies

- ✓ Which institutions are responsible for the enforcement of this right in your country? Please expose here the structure of the judicial system of the country under study. Indicate, in particular, whether the country under study has a constitutional court or equivalent body. If not, how is compliance with international, European (including EU) and national (constitutional) civil rights guaranteed. Explain the role of other relevant bodies (eg ordinary courts, specialised courts, etc.)

¹⁴⁷ Case number II/00861/2015 (pending).

¹⁴⁸<http://www.direkt36.hu/2015/03/12/lazar-janos-hotelszamlai-masodfok/>

- ✓ How are these institutions regulated at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other)
- ✓ Is the independence of these institutions and organs guaranteed? If so, how? Have there been concerns related to the independence of the judiciary in the country of study, which could undermine the effective enforcement of the selected civil right? Please indicate the different modes and modalities of enforcement of civil rights carried out by the different judicial institutions involved.
- ✓ What are currently the main judicial procedures available to sanction, remedy or compensate for violations of the selected civil right (eg judicial review, damages, emergency measures, etc.). Indicate for each of them important information related in particular to time limits, costs, legal aid availability, length of proceedings, type of actions (eg collective action, class action), admissibility criteria (including standing conditions, delays, etc) as well as merits conditions (acceptable grounds, substantive conditions, degree of control, evidential aspects, burden of proof, etc.). What are the consequences of successful or unsuccessful legal actions under each of the procedures (annulment, compensation, sanctions, etc.)
- ✓ Is the judiciary effective and/or trusted to protect civil rights, or do people turn to alternative modes of action in order to protect these rights (ie demonstration, media involvement, social network activities, lobbying, etc)

Please indicate particular weaknesses and deficiencies, or on the contrary, elements of good practice, which are worth highlighting in that they are likely to have a particular impact on the enforcement of civil rights in the EU.

Section 31 on the Act on Informational Self-determination and Freedom of Information:¹⁴⁹

¹⁴⁹As translated on the website of the Freedom of Information Authority: http://www.naih.hu/files/Privacy_Act-CXII-of-2011_EN_201310.pdf.

Section 31 (1) In the event of failure to meet the deadline for the refusal or compliance with a request for access to public information, or with the deadline extended by the data controller pursuant to Subsection (2) of Section 29, and - if the fee chargeable has not been paid - the requesting party may bring the case before the court for having the fee charged for the copy reviewed.

(2) The burden of proof to verify the lawfulness and the reasons of refusal, and the reasons for determining the amount of the fee chargeable for the copy lies with the data controller.

(3) Litigation must be launched against the body with public service functions that has refused the request within thirty days from the date of delivery of the refusal, or from the time limit prescribed, or from the deadline for payment of the fee chargeable. If the requesting party notifies the Authority with a view to initiating the Authority's proceedings in connection with the refusal of or non-compliance with the request, or on account of the amount of the fee charged for making a copy, litigation may be launched within thirty days from the time of receipt of notice on the refusal to examine the notification on the merits, on the termination of the inquiry, or its conclusion under Paragraph b) of Subsection (1) of Section 55, or the notice under Subsection (3) of Section 58. Justification may be submitted upon failure to meet the deadline for bringing action.

(4) Any person otherwise lacking legal capacity to be a party to legal proceedings may also be involved in such legal proceedings. The Authority may intervene on the requesting party's behalf.

(5) Actions against bodies with public service functions of nation-wide jurisdiction shall be brought at the competent tribunal. Actions falling within the jurisdiction of local courts shall be heard by the local court of the seat of the tribunal, or by the Pesti Központi Kerületi Bíróság (Pest Central District Court) in Budapest. Jurisdiction shall be determined by reference to the place where the head offices of the body with public service functions, being the respondent, is located.

(6) The court shall hear such cases in priority proceedings.

(7) When the decision is in favor of the request for access to public information, the court shall order the data controller to disclose the information in question. The court shall have powers to modify the amount charged for making a copy, or may order the

body with public service functions to re-open its proceedings for determining the amount of the fee chargeable.

As data protection is a personality right, the act also provides for the possibility of claiming 'damages for pain and suffering.'¹⁵⁰

See pages 37-47.

Question 6 – Non-judicial enforcement institutions and bodies relevant for the enforcement of the selected civil right

- ✓ Are there non-judicial/administrative procedures available to enforce the selected right against public authorities or private actors involved in public policy activities (eg delivery of public services, quasi-regulatory bodies, etc.) ?

There is a Data Protection and Freedom of Information Authority which is responsible for the enforcement of the right.

The 2011 law on data protection and freedom of information¹⁵¹abolished the previous function of data protection ombudsman, and its place was given to a so-called independent freedom of information authority (with a head nominated by the prime minister and appointed by the president of the republic for nine years. Note that the president of the republic was elected solely by the votes of the – two-third – governing majority.). Contrast this with the election of the head of the previous data protection body, i.e. the ombudsman who was *nominated by the president, and then elected by two-third in the parliament for six years*, without the involvement of the prime minister. The previous ombudsman's term thus prematurely expired, in violation of EU law,¹⁵² as it did not conform to the requirement of independence.¹⁵³ The way the current authority was established thus already raises doubts about its independence.

¹⁵⁰Art. 23. of Act CXII/2011

¹⁵¹ Act CXII/2011.

¹⁵² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

¹⁵³ C-288/12, Commission v. Hungary.

This does not mean that the authority does not work at all. For instance, it recently ordered the Hungarian Paralympic Committee to publish data related to the benefits received by its managers.¹⁵⁴ However, sometimes, the authority's activity does not appear professional. Famously, the authority did not find problematic the abuse of the system of supporting electoral candidates, where there were clearly documented instances of signatures endorsing a party or candidate were copied for another. When asked whether a person has the right to request the electoral authority to provide information on whether his or her signature appeared among the supporters of which parties, the Data Protection and Freedom of Information Authority argued that the electoral commissions do not have the resources and capacity to examine every complaint for abuse of personal data, as the signatures are only kept on paper.¹⁵⁵ Note that there were documented cases of such copying, and thus it is likely that several parties falsified the supporting signatures this way (with the result that parties without any real support also became entitled to state aid). Therefore, the Authority found that it is more important to hold the election on time than to hold it legally.

See also pages 47-51.

- ✓ Are there non-judicial procedures available to uphold these rights against private actors (eg employers, landlords, etc.)?
- ✓ Which organs, institutions, or bodies contribute to promoting and enforcing the selected civil right? (eg equality body, ombudsperson, governmental supervisory authorities, etc.)

- ✓ How are procedures before these bodies regulated at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?

- ✓ What is their respective mandate? Were/are there discussions as to expanding, or reducing their mandate?

¹⁵⁴<http://blog.atlatszo.hu/2015/07/gomori-zsolt-175-millio-ft-jutalmazat-kapott/>

¹⁵⁵ Case NAIH-703-3/2014/V, http://www.naih.hu/files/703_2014_allasfoglalas_ajanloivek_taj_jogrol.pdf

- ✓ What are their powers? (eg consultation, information-gathering, reporting, adjudication/decision-making, regulatory powers, etc)? Were they/are they discussions as to expanding, reducing their powers?
- ✓ How independent are they from government, parliament, stakeholders, others? Please pay particular attention to powers of appointment, and termination of the mandate of actors, as well as the bodies' decision-making procedures?

As discussed above, the Authority is not totally independent from government.¹⁵⁶

Question 7 – Access to Justice

- ✓ Are access to justice rights (fair trial, due process, right to an effective remedy...) respected when it comes to the enforcement of the selected right? Are there particular problems in that respect. Please develop.
- ✓ Does the principle have a broad scope of application, or are there exceptions?

Access to justice regarding freedom of information requests is generally guaranteed, courts are quite efficient in forcing government authorities and other data processors to make data of public interest available. Problems lie more with the legislation and administrative practice.

Question 8 – “Support structures”

- ✓ What is the role of NGO or other civil society actors (eg legal entrepreneurs, etc.) in bringing awareness about modes of enforcement of the selected civil right and in supporting actions to uphold the selected right using judicial or non-judicial means? Please give as many details as possible and identify the most relevant actors

NGOs play a vital role in upholding freedom of information. In fact, without them, freedom of information would be non-existent in Hungary.

¹⁵⁶ C-288/12, Commission v. Hungary.

While all NGOs, especially human rights NGOs contribute to freedom of information in the broad sense, in the narrow sense, most important appear four NGOs: atlatszo.hu, K-Monitor and Transparency International Hungary, and the Hungarian Civil Liberties Union.

The first three operate together an application by which anyone can submit requests for access to data of public interest.¹⁵⁷

- ✓ Does the organization and structure of the legal professions support the selected civil right claims? In particular, are there developed legal aid systems or pro bono schemes, or any other relevant support system which purports to enable public interest litigation aimed at promoting/supporting the development and effective enjoyment of the selected civil rights.

Freedom of information appears to be an area where small donations from individuals form an important component of the budget of NGOs in enforcing the right. This is most likely due to the fact that a lot of freedom of information requests affect politicians involved in corruption. Átlátszó.hu (meaning transparent.hu) is an extremely successful example of this sort of NGO which grew out of that outrage, and now gets close to half of its budget through crowd-funding.¹⁵⁸

Legal aid does not play a role in claims relating to freedom of information.

- ✓ Does legal training contribute or undermine the effective protection of the selected civil rights? Please give evidence based on standard law-school and/or bar-exams curricula?

In general constitutional law courses there is at least one session on freedom of information and data protection (discussed often together). According to the webpages of the seven legal faculties of the country, ELTE Law School is the only law faculty which offered a specialized course on data protection and freedom of information as an elective course in 2014/15. In addition, ELTE's social sciences

¹⁵⁷<http://kimitud.atlatszo.hu/>

¹⁵⁸As explained by Tamás Bodoky, editor-in-chief, at a conference at CEU Budapest.

faculty hosts an MA program in international human rights, where there is a mandatory course on communicative freedoms, which include a few sessions on freedom of information.

- ✓ What are the relationship between legal elites, political/governmental elites and civil society organizations? Do they contribute or undermine civil rights litigation and enforcement?

Freedom of information NGOs tend to have very good lawyers, because otherwise they would not be able to perform their job securely. While authorities and government contractors are obliged to publish data of public interest if not proactively on their website, then at least at the request of anyone, the immense amount of – predictably -- successful litigation in this area shows that they are not always willing to do so, and they must be brought to court (and, then, the cost of litigation will be often borne by the public...).

- ✓ What is the role played by academic scholars in promoting and supporting the effective enforcement of the selected civil rights?

Legal scholars play only an indirect role: in legal training and in advising human rights NGOs.

Question 9: Further practical barriers to the effective enjoyment of the selected civil rights

During the time of the writing, the government introduced a new bill binding the access to public data to vaguely formulated payment requirements, and introducing other restrictions on access to data of public interest. The head of Data Protection and Freedom of Information Authority – which was established in violation of EU law, but still operates – already issued a statement that no constitutional concerns arise in this regard.¹⁵⁹

¹⁵⁹ NAIH-1509-23-2015-J.

- ✓ Can you identify further barriers to an effective enjoyment of the selected civil rights in practice?

Please, include here (or repeat) particularly problematic barriers towards the enforcement of the selected civil rights (such as overbearing costs, judicial corruption, unavailability of legal aid in practice, lack of information about the rights, lack of expertise on the part of attorneys or other legal actors, intimidation towards people who want to enforce their rights, etc.)

- ✓ Can you identify linguistic barriers, and/or barriers related to difference between legal and judicial culture and practices which could undermine the effective enforcement of the selected civil rights, in particular for mobile EU citizens/Third Country Nationals?

Please, make sure to point out right-, gender-, or minority-specific differences with regard to an effective enjoyment of the selected civil rights.

Information related to civil rights is often not available in any other language than Hungarian. Even when it is, it might not be up-to-date. For instance, the website of the Data Protection and Freedom of Information Authority has an outdated version of the freedom of information act, and the Equal Treatment Authority's website has an outdated version of the Equal Treatment Act in English.¹⁶⁰

Question 10: Jurisdictional issues in practice

- ✓ Personal
 - Is there any de jure or de facto difference in the effective enjoyment of the selected civil rights in your country depending on the status of the person? (differences between natural and legal persons; citizens of that state; EU citizens; third country nationals; refugee; long term resident; family members; tourists; etc.)

¹⁶⁰ <http://www.egyenlobanasmod.hu/data/SZMM094B.pdf>

The right to freedom of information is expressly granted to everyone in the Fundamental Law and to anyone in the Law on Freedom of Information. That means that no restrictions as to the personal scope can be constitutionally and legally applied. Any natural person, be they citizens or not, adults or not, etc., and any legal person has the right the same way.

✓ Territorial

- Are there any de jure or de facto differences in the effective enjoyment of the selected civil rights in different parts, provinces or territories in your member states?

There are no explicit differences, and as also the most important component of the right, ie the access dimension, can be exercised in any form, including submitting requests for public interest data *online*, territorial differences should be minimal. In practice, a few Budapest-based NGO-s submit the bulk of such requests.

✓ Material

- Are rights enforced differently in different *policy areas* (e.g. security exceptions, foreign policy exclusion, etc.)? Please, make an assessment on the basis of practice, too (eg more deference accorded in the balancing to the executive when it comes to these policy areas, though the legal framework – what you described in the response to the D7.1. questionnaire — is itself not different from other areas).

Freedom of information can be limited in the interest of national security. That it can be as easily abused as references to national security in general can be, is well illustrated by the controversy around the transparency of a massive Hungarian-Russian cooperation in nuclear industry. A 30 year secrecy provision was attached to the contracts on the project Paks II, a new nuclear power station financed by Russia in Hungary.

✓ Temporal

- What is the temporal scope of protection in the enforcement of the selected civil rights? Are there any notorious or systematic deficiencies in how deadlines are determined or related to the length of proceedings in

practice? Please, answer this question from the viewpoint of the practical application of the rules on deadlines for both initiating proceedings, reviews, etc., and for the court's duty, if there is any (next to Art 6 ECHR), to complete proceedings.

Requests on access to data are often not fulfilled within the statutory deadline (15 days, can be prolonged once in case a large amount of data is requested) by the authorities. This can be sometimes quite harmful as eg when a new law is being passed without the necessary information for public debate being in the public. A bill passed just during the finalizing of the report prolongs the deadline.

Please offer details as to how different rights are enforced to different *categories of persons in different location and policy contexts over time?*

Question 11: Systematic or notorious lack or deficient enforcement of the selected civil rights in the country under study?

Please, discuss here in detail any 'revealing' cases of weaknesses in the effective exercise of selected civil rights in your country. Try to identify the reasons (eg political influence, financial hurdles, lack of expertise, etc.). Feel free to either repeat here, or refer back to points elaborated upon in previous replies.

Freedom of information litigation is thriving in Hungary. Almost every day or week important cases are decided in court on a request of access to data. Of course, the intense litigation also shows that authorities and other data processors are not always willing to fulfil their constitutional duty without being forced so by a court in proceedings which costs are covered by the public. As an HCLU lawyer told us at a stakeholder event: it is always ironic for them to engage in public interest data litigation, as the government is using public money for shielding the information away from the public.

The other systematic deficiency lies in the institutional structure. The Freedom of Information Authority lacks the appearance of independence as it was brought into

being by violating the independence of the data protection ombudsman whose office was simply abolished prematurely.

The Authority also does not always operate in a professional manner. Although it sometimes issues recommendations which are clearly in line with European standards, at other times it makes quite apparent omissions and rubberstamps governmental claims of secrecy taking them at face value. Perhaps the most egregious was the case of the abuse of the system of supporting electoral candidates, where there were clearly documented instances of signatures endorsing a party or candidate were copied for another. When asked whether a person has the right to request the electoral authority to provide information on whether his or her signature appeared among the supporters of which parties, the Data Protection and Freedom of Information Authority argued that the electoral commissions do not have the resources and capacity to examine every complaint for abuse of personal data, as the signatures are only kept on paper.¹⁶¹ Note that there were documented cases of such copying, and thus it is likely that several parties falsified the supporting signatures this way (with the result that parties without any real support also became entitled to state aid). Therefore, the Data Protection Authority found that it is more important to hold the election on time than to hold it legally.

Question 12: Good practices

- ✓ Please highlight legal frameworks, policies, instruments or practical tools which facilitate the effective exercise of the selected civil rights in the country under study.

¹⁶¹ Case NAIH-703-3/2014/V, http://www.naih.hu/files/703_2014_allasfoglalas_ajanloivek_taj_jogrol.pdf



BEUCITIZEN
BARRIERS TOWARDS EU CITIZENSHIP

WP7: CIVIL RIGHTS

QUESTIONNAIRE'S ANSWERS

Deliverable D7.2 “Mechanisms for enforcing civil rights- Questionnaire for Country report”

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Version 1.0: 30April2015



Grant Agreement Number 320294
SSH.2012.1-1

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1. The (legislative) transposition, (executive/administrative) implementation and (judicial) application of EU legislative instruments which provide protection for specific civil rights

1.1 EU legislation affording protection or potentially undermining civil rights in judicial proceedings¹

1.1.1 Protection of rights in civil proceedings (mutual recognition instruments)

- Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Regulation') – in particular Articles 1, 2, 3, 4, 5, 6, 7, 31, 32-56; 57-58, 61.
- Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ('Brussels IIa Regulation'). All provisions.
- Regulation No 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters. All provisions.

Question 1: Transposition of the above EU instruments protecting or potential affecting civil rights

How are the EU instruments listed below transposed in the country of study? Have there been notorious failure or defect in the national transposition? Is the national legislative transposition of these EU instruments reinforcing or on the contrary threatening civil rights norms?

¹This Paragraph has been written with the support of Prof. Laura Baccaglini, Professor of Civil Procedure at the University of Trento.



Before focusing on the issues raised by the national legislative implementation of the European instruments concerning jurisdiction and mutual recognition of judgements in civil rights matters, some preliminary remarks on the Italian main legal source governing cross-border disputes in civil and commercial matters.

In Italy a specific private international law statute has been enacted, namely Law n. 218 of 31 May 1995 (*Riforma del sistema italiano di diritto internazionale privato*), which replaces some sections of the general legal provisions of the Italian Civil Procedure Code. The statute is intended to determine in which cases a national judge takes jurisdiction, i.e. the power to adjudicate a case, through a series of factors connecting disputes to the national legal order.

A two-step reasoning is therefore needed in order to identify the judge who can technically hear a given case: it is first of all necessary to determine whether the national judges have jurisdiction pursuant to the private international law statute and, secondly, to identify which of them may decide the claim, according to the national procedural rules.

In Italy, rules concerning jurisdiction and criteria for determining the law applicable to transnational disputes are laid down by the same statute, which also regulates the effects of foreign judgments.

From a comparative perspective, the type of legal source, whether national procedural law statutes or special private international law statutes, is not a mere formal factor since in the latter case it is not necessary to resort to rules governing internal disputes – thus conferring them a second function – in order to comply with issues of international jurisdiction.

Moreover, law n. 218/95 is characterised by some specific features that prove to be of peculiar importance in the relationships between the so-called “Brussels regime” and the Italian private international law framework for jurisdiction and mutual recognition of acts and decisions concerning civil rights.

In this perspective, it should also be pointed out that although Regulation no. 44/2001 has been replaced by Regulation no. 1215/2012, for purposes of this analysis the issues raised by the national legislative implementation of these EU instruments will be mainly considered with reference to the Brussels I Regulation, which continues to apply to all proceedings settled before the new Regulation came into force (i.e. on 10 January 2015).

According to the principles of precedence of European law and direct effect, the EU Regulation is directly applicable and prevails over the rules of the Italian law 218/95.

No legislative transposition is therefore needed.



Nevertheless its scope of application covers only some matters in which the Italian judges may have jurisdiction.

In particular, the “Brussels regime” (Regulation EC 44/2000, now Regulation 1215/2012) provides for uniform rules in the specific field of civil and commercial matters (Art. 1). Moreover, as expressly stated by the Regulation, its rules shall not apply to: (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage; (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (c) social security; (d) arbitration; (e) maintenance obligations arising from a family relationship, parentage, marriage or affinity; (f) wills and succession, including maintenance obligations arising by reason of death.

Within its material scope the EU Regulation is applicable to disputes concerning defendants domiciled in a EU Member States (Articles 4 and 6 of Reg. no. 1215/2012 and Articles 2 and 4 of Reg. no. 44/2001) and cases connected to EU States according to the EU exclusive jurisdiction rules. Despite some specific exceptions, the Brussels regime does not provide for general rules concerning defendants not domiciled in an EU Member States and according to Article 4.2 in cases not covered by the EU Regulation the jurisdiction of the courts of a given EU Member State shall be determined by the rules of that State.

Therefore, in Italy some matters are partly covered by the uniform and directly applicable rules of the Brussels regime, and partly regulated by law no. 218/95.

In any case, as a general and fundamental rule, Italian rules on jurisdiction in civil and commercial matters must comply with the principles of the Italian Constitution (1948), particularly with Articles 2, 3 and 24, as well as with human rights protection according to international law conventions and especially to the European Convention of Human Rights.

From a general perspective, the Italian law contains rules concerning jurisdiction, rules dealing with the law applicable to specific situations and rules regulating the effects of foreign judgments and acts. Articles 3-11 (Title II) deals with the first group of rules, and namely with the scope of jurisdiction, its acceptance and derogation, actions in rem concerning immovable property situated abroad, preliminary questions, lis pendens, time for determining jurisdiction, voluntary jurisdiction, provisional measures and pleading for lack of jurisdiction. The chapters included in Title III concern instead the applicable law in specific situations, such as, for instance, disappearance, absence and presumption of death of natural persons, family and matrimonial matters, invalidity, nullity, separation and dissolution of marriage,



filiation, adoption, protection of incompetent people, wills, rights in rem, etc. Finally Title IV deals with recognition, enforcement and notification of foreign judgments and acts.

As to the relationships between the national and the supranational level, it is important to stress that the Italian law introduced some important changes to the Italian general civil procedure framework, showing a more open attitude towards Europe and foreign judgements even before the EU Regulation and mainly on the basis of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

Indeed, the reform of the Italian international private law regime provided new jurisdiction rules and changed two cornerstones of the previous framework set out by the Italian Civil Procedure Code: the compulsoriness of a prior decision by an Italian judge for the recognition of foreign judgements and the traditional rule of non-recognition of foreign *lis pendens* (Articles 796 ff. of the Italian Civil Procedure Code, now repealed)².

As to jurisdiction, two important features of the Italian system must be pointed out.

First of all, the Italian law changed the original criterion of citizenship into those of residence and domicile, in compliance with the choice adopted by the European Member States in the 1968 Brussels Convention and then confirmed by Regulation no 44/2001 and Regulation no. 1215/2012.

According to Article 3.1: “Italian courts shall have jurisdiction if the defendant is domiciled or resides in Italy or has a representative in this country who is enabled to appear in court pursuant to Article 77 of the Code of Civil Procedure, as well as in other cases provided for by law”.

The general jurisdiction rule is therefore the domicile or the residence of defendant. Pursuant to the law, Italian jurisdiction also exists in cases where the defendant has a representative authorized to appear before the court according to Article 77 of the Italian civil procedure code.

The most peculiar feature of the Italian international private law regulation is nevertheless the direct reference made to the criteria of the Brussels Convention in Article 3.2.

Besides the general rule concerning residence and domicile, Article 3.2 states indeed that: “Italian courts shall further have jurisdiction according to the criteria set out in Sections 2, 3 and 4 of Title II of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters with Protocol, signed in Brussels on 27 September 1968, enforced

² For a general overview, see for instance, C. Consolo, *Spiegazioni di diritto processuale civile*, vol. II, 3° ed. (Torino, 2014), 69 ff.;



by Law No. 804 of 21 June 1971, with amendments in force for Italy, including when the defendant is not domiciled in the territory of a contracting State, with respect to any of the matters falling within the scope of application of the Convention”.

In addition to the general rule, there is a series of special factors connecting the case to the Italian jurisdiction even if the defendant is not domiciled or does not reside in a EU Member State. In these cases an important distinction should nevertheless be stressed, because as far as civil and commercial matters are concerned the Italian law makes an express and direct reference to the Brussels Convention, and namely to the criteria set out in sections II-IV (i.e. in Articles from 5 to 15) of the Title II of this international source. As far as relations with international instruments are concerned, it is also worth noting that according to Article 2 of the Italian law, its provisions “shall not affect the application of any international conventions to which Italy is a party”.

In this perspective, considering that the so called “Brussels I” Regulation replaced the 1968 Brussels Convention, the reference expressly made by Article 3 of the Italian law to the latter should now be considered as a reference made to the former³. The text of the EU Regulations states indeed “continuity between the Brussels Convention and this Regulation should be ensured” (recital n.19) and, above all, that “the Regulation shall, as between the Member States, supersede the Brussels Convention” (Article 68).

Therefore, the Italian law expressly refers to sections II-V (General provisions - Special jurisdiction - Jurisdiction in matters relating to insurance - Jurisdiction over consumer contracts - Jurisdiction over individual contracts of employment) of Chapter II of the Regulation, i.e. to Articles from 5 to 21.

As a consequence, through Article 3.2 the Italian law makes reference to the special rules of the “Brussels regime” in an immediate manner as rules of the internal legal system; they apply therefore automatically.

In particular, this direct reference is made to regulate also cases where the defendant is not domiciled in a EU Member State, thus giving a “non-EU” extension to the rules included in the EU Regulation. The Italian law aims therefore at granting a uniform framework as to the special criteria for jurisdiction within the material scope of the Brussels system, creating a parallelism between EU and non-EU cases. In this perspective, the Italian law permits also to overcome possible discriminations of third State defendant, which may arise from Article 4.2 of the Regulation. According to the Brussels regime defendant not domiciled in a EU Member

³ Ibid. See also M. A. Lupoi et al., *Giurisdizione italiana, efficacia di sentenze e atti stranieri* (Napoli, 2007);



State are for instance not protected against exorbitant grounds of jurisdiction as EU defendant are⁴.

The second part of Article 3.2 finally states that with regard to other matters, jurisdiction shall be also determined according to the criteria laid down for territorial jurisdiction by the Italian Civil Procedure Code.

Just to summarize, according to the framework for Italian jurisdiction in cross-border disputes set out by law 218/95, Italian judges shall have jurisdiction in the following cases:

- when the defendant, irrespective of his/her nationality, is domiciled or resident in Italy or has a representative pursuant to Article 77 of the Code of Civil Procedure (Article 3.1, first part, law no. 218/95);
- in specific cases provided for by the law (Article 3.1, second part, law no. 218/95);
- pursuant to the criteria set out in sections 2, 3 and 4 of Title II of the Brussels Convention, in all the matters falling within the scope of application of this Convention (now EU Regulation) even when the defendant is not domiciled in a EU State (Article 3.2, first part, law 218/95);
- with regard to other matters, pursuant to the criteria laid down for internal jurisdiction by the Italian Civil Procedure Code (Article 3.2, second part, law no. 218/95).

Moreover, the law provides that Italian courts have jurisdiction in cases where the parties have expressly conferred jurisdiction on an Italian court (Article 4.1). The same rule applies if the defendant appears before an Italian judge without contesting jurisdiction. It is worth noting that also with reference to this aspect, the Italian reform of international private law introduced a more liberal rule if compared to the previous one provided for by Article 2 of the Italian Civil Procedure Code.

Article 4 imposes indeed only the written evidence without limiting the prorogation of jurisdiction to cases involving obligations between foreigners or between a foreigner and an Italian citizen without residence, nor domiciled in Italy, as art.2 of the Italian Civil Procedure Code did.

Pursuant to Article 4 and 11 of the Italian law, a distinction needs to be drawn, in a manner substantially similar to the rules set up by Article 24 and 26 of the EU Regulation. In case of “default of appearance”, the court of its own may raise the lack of jurisdiction, whereas in cases where the defendant appears in court, his/her objection is needed and can be proposed only if he/she has not accepted (explicitly or implicitly) Italian jurisdiction.

⁴ C. Consolo et al, Study JLS/C4/2005/03 – National Report Italy, 2005, IT-5.



There is only one rule in the Italian law, which completely excludes Italian jurisdiction: according to Article 5, Italian judges cannot hear cases dealing with rights “in rem” (included possessory actions) concerning immovable property situated abroad.

In such a case the lack of jurisdiction is raised by the judge on its own and cannot be accepted by the defendant.

The Italian law provides also for specific rules as to “voluntary jurisdiction” and “provisional measures”.

According to Article 9, Italian judges shall have jurisdiction not only in cases specifically referred to by law 218/95 and when the territorial jurisdiction of an Italian judge is provided for, but also in cases where the decision sought concerns an Italian citizen or a person that resides in Italy or situations and relationships to which the Italian law is applicable.

As to provisional measures Article 10 states that Italian jurisdiction may exist not only when the given Italian court has jurisdiction on the merit of the claim, but also when the measure has to be enforced in Italy.

This rule is similar to the former provision included in the Italian Civil Procedure Code (Article 4, n. 3), then confirmed by Articles 669 ter, section 3 and 669 quater, section 5 introduced by law n. 353/1980; the rule complies also with Article 31 of the Regulation according to which “application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter”.

Although the European case law has repeatedly confirmed that provisional measures may be decided by a Member State judge without jurisdiction on the merits, the new Regulation introduces a significant change in this framework notwithstanding the fact that its Article 35 is formally identical to Article 31 of Regulation no. 44/2001.

According to Article 2 of the new Regulation the term ‘judgment’ “includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter” but only “for the purposes of Chapter III”. In this perspective Recital n. 33 is particularly clear stating that “where provisional, including protective, measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured” but also pointing out that “where provisional, including protective, measures are ordered by a court of a Member State



not having jurisdiction as to the substance of the matter, the effect of such measures should be confined, under this Regulation, to the territory of that Member State”.

Regulation n. 1215/2012 introduces therefore a *summa divisio* within the general category of “provisional and protective measures”: on the one hand measures ordered by the judge that has jurisdiction on the merit may circulate freely without needing a specific formal recognition to be effective; on the other hand, measures ordered by a court without jurisdiction on the merit should have effect only in the territory of the Member State concerned⁵.

As to the Italian legal system the term “provisional measures” may include each temporary measure aimed at safeguarding rights the recognition of which is sought or will be sought in the main proceeding or at anticipating, on a temporary basis, the decision on the merit. According to the Italian Civil Procedure Code, these measures may include sequestrations (Articles 670 ff.) or so called satisfactory measures (Article 700) or interim payment orders (Articles 186bis and 432)⁶.

With regard to the directly applicable EU system of recognition of judgements, the EU Regulation provides for a high degree of simplification stating that “a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required” (Article 33).

In particular it draws a distinction between the recognition of the judgement and the enforcement of foreign decisions.

According to art 33.2, the intervention of the judges aimed at verifying the criteria for allowing recognition is indeed needed only in case of a dispute on the recognition itself: “any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be recognised”.

As to the criteria for recognition it is interesting to note that Article 34 of the EU Regulation provides for a less complex series of requisites in comparison with the Italian law. In particular, the EU Regulation does not impose to verify the jurisdiction as Article 67 of the Italian law does. The reference to public policy and to the right to defence is instead common to both regulations.

⁵ L. Querzola, Il nuovo sistema delle misure provvisorie e cautelari nel reg. Ue n. 1215/2012, in *Rivista trimestrale di diritto e procedura civile*, 2013, 1479-1490, at 1480.

⁶ C. Consolo et al, Study JLS/C4/2005/03 – National Report Italy, 2005, IT-16. For a general overview see, among others, Id, *Spiegazioni di diritto processuale civile*, vol.I, 3° ed.(Torino, 2014).



Whenever the intervention of the court is needed, the procedure regarding the recognition and enforcement may be characterised by two rather simple and rapid phases. The first one is lead “*inaudita altera parte*”(without hearing the opposite party) and, moreover, the court is not allowed to ascertain of its own the existence of elements precluding the recognition and exequatur pursuant to Article 34. In this stage the court issues therefore a purely formal check of the documents supplied. This phase is concluded by a decision which has the form of a decree and is potentially definitive because the other party has the burden to start an opposition.

In this perspective some features of the relationships between the national and European level should be stressed.

Indeed, the principle of automatic recognition has been already embedded in the Italian reform of private international law. By choosing this principle the Italian legal system actually came back to the previous rule set out by the Civil Procedure Code of 1865.

Moreover, Italy has recently issued a statute aimed at simplify the various procedures in the Italian legal system. This act reforms also the rules governing disputes on recognition of foreign judgment pursuant to law 218/95.

In particular, Article 30 of legislative decree (*decreto legislativo*) no. 150/2011 (entered into force in October 2011) imposes to procedures regarding recognition and enforcement of foreign judgement (referred to by Article 61 of law 218/95), a more simple and rapid type of procedure (*ritosommario di cognizione*) pursuant to Article 702-bis ff. of the Italian Civil Procedure Code, instead of the common ordinary procedure traditionally imposed to ascertain the criteria for recognition (*ritoordinario di cognizione*).

As far as a procedure for recognition and enforcement in concerned, the Italian judge is not allowed to change the procedure in an ordinary due (this possibility, provided for by the Civil Procedure Code, is indeed excluded in cases regulated by legislative decree no. 150/2011).

Furthermore the decree deciding on recognition cannot be appealed following the common rules of “*ritosommario*” pursuant to Article 702-quater, but can be challenged only with a “*ricorso per Cassazione straordinaria*”.

Consequently, also the second phase of the procedure pursuant to the EU Regulation should now follow the rules of the so called “*ritosommario*” provided for by Article 702 bis of the Italian Civil Procedure Code as clarified by legislative decree no. 150/2011⁷.

⁷C. Consolo, *Spiegazioni di diritto processuale civile*, op. cit., at 98.



In addition to the homogeneity between the judgement ruled by Article 67 of the Italian law and the one deciding on the opposition to the exequatur, according to the EU Regulation, the principle of equivalence obliges the Member State not to apply a less “convenient” procedure to situations covered by EU law⁸.

From a general perspective, as to the directly applicable rules of the EU Regulation the Italian legislative framework for private international law proves therefore to be sufficiently open towards the principles embedded in the Brussels regimes. The most intricate and complex issues may instead arise, as we will see, with regard to the interpretation of concepts and categories included in the Regulation, such as for instance the difference between “contract” and “tort” matters, “public policy”, etc.

The rules of the EU Regulation, although directly applicable, make indeed reference to national legal concept and in specific fields they expressly refer to the Member State law. Just to give an example, as to the general rule for jurisdiction concerning domicile, Article 59 states that “in order to determine whether a party is domiciled in the Member State whose courts are seized of a matter, the court shall apply its internal law”. In the Italian legal system reference needs to be made to Articles 43 and ff. of the Italian civil code, according to which the domicile is the place where the person has established the main seat of his/her business and interest, whereas the residence is the place where a person has his/her adobe⁹.

The issues raised by the interpretation of these concepts will be analysed in question n. 3.

As to the application of conflict-of-laws rules it must be pointed out that under Italian law, this task is considered as part of the judge’s normal functions. According to the principle of *iura novitcuria*, the judge has indeed to decide which law to apply, irrespective of a request by the parties.

Regulation (EC) No 2201/2003

The Italian legal framework for matrimonial matters, children protection and parental responsibility is characterised by a complex regime based on both international and national instruments.

As already said with reference to civil and commercial matters, the *EU Regulation no. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in*

⁸Ibid., at 100.

⁹ For an analysis of the Italian notion of “domicilio” in reference to Law no. 218/1995, see for instance M. A. Lupoi, Art. 3 legge n.218 del 1995 e disciplina della giurisdizione italiana, in M. A. Lupoi et al., *Giurisdizione italiana, efficacia di sentenze e atti stranieri*, op. cit., 1-38, at 12 ff.



matrimonial matters and the matters of parental responsibility and repealing Regulation no 1347/2000 is binding in its entirety and directly applicable in Italy.

Nevertheless the Regulation explicitly refers to the law of each Member State with regards to “residual jurisdiction”, stating that: “where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State”. Consequently, the already mentioned Italian international private law statute (law no. 218/95) applies.

Parental responsibility and protection of children are also covered by the *Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants* entered into force in Italy in 1980 (law n. 742 of 24 October 1980). The ratification by Italy has been postponed several times in order to wait for the implementation rules set out by law n. 64 of 1994.

In the relationships with States that are not party to the Convention (or with non-EU States or in cases of “residual jurisdiction” as far as the scope of the EU Regulation is concerned), the applicable law is again the Italian international private law statute.

In this perspective we should nevertheless underline that Article 42 of the Italian law directly refers to the rules of the Hague Convention. In Italy this international instrument therefore covers the protection of children, in any case, and applies also to people considered “underage” only according to Italian law and to minors that do not have the nationality of one of the contracting States (Article 42.2).

This Convention had then been replaced by the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children*.

With specific reference to matrimonial matters, the lack of uniformity regarding the applicable law pushed the EU Commission to adopt a proposal for a new Council Regulation. Within this context, Italy has been one of the Member States, which addressed a specific request to the Commission communicating that they intended to establish enhanced cooperation between themselves in the area of applicable law in matrimonial matters¹⁰.

As a consequence, on 12 July 2010 the Council adopted Decision 2010/405/EU authorising enhanced cooperation in the area of the law applicable to divorce and legal separation. Accordingly, Council Regulation no. 1259/2010 of 20 December 2010 aims at implementing between these Member States – included Italy – this cooperation, introducing

¹⁰ See Council Decision of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, Recital no.5.



rules concerning applicable law in matrimonial matters. In particular the Regulation acknowledges an important role to the choice of applicable law by the parties.

Divorce, legal separation and marriage annulment

In Italy, the standard procedure provided for by Regulation no. 2201/2003 applies to the recognition of decisions on divorce, legal separation and marriage annulment issued in other EU Member States. Since the recognition is automatic, there is no need for any special procedure to update the Italian registry of marriages, births and deaths as a consequence of the divorce/legal separation/annulment ruling. The interested party may nevertheless lodge an application (*ricorso*) with the Italian Court of Appeal (*Corte di appello*) of the place where the ruling has to be implemented. The recognition of the foreign decision may be challenged before the same court of appeal that issued the ruling. The party has to oppose the recognition within one month of its notification or within two month in cases where the other party is resident in another state.

In this second phase the ordinary rules of litigation apply and in compliance with the adversary principle, both party must be heard. The decision issued on the objection may then be challenged before the Italian Supreme Court (*Corte di Cassazione*).

As to the law applicable in proceedings between spouses who do not leave in Italy or with different nationality, in cases where the Italian law applies (directly or as a residual rule), Article 31 of law 218/95 states that the decision shall be governed by the national legislation common to the couple at the time the application is lodge. Where the spouses have different nationality, the judge will determine the law applicable according to the country in which they spent most of their married life. Moreover, the Italian law applies also in cases where the law of that country does not provide for legal separation or divorce.

Parental responsibility

It is worth mentioning that Italy has recently issued a reform in the field of filiation pursuant to Law no. 219 of 2012 (entered into force in January 2013) and Legislative Decree (*decreto legislativo*) no. 154 of 2013 (entered into force in April 2014). Consequently, the term “parental authority” characterising the Italian framework has been changed into “parental responsibility”.

This amendment, as well as other rules introduced with regard to filiation, reveals a more children-centred way of considering family relationships and seems therefore to be more



in compliance with the aims of the EU Regulations and International Conventions concerning the rights of children.

Furthermore, according to the new decree some competences previously attributed to the Juvenile Courts (*Tribunale per iMinorenni*) have been conferred to Ordinary Tribunals (*Tribunaliordinari*). So, the Ordinary Tribunal is now the judge that can hear a given case concerning parental responsibility for both married and unmarried parents.

Similarly to the other fields analysed, in Italy the recognition of a decision on parental responsibility issued by a judge of a EU Member State is automatic pursuant to Regulation no. 2201/2003. For the enforcement the interested party shall lodge the application with the Court of Appeal, which is territorially competent according to Italian law. The decision will then be implemented under the same conditions applied to Italian rulings.

The Court of Appeal is competent also as regards the opposition to the recognition and its decision may then be challenged before the Supreme Court (*Corte di Cassazione*).

As to the applicable law in claims concerning parental responsibility in cases where children or parents do not reside in Italy or have a different nationality, according to Italian law two rules apply. The first one is the already mentioned Article 42 of law n. 218/95, which refers to the Hague Convention. The second one is Article 36 of the same law (as recently modified by the already mentioned decree no. 154 of 2013), according to which the national law of the child shall govern personal and property relationships between parents and children, included parental responsibility.

As already said with reference to Regulation no. 44/2001, also in this field the interpretation made by the national case law of the concepts and principles embedded in the directly applicable EU instruments shows the concrete implementation of the rights concerned.

Regulation No 606/2013

With regard to *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*, since it entered into force only in January 2015, there are no specific issue concerning its implementation or interpretation, so far.

Nevertheless, as far as protection measures are concerned, it is interesting to mention the rule set out by the Italian Civil Code.



In the Italian legal system the so-called “Orders of protection against family abuses” (*Ordini di protezione contro gli abusi familiari*) have been indeed provided for by law no. 154 of 2001, which introduced Articles 342bis and 342 ter in the Italian Civil Code.

According to the first Article the judge may issue protection orders in cases of serious injury caused by a spouse or a partner.

More specifically, two distinct prerequisites shall exist in order to demand and obtain one of the measures provided by Article 342 ter of the Civil Code:

- cohabitation (the rule aims indeed at protecting domestic life);
- a conduct seriously prejudicial to physical or moral integrity or to the freedom of the spouse or cohabitee.

The procedure for the adoption of the protection orders is governed by new Article 736 bis of the Civil Procedure Code

In order to obtain such an order the party shall lodge the action with the Court of the place where he/she has the residence or is domiciled. After a brief investigation during which the judge has a high degree of discretionary power, the proceeding is decided by a decree intended to impose to the spouse or cohabitee to cease the conduct.



Question 2: Executive/administrative implementation of EU instruments affecting civil rights

How are the EU instruments below and their national transposition measures implemented through regulatory/executive or administrative measures? Have these EU instruments been implemented in ways which affords further protection or potentially undermine civil rights norms?

As a general rule, in Italy the regulation of the “due process” as regards both civil and criminal procedure, is based upon the principle of “riserva di legge”¹¹. As a consequence only primary sources of law may regulate this field.

In Italy the main source implementing the Code of Criminal Procedure and therefore regulating, for instance, authorities, acts, and further specific aspects of the proceedings is Royal Decree (Regiudicrete) no. 1368 of 18 December 1968 (*Disposizioni per l’attuazione del codice di proceduracivile e disposizioni transitorie*).

However, to understand how the European instruments are implemented from a practical and executive perspective, we should mention some features of the Italian judicial system that may have an influence on the implementation of civil rights norms (for a general description of the Italian judicial system see below, Part II, question n. 2.1.5 “Judicial enforcement institutions and bodies”).

Moreover, before focusing on these aspects, in order to have a general picture of how Italy participates in the European Judicial cooperation in civil and commercial matters, it is worth mentioning also the notifications made by the Italian Ministry of Justice. The Italian government notified indeed the EU Commission of the information requested by the EU Regulations, included names and contact details.

With particular reference to the new Regulation no. 1215/2012 the practical information given by the Italian government may be summarized as follows.

Pursuant to Article 75, the Member States had to communicate to the Commission (within 10 January 2014):

¹¹It is not so easy to find a correct translation for this term in the English legal language. So we decided to use the Italian version. It refers to that portion of the regulative legislative power which can only be exercised by a legislative level source of law under the Italian Constitution.



- the courts to which the application for refusal of enforcement is to be submitted pursuant to Article 47(1);
- the courts with which an appeal against the decision on the application for refusal of enforcement is to be lodged pursuant to Article 49(2);
- the courts with which any further appeal is to be lodged pursuant to Article 50; and (d) the languages accepted for translations of the forms as referred to in Article 57(2).

As to the first point, also Article 36 and 45.4 should be mentioned. The first one deals with the application for a decision that there are no grounds for refusal of recognition, whereas Article 45.4 concerns the application for refusal of recognition.

In Italy, the courts to which the applications have to be submitted according to these Articles are the ordinary courts (*Tribunali Ordinari*).

Pursuant to Article 49, each party may appeal against the decision on the application for refusal of enforcement. In this case, according to the communication by the Italian Ministry of Justice, the appeal is to be lodged with the Court of Appeal (*Corte di Appello*).

Article 50 deals with the decision given on the appeal, which may only be contested by an appeal “where the courts with which any further appeal is to be lodged have been communicated by the Member State concerned to the Commission”. In Italy it is the Supreme Court (*Corte di Cassazione*).

Another important rule is the one set out by Article 57 regarding the translation or transliteration of documents. Whenever required, such translation or transliteration shall be into the official language of the Member State concerned or “where there are several official languages in that Member State, into the official language or one of the official languages of court proceedings of the place where a judgment given in another Member State is invoked or an application is made, in accordance with the law of that Member State”. Despite the principle of linguistic minorities protection embedded in the Italian Constitution (Article 6) and the existence of official bilingual regions and provinces (Valle d’Aosta/Vallée d’Aoste and Alto Adige/Südtirol, see Article 116 of the Italian Constitution), the Italian government answered that the only language admitted is Italian. Therefore, the second part of Article 57 seems not to apply in Italy.

According to Article 76.1, the Member States shall notify the Commission of:

- the rules of jurisdiction referred to in Articles 5(2) and 6(2),
- the rules on third-party notice referred to in Article 65,
- the conventions referred to in Article 69.

As to the first point, as already underlined law n. 218/95 applies, and namely Articles 3 and 4.



With reference to the concept of “third-party notice”, the Italian Government answered that the given Article does not apply in the Italian legal system.

The Ministry of Justice also clarified that in Italy rules concerning the so called “third party notice” provided for in Article 65, and usually translated as “*chiamata del terzo*” in Italian, do not exist. The expression “*chiamata in causa del terzo*” adopted in the Italian version of the Regulation is indeed referred to a legal concept, which does not correspond to the “*chiamata in causa del terzo*” pursuant to Article 106 of the Italian Civil Procedure Code¹².

Considering that the implementation of the right to access to justice is also influenced by costs incurred in legal proceedings, it should be taken into account that the examination of the issue of jurisdiction may be expensive and in some cases also time-consuming.

In particular, attorney’s fees may depend on several factors, such as the number of hearings, the amount of time spent on the claim, the difficulties of the case, the number of evidences or witnesses examined, etc.

Law no. 248/2006 and law no. 27/2012 have recently reformed the attorney’s fees system, which is now governed also by Ministerial Decree no. 55 of 2014, which seek to foster transparency, equity, predictability, clarity, simplicity as well as freedom and competition¹³ (on the role of professional orders as a “support structures” or as a “further barriers” see below, Part II, answers to questions n. 8 and 9). Moreover, under Italian law a fee arrangement is now possible (for the legal aid system see instead Part II, question n. 8 “Support structures”).

As to the examination of the issue of jurisdiction, if the case has been decided also on the merits, there should be no extra-fee because the dispute includes the examinations dealing with jurisdiction.

Anyway, Italian law provides also for a pre-emptive instrument, the so-called “*regolamento di giurisdizione*”, i.e. an appeal to the Supreme Court (*Corte di Cassazione*) through which the party may obtain an immediate decision on the jurisdiction issue. This instrument leads to an irrevocable decision of the Supreme Court. As to expenses, on the one hand this appeal brings

¹² See the website of the Italian Ministry of Justice: http://www.giustizia.it/giustizia/it/mg_2_1_2_5.wp?jsessionid=0F38A09CF7F57ED82219E72412388F08.ajpAL02

¹³ See for instance the website of the Italian *Consiglio Nazionale Forense* (Italian National Bar Council) <http://www.consiglionazionaleforense.it/site/home/naviga-per-temi/in-evidenza/articolo8544.html>



costs, but on the other it can prevent from other expenses, which may arise if the jurisdiction will become a ground for further challenges¹⁴.

Issues concerning enforcement

Since the effective enforcement of a judicial decision is part of the right to an effective remedy – as stated also by the European Court of Human Rights (ECtHR), for instance in a case concerning Italy (*Zappia v Italy*, judgment of 26 September 1996) – it is worth underlining some elements characterizing the enforcement of judgments in the Italian judicial system in civil and commercial matters.

According to the Italian law (Article 474 and ff. of the Italian Civil Procedure Code) enforcement can be carried out only if there is a valid authority to execute, i.e. a judicially enforceable title, such as decisions, measures and instruments to which the law expressly acknowledge executory effect. The claimant has to notify the debtor a specific document (*precetto*) with a warning to fulfil the obligation arising from the judicial title. After a specific period of time without compliance by the debtor, expropriation can start following specific procedures as regards documents and time limits, pursuant to the Italian code of civil procedure. An appeal can be lodged either against the enforcement, thus challenging the right to proceed to enforcement itself (Article 615 of the Italian Civil Procedure Code), or against the enforcement documents challenging their validity (Article 617 of the Italian Civil Procedure Code).

The procedures for enforcement involves various public agents and judicial staff. Among public authorities an important role is played by bailiffs, i.e. enforcement agents responsible of specific activities in civil, as well as in criminal procedures, which also carry out extra-judicial duties. These agents are responsible for both the notification of legal documents and the execution of judgements, thus becoming an essential part of the executive process. Their extra-judicial tasks cover, for example, the notification of extrajudicial documents such as injunctions or warrants and the preparation of protests.

From a comparative perspective it is interesting to note that Italy has a high percentage of “other non-judge staff” (which includes, for instance, assistants, receptionists and other judicial staff). This is probably due to the strict interpretation usually given to the definition of the main categories¹⁵.

Telematic Civil Procedure

¹⁴ C. Consolo et al, Study JLS/C4/2005/03 – National Report Italy, 2005.

¹⁵ See European Commission for the efficiency of justice (CEPEJ) Study on the functioning of judicial systems in the EU – Report Italy.



With reference to the quality of the judicial system as an important element in protecting civil rights, a recent reform should be mentioned.

Presidential Decree (*Decreto del Presidente della Repubblica*) no. 123 of 13th February 2011 (Regulation on the use of IT and telecommunication tools in the civil trial, in the administrative process and in the process before the judicial panels of the Court of Auditors (*Corte dei Conti*) has recently introduced the so-called “Telematic Civil Procedure” (*Processocivile telematico* - PCT), a reform aimed at creating a more efficient and rapid judicial system.

The length of proceedings plays, indeed, an important role in the perception of the inefficiency of the Italian system: on average, the longer duration of the processes, the higher the costs for the business and the lower the confidence in the judicial systems. In comparison with other Member States, in 2013 Italy showed, for instance, the highest trial length and the highest trial cost¹⁶.

This situation led to the need for a reform of the judicial system, especially by increasing the capacity to act effectively, efficiently, transparently and in line with the expectation of citizens and users.

Italy tried to achieve this result by introducing the use of the telematic civil procedure.

Ministerial decree no. 44/2011, in compliance with the principles laid down by Legislative Decree no. 82/2005 (the so-called Digital Administration Code), partially reformed the information system for the telematic civil process, made then mandatory pursuant to the so-called “Stability Law 2013” no. 228 of 24th December 2012.

Articles 16-bis. of this law states that the filing of pleadings and documents shall be held by electronic means in civil proceedings, of controversies or voluntary jurisdiction and in other procedures specifically mentioned.

The telematic civil procedure is the production in digital form, the integral and integrated management, as well as the exchange of documents produced as part of the civil trial by actors of the proceeding, according to the rules of authenticity, integrity, security and validation required for the digital document¹⁷.

Procedural acts and documents need to be sent according to specific technical requirements and regulations, updated from time to time by ministerial decrees.

¹⁶ Ibid.

¹⁷ For a general overview, see C. Consolo, *Spiegazioni di diritto processuale civile*, vol. III (Torino, 2012), at 245ff.



The electronic management of the documents requires hence the possession and use of some IT tools, which are: a certified e-mail address (PEC), a digital signature, a software tool that allows the creation of the so-called "Electronic envelope" for the filing of the pleadings (the so-called acts Editors, *Redattoreatti* in Italian) and a Point of Access that supplies lawyers with consultation services and electronic transmission of acts.

The benefits of the combination of justice and Information and Communications Technologies are various: it will not only lead to greater speed in carrying out procedural activities, but it will also generate significant economic savings concerning money, as well as human resource.

The electronic filing system ensures the constant availability and use of the produced information, in addition to a higher level of confidentiality, reliability and integrity, guaranteed by the underlying technology.

Family matters

As far as family matters are concerned an important Italian regulatory measure is Presidential Decree (D.P.R.) no. 396 of 3 November 2000, n. 396, which set out specific rules concerning civil status documents.

From an administrative perspective, in order to obtain the registration of a given civil status document issued abroad, the person shall supply the original version, the official translation and legalisation. The latter is not needed if the document has been issued in a country, which is party to specific Conventions, or according to the multilingual model in one of the contracting State of the *1976 Vienna Convention on the issue of multilingual extracts from civil status records*. Finally, the document must not be contrary to the public policy (*ordine pubblico*).

The application shall be filed either personally by the interested person (or the person exercising the parental authority in case of children) or by email with the copy of an identity document.

In this perspective it is interesting to mention the Circular adopted in 2007 by the Italian Ministry of Internal Affairs, aimed at clarifying some aspects concerning the translation of documents in compliance with the EU Regulation no. 2201/2003.

The procedure developed according to Regulation 1347/2000 was indeed that of requiring the original document duly translated into Italian (pursuant to Article 22 of Presidential Decree 396/2000). Nevertheless, after the entry into force of the new Regulation conflicting opinions arose as to the need for such translation.



On the basis of both an analysis of Regulation no. 2201/2003 and an opinion of the Ministry of Foreign Affairs, the Ministry of Internal Affairs decided that the registration of civil state documents or judgments in matrimonial matters issued in a EU Member State must be granted without requiring a translation.

Likewise, no copy of the judgment is needed. This type of document, although not written in Italian, is indeed drawn with a numerical coding system that allows the comparison between the text written in another language and the one written in Italian, so that it is possible to clearly identify the various substantial elements.

Only in cases where from the above-mentioned certificate emerges an evidence as to the existence of a ground of non-recognition for judgments pursuant to Article 22 of the Regulations, the public agent must ask further documents (including a copy of the judgment translated), able to clarify the doubts, thus allowing for the registration. According to Article 22 a judgment relating to a divorce, legal separation or marriage annulment shall not be recognised: (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought; (b) where it was given in default of appearance, if the respondent was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable the respondent to arrange for his or her defence unless it is determined that the respondent has accepted the judgment unequivocally; (c) if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought; or (d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

In cases where the judgment was given in default of appearance the applicant shall also supply the documents required by Article 37 par. 2 of the Regulation, or the original, or a certified copy of the document showing that the claim has been notified to the defendant or a document proving that he/she has unequivocally accepted the judgment.

The Ministry also underlined that the Regulation has removed the requirement for legalization of the documents mentioned in art. 37, namely a “copy of the judgment, which satisfies the conditions necessary to establish its authenticity”, and the certificate concerning judgments in matrimonial matters pursuant to art. 39. Therefore, no legalization for the mentioned certificate is needed.

In the opinion of the Ministry such conclusion is coherent with the normative framework drawn by the EU Regulation.



First of all, the EU instrument provides for a standard certificate associated to the judgment, thus permitting to understand the contents even without a translation.

Moreover, Article 21 expressly provides for the recognition of decisions without any special procedure for updating the civil-status records of a Member State on the basis of a judgment relating to divorce, legal separation or marriage annulment given in another Member State, and against which no further appeal lies under the law of that Member State. Article 22 has significantly reduced the grounds of non-recognition, eliminating, for example, the cases related to the lack of jurisdiction, substantially restricting non-recognition grounds to serious violation of the rights of defence and to conflicts with other decisions.

Also the reference to public policy has been further reduced by providing for non-recognition only in cases where the decision is manifestly contrary to it.

As stressed by the Ministry, this in line with the general principle of free movement and mutual recognition of all decisions within the European Union, which is now characterized by a substantial compatibility of the rules of the various Member States, which form a legal area substantially informed by principles similar and compatible.

Therefore, outside of the limits set out by the EU Regulation, the Italian public authority in charge for the civil state record has not the competence to examine the judgment in order to allow its recognition in Italy.

Accordingly, considering also the uselessness of the copy of the judgment without translation, under the Ministerial Circular the mentioned certificate is sufficient, without the judgment and its Italian translation as required before.



Question 3: Judicial interpretation and application of EU instruments affecting civil rights

How are the EU instruments listed below and their transposition and implementation measures, interpreted and applied by courts? Is the judicial interpretation and application of these instruments and their domestic transposition and implementation measures furthering civil rights protection or, on the contrary, raising concerns in that respect?

The judicial practice shows how the rules of EU Regulations, notwithstanding their direct application and the role of ECJ decisions, may raise interpretative issues and lead to different approaches of the courts.

From a general perspective it must be stressed that, since the “Castelletti” decision, a preliminary ruling from the Italian Supreme Court (*Corte di Cassazione*) regarding the interpretation of the Brussels Convention (Article 17)¹⁸, Italian courts implement faithfully ECJ interpretation, without making national rules prevail. Moreover, Italian judges often apply requirements of the European regulation and ECJ interpretation also outside their territorial scope or in cases concerning national rules made identical to those of the Brussels Convention (and therefore of the EU Regulations) by Article 3.2 on the Italian law no. 218/95.

As to the first aspect, Italian courts has sometimes held, for instance, that the formal national legal requirement according to which clauses in standard form contracts must be separately and explicitly approved by written reference (pursuant to Articles 1341 and 1342 of the Italian Civil Code) is not needed in cases where such a clause is subject to the application of the Brussels Convention¹⁹.

Also with reference to the construction of the expression “civil and commercial matters”, Italian case law is generally consistent with the autonomous interpretation given by the ECJ.

As to the second aspect, the Italian Supreme Court held that the requirements of Articles 17 of the Brussels Convention (prorogation of jurisdiction) are relevant also with reference to the interpretation of the formal requirement of Article 4 of Italian law no. 218/95, according to

¹⁸ C. Consolo et al., National Report Italy, op. Cit., IT-14.

¹⁹ Ibid., T-8. See, for instance, Cass., decisions no. 7854 of 11 June 2001 and no. 6238 of 11 July 1997.



which agreements must be proven by written statements. In another case concerning a so called *actiopauliana* in a cross-border dispute outside the territorial scope of the European regulation, the Italian Supreme Court applied the interpretation of the ECJ considering such an action as covered by the “matter of contract” pursuant to Article 5 no. 1 of the European Regulation (referred to by the Italian law no. 218/95) and therefore stating that the plaintiff could bring the claim before the judge of the place of performance of the contract²⁰.

With reference to the “matters relating to tort” under Article 5 no. 3 of the EU Regulation, the Italian judges have generally accepted the principle of the relevance of both the place of the event giving rise to the damage and the place where the damage occurred held by the ECJ in the “Bier decision”, according to which “where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression ‘place where the harmful event occurred’, in Article 5.3 of the Convention [...] must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it”. Consequently, the plaintiff may choose to sue the defendant before the court of either of those two places.

Also the rationale of the *Schevill* decision has influenced Italian courts as regards cross-border libel and defamation claims. According to the ECJ decision a proper construction of the expression “place where the harmful event occurred” in Article 5.3 of the Convention allows the victim of a libel by a newspaper Article distributed in several Contracting States to bring an action for damages against the publisher either before the courts of the place where the publisher of the defamatory publication is established (these courts have jurisdiction to award damages for all the harm caused by the defamation) or before the courts in which the publication was distributed and where the victim claims to have suffered injury to his/her reputation (these courts have jurisdiction to rule solely in respect of the harm caused in the State of the court seized). Implementing this decision, the Italian Supreme Court has, for instance, declined jurisdiction in relation to newspaper defamation because the Swiss magazine concerned did not sell copies in Italy and therefore Italy could not be considered as the place where the damage occurred. On the contrary, in relation to a German newspaper with a broad diffusion in Italy, Italian judges affirmed their jurisdiction even if limited to the damages suffered in Italy²¹. It must be stressed that the ECJ case law influenced Italian decision also as regards the law of venues. In particular Italian judges made specifically

²⁰ Ibid. See Cass., Plenary Session, 7th May 2003, no. 6899.

²¹ Ibid., T-10. See Cass., Plenary Section, 27th October 2000, no. 1141 and 21st June 2006, no. 14287.



reference to ECJ decision, and namely to the *Shevill* decision to considered every place where an access to the net is possible as a place where the damage occurred²².

Nevertheless also the restrictive approach of the ECJ in the *Marinari* case proved to have influenced Italian courts. In this decision on a preliminary ruling by the Italian Supreme Court, the ECJ held that “the term ‘place where the harmful event occurred’ in Article 5.3 of the Convention does not, on a proper interpretation, cover the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State”.

Accordingly, for instance in a case concerning a car-accident where relatives claimed damages in Italy because the psychic pains were suffered in the place of their domicile, the Italian Supreme Court declined its jurisdiction underlining the irrelevance of the so called “*damage par ricochet*” and therefore excluding the possibility to find a ground for jurisdiction in places other than that were the initial damage occurred²³. Also in this case Italian judges made reference to the ECJ case law while applying Italian rules of jurisdiction, which according to Article 3.2 of the Italian private international law statute are identical to those of European regulations.

Besides these examples of faithful implementation of the ECJ construction of the EU Regulations by Italian judges, it is worth mentioning specific issued raised by the Italian judicial practice regarding some important concept included in the EU instruments.

Concept of “contractual matters”.

As to the distinction between Articles 5 no. 1 and Article 5 no. 3 of the EU Regulation, we have already mentioned some aspects of the definition of “matters relating to tort”. This section focuses therefore on specific problems concerning the application of these two European rules, which may arose in Italy as regards pre-contractual liability and the decision seeking to challenge the validity of a contract.

In this perspective we should first of all stress that the distinction between “contractual” and “tort” matters is also based on the pleadings and on the type of relief sought by the plaintiff²⁴.

With specific reference to the definition of “contractual” and “non-contractual” liability, the ECJ case law qualifies the pre-contractual liability, and namely the breach of the duty of good faith during negotiations, as a “non-contractual” matter, thus covered by Article 5 n. 3 of the EU Regulation.

²² Ibid. See Cass., 8th May 2002, no. 6591 and 1st December 2004, no. 22586.

²³ Ibid., T-9. See Cass., Plenary Section, 11th February 2003, no. 2060.

²⁴ Ibid.



According to the *Tacconi* decision “in circumstances [...] characterised by the absence of obligations freely assumed by one party towards another on the occasion of negotiations with a view to the formation of a contract and by a possible breach of rules of law, in particular the rule which requires the parties to act in good faith in such negotiations, an action founded on the pre-contractual liability of the defendant is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention”.

Although the Italian case law generally implemented this interpretation, applying an equivalent construction of such concept, it must be stressed that this issue has been argued by Italian scholars²⁵; it is above all important to mention two recent ground-breaking decisions of the Italian Supreme Court according to which pre-contractual liability should not be considered as a tort, but as a liability arising from the breach of the obligations based on the “social contact” between the parties of the future contract and congruent to the principle of good faith²⁶.

Another important aspects dealing with the concept of “contractual matters” is whether it covers also issues regarding decisions aimed at proving the nullity of the contract. While ECJ case law normally considers this matter as “relating to contract” pursuant to Article 5 no.1 of the Regulation, Italian judges sometimes disagree.

In this perspective it is interesting to mention a recent request for preliminary ruling from the Italian Supreme Court now pending before the ECJ and lodged on 1 July 2013 within the claim “Profit Investment SimSpA, in liquidation v Stefano Ossi and Commerzbank AG” (Case C-366/13). Among the questions referred to the ECJ, the Italian Supreme Court asked whether the expression “matters relating to a contract”, as used in Article 5 no. 1 of Regulation no. 44/2001, should be understood to refer “only to disputes in which the applicant intends to assert before the court the binding legal relationship arising from the contract and to disputes which are closely linked to that relationship” or whether it must be extended “so as also to include disputes in which the applicant, far from invoking the contract, disputes the existence of a legally valid and binding contractual relationship and seeks to obtain a refund of the amount paid on the basis of a document which, in its view, is bereft of legal value”.

Just to give an idea of other interpretative issues concerning the EU Regulation debated in the Italian context, the Supreme Court also referred two questions concerning the connecting link

²⁵See, for example, C. Scognamiglio, *Tutela dell'affidamento, violazione dell'obbligo di buona fede e natura della responsabilità precontrattuale*, in *Responsabilità civile e previdenza*, 6, 2012, 1949 ff.

²⁶Cass., no. 24438 and 27648 of 2011.



between different actions set out by Article 6.1 and the requirement of written form for the agreement conferring jurisdiction as laid down in Article 23.1 of the EU Regulation.

As to the first point, Article 6.1 states that a person domiciled in a Member State may also be sued “where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”. The Italian Court asked whether this connecting link could be said to exist “where the subject-matter of the heads of claim put forward in those actions and the basis for the pleas in law raised therein are different and there is no relationship between them of subordination or logical and legal incompatibility, but the upholding of one of those actions is nonetheless potentially capable, in practice, of affecting the extent of the interest on the grounds of which the other action has been brought”.

As to the second issue the Italian Court asked whether the requirement of written form could be satisfied if the agreement “is inserted into the document (Information Memorandum) that has been created unilaterally by a bond issuer, with the effect that the prorogation of jurisdiction is made applicable to disputes involving any future purchaser concerning the validity of those bonds”. The Court also asked whether, in case of negative answer, could it be said that “the insertion of that agreement into the document governing a bond issue which is intended for cross-border movement corresponds to a form which accords with usages in international trade or commerce within the terms of Article 23(1)(c) of that regulation”. Indeed, according to the latter rule in international trade or commerce, the agreement can also be made “in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned”.

With reference to the specific aspect related to the evidence of a prorogation of jurisdiction (also dealt with by the ECJ and other national judges), it should be stressed that in Italy the rule providing for the burden of proof is Article 2697 of the civil code. Despite the fact that this rule is not directly applicable to the prorogation of jurisdiction, it has been argued that it could apply by analogy²⁷.

This Article distinguishes between “constitutive” facts and facts which modify or extinguish the right concerned. As to the first kind of facts the burden of proof falls on the plaintiff, whereas in the second case it falls upon the defendant.

²⁷ L. Penasa, *La legge applicabile alla severability della clausola di electio fori e l'onere della prova della giurisdizione secondo l'High Court of Justice*, in *Int'lLis*, 2011, 10, 9-17, at 12ff.



As far as Italian jurisdiction is concerned, law no. 218/95 includes both facts establishing the power of a given judge to hear the case and facts extinguishing this power. Since the rule on the prorogation of jurisdiction (Article 4) not only excludes jurisdiction but also the duty of Italian judges to decide the case on the merit, the burden of proof should fall upon the party interested to challenge it. Italian courts have also confirmed this principle²⁸. Consequently, as regards the grounds for jurisdiction provided for by the law, the burden of proof should fall upon the plaintiff (in the sense, for instance, the decision of the Italian Supreme Court in 2008, no. 1401)²⁹.

Place of delivery

Specific issues may arise from the interpretation of Article 5 no. 1 letter b), first indent.

It should first of all be stressed that taking into account the problems raised by the interpretation of the former Article 5 of the Brussels Convention, Regulation no. 44/2001 introduced a new version, which now includes a general and a specific rule.

According to letter a) a person domiciled in a Member State may, in another Member State, be sued “in matters relating to a contract, in the courts for the place of performance of the obligation in question”, while pursuant to letter b): “for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered;
- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided”.

The definition of the concept “place of delivery” is therefore an important interpretative issue influencing the implementation of Article 5 no. 1 letter b) since this rule concentrate on this place the jurisdiction of all claims concerning the sale of goods. The judicial application of this rule shows how complex this definition may be³⁰.

In that respect, a solution may be represented by the agreement between the parties, in cases where the place is determined under the contract itself. The importance of this agreement has been indeed stressed also by the ECJ in the *Car Trim* case (2010), according to which the rule set out by letter b) must be interpreted as meaning that, in the case of a sale involving carriage of goods, the place where, under the contract, the goods sold were delivered or should have

²⁸Ibid., at 13.

²⁹ Ibid.

³⁰See, among others, M. A. Lupoi, *La giurisdizione in materia contrattuale nel regolamento n. 44 del 2001: la nozione di luogo di consegna del beni e di prestazione dei servizi*, in M. A. Lupoi (ed.), *Tutele e procedure giudiziarie europee. Principi fondamentali e applicazioni pratiche* (Rimini, 2011), 75-103, at 80.



been delivered must be determined on the basis of the provisions of that contract”. The ECJ also clarified that where it is impossible to determine the place of delivery the basis of the contract “without reference to the substantive law applicable to the contract, that place is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction”.

Another issue arising from the agreement is whether it could be inferred also in case of the use of Incoterms³¹. The ECJ (*Electrosteel* case, 2011) had to comply with this problems and held that in order to verify whether the place of delivery is determined “under the contract”, the national court must take account of “all the relevant terms and clauses of that contract which are capable of clearly identifying that place, including terms and clauses which are generally recognised and applied through the usages of international trade or commerce, such as the Incoterms drawn up by the International Chamber of Commerce in the version published in 2000”.

In cases where the place of delivery is not determined under the contract, two approaches characterises the case law, and also the Italian one³².

The first one is the so-called “normative approach” according to which it is the substantive law (*lexcausae*) that should apply according to the national conflict-of-law rules. This was actually the construction already implemented under the Brussels Convention. The second one is the “factual approach” according to which the place of delivery must be considered the place of final destination.

The difference between these two approaches has been strongly debated by scholars.

For a long time, despite the fact that some lower courts held that the place of delivery is that of the final destination, the Italian Supreme Court has adopted the “normative approach” in most of the cases³³. In 2007 the Court not only confirmed this approach but also considered the request of a preliminary ruling as to unnecessary, due to the fact that in its opinion there was no doubt on the definition to be given to the concept of place of delivery³⁴.

³¹See also C. Silvestri, *Ancora sul forum contractus nel Reg. n. 44/2001: il valore delle previsioni contrattuali e delle clausole d'uso del commercio internazionale nell'individuazione del “luogo di consegna” ai sensi dell' art. 5, n.1, lett. b)*, in *Int'ILis*, 10, 3-4, 2011, 127 ff.

³² M. A. Lupoi, *La giurisdizione in materia contrattuale nel regolamento n. 44 del 2001: la nozione di luogo di consegna dei beni e di prestazione dei servizi*, op. cit., at 79ff.

³³*Ibid.*, at 84.

³⁴See for instance A. De Franceschi, *Compravendita internazionale di beni mobili con pluralità di luoghi di consegna*, in *Int'ILis*, 2007, 123ff;



This decision was nevertheless inconsistent with the ECJ case law and in particular with a ruling of the same year. In the *Color Drack* case (2007) the ECJ stated indeed that first indent of Article 5.1. letter b), applying where there are several places of delivery within a single Member State, must be interpreted as “the court having jurisdiction to hear all the claims based on the contract for the sale of goods is that for the principal place of delivery, which must be determined on the basis of economic criteria”. The ECJ also pointed out that, in the absence of determining factors for establishing the principal place of delivery, the plaintiff might sue the defendant in the court for the place of delivery of its choice.

In 2009 the Italian Supreme Court has changed its approach considering the place of delivery as the place of final destination³⁵.

Matters related to torts and action for a negative declaration

The implementation of Article 5 no. 3 raises intricate issues concerning, for instance, actions for a negative declaration seeking to establish the absence of liability in tort, delict, or quasi-delict. This matter is indeed linked to the problem of the so-called Torpedo actions. This term is usually used to define actions for a negative declaration as to infringement of an intellectual property right, especially in the field of patents. As well known, this procedural technique consists in filing a claim (by the potential injuring party) taking advantage of the EU Regulation’s *lis pendens* rules by choosing the jurisdiction of a Member State known – as Italy is – for the length of the proceedings, thus preventing the patent holder (the potential injured party) from the action for liability in Member States with quicker proceedings. The courts of these States are in fact obliged to suspend the procedure, waiting for the judgement on the negative declaration of liability for patent infringement firstly filed in the other Member State. In particular, these actions were based on the rules contained by the EU Regulation according to which in matters relating to tort, delict or quasi-delict, a person domiciled in a Member State may be sued in another Member State “in the courts for the place where the harmful event occurred or may occur”.

With reference to the implementation of this rule the Italian Supreme Court has for a long time declined Italian jurisdiction considering that if the plaintiff aims at a negative declaration of the existence of a tort, Article 5.3 shall not apply³⁶.

³⁵ M. A. Lupoi, *La giurisdizione in materia contrattuale nel regolamento n. 44 del 2011: la nozione di luogo di consegna dei beni e di prestazione dei servizi*, op. cit., at 85.

³⁶ For a general analysis see F. Bossi, *Le azioni di accertamento negativo della contraffazione ed il forum commissidelicti*, in *Giurisprudenza Italiana*, 2014, 588 ff.



Nevertheless, on this matter the ECJ has recently ruled differently stating that such an Article of the EU Regulation “must be interpreted as meaning that an action for a negative declaration seeking to establish the absence of liability in tort, delict, or quasi-delict falls within the scope of that provision” (Folien Fischer judgment, C-133/11).

Accordingly, in 2013 the Italian Supreme Court has accepted Italian jurisdiction in these kind of actions pursuant to Article 5.3 of the EU Regulation, as interpreted by the ECJ. The Italian jurisdiction has been extended also to the “foreign fraction” (German in this case) of the patent.

This new decision by the Italian Court, although more in compliance with EU standards, is likely to increase the “torpedo actions” problems³⁷.

It must anyway be stressed that the new rules on *lis pendens* introduced by the EU Regulation no. 1215 of 2012, recently entered into force, may limit this kind of procedural technique and problems linked to the so-called “forum shopping”³⁸.

With regard to the Italian case law it must nevertheless be underlined that in 2014 the trial court of Milano (Tribunale ordinario di Milano, decision no. 1143/2014) has declined the Italian jurisdiction on the “foreign fraction” (Spanish in this case) of the patent, notwithstanding the application of Article 5.3 of the Regulation, as interpreted by the ECJ.

Therefore, in Italy the issue of the judicial implementation of rules on jurisdiction in this field seems to be still controversial.

Public policy (ordine pubblico)

The three instruments analysed provide for the same limit to recognition of judgments and measures: the public policy.

According to Article 34 (recognition of judgment) of the Brussels I Regulation, Articles 22 (judgments relating to divorce, legal separation or marriage annulment) and 23 (judgments relating to parental responsibility) of the Brussels IIa Regulation, Article 13 (recognition enforcement of the protection measures), the judgments and measures concerned shall not be recognised if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought.

The concept of “public policy” (*ordre public*) and its scope are debated in many fields by both courts and scholars.

³⁷ See for instance *Ibid.*, at. 591ff.

³⁸ As regards the changes introduced by the new Regulation concerning *lis pendens* and the problems raised by the former, see M. A. Lupoi, *La nuova disciplina della litispendenza e della connessione tra cause nel regolamento Ue n. 1215 del 2012*, in *Rivista trimestrale di diritto e procedura civile*, 2013, 1425-1440.



It must be first of all underlined that this concept includes also the so-called procedural public policy, which concerns the fundamental principles of the right to defence.

The Gambazzi case is an example of the role that procedural public policy may perform in the enforcement of foreign judgments³⁹. The Italian Court of Appeal of Milan referred a request for preliminary ruling to the ECJ asking whether, in order to enforce an English judgment, was to be considered the fact that the judgment had been issued by the Court without hearing the defendant, who after having entered appearance before it, had been excluded from proceedings by means of an order, on the ground that he had not complied with the obligations imposed by an earlier order. In particular, since he had failed several times to fully comply with disclosures orders, the High Court of London held Mr. Gambazzi in contempt of court and therefore excluded him for proceedings (“debarment”). He was consequently condemned without being heard. He then appealed against the orders issued by the Italian courts declaring the English judgment enforceable in Italy.

According to the ECJ such a judgment may be considered contrary to public policy if the sanction imposed is disproportionate. Moreover the Court stated that it is for the national court to verify a series of elements (opportunities to be heard, remedies, procedural guarantees, a due examination of the well-foundedness of the claim, possibility of expressing his opinion on that subject and a right of appeal, etc.) in order to evaluate the respect of the right to be heard, to balance it with the aim being pursued and to assess whether the sanction was disproportionate.

Both the Court of Appeal and the Supreme Courts stated that there was not disproportionate infringement of the right to be heard of Mr. Gambazzi and therefore dismissed his appeal.

This decision shows, on the one hand, that the content of “public policy” depends on the evaluation of each State and, on the other hand, the interpretation given by the Italian courts, which held that the given judgment, although issued without hearing the defendant, could meet the requirements imposed by the ECJ.

It has nevertheless been argued that the Italian judges should have considered more seriously, if not the fact that the defendant was in default, at least the lack of motivation, which characterised the type of judgment whose enforcement was sought⁴⁰.

³⁹ For a general analysis of this case see M. Winkler, *Circolazione delle decisioni contumaciali e ordine pubblico processuale nello spazio giudiziario europeo: un nuovo tassello della vicenda Gambazzi-Stolzenberg*, in *Nuova Giurisprudenza Civile Commentata*, 2011, 578 ff.; and Id., *La circolazione internazionale delle sentenze contumaciali: il caso Gambazzi*, in *Nuova Giurisprudenza Civile Commentata*, 2014, 64 ff.

⁴⁰ Ibid.



As to matrimonial matters, the concept of public policy may perform a role as to the recognition of decisions related to types of marriage that are allowed in other European countries but not legal in Italy, such as, for instance, same-sex marriages. Although Regulation no. 2201/2003 concerns divorce, legal separation and marriage annulment, decisions on the matrimonial relationship are likely to influence the framework for the recognition and enforcement of the acts referred to by the Regulation and for parental responsibility as well.

For a long time, same-sex marriage could not be recognized in Italy (see, for instance, the decree of the trial court in Latina issued in 2005 and the decree issued by the Court of Appeal in Rome in 2006 dismissing the complaint filed by same-sex couples). Recently, some municipalities began instead to register such relationships and in 2014 the trial court in Grosseto ordered for the first time to recognize a same-sex marriage, stating that there was no legal obstacle to it⁴¹.

Public policy exceptions may also arise in the religious fields, for instance when gender equality or minors protection are at stake.

With reference to children the concept of public policy is also used as regards the recognition of minors born through assisted reproduction techniques not allowed in Italy. Also in this case, although the EU Regulation does not specifically deal with such situations, decisions on these issues may anyway affect the rights protected by the European rules.

In this respect, a recent case dealt with the registration of the birth certificate in the civil state's record of an Italian municipality of a child born thanks to an assisted reproduction carried out by two married women in Spain. The municipal authority refused the registration and the trial court dismissed the appeal. On the contrary, the Court of Appeal of Torino acknowledged the possibility to register in Italy a certificate of birth of a child born in another State from a same-sex couple. In particular, the Court underlined the need for a proper exercise of the parental responsibility and the best interest of the child, which may prevail on the protection of public policy⁴².

While in case of children, the principle of public policy must be always balanced with their rights and best interest, which are strongly protected, the issues concerning matrimonial relationships of same-sex couple seem instead to be still more controversial in Italy.

⁴¹Trial Court of Grosseto, decision of 9 April 2014.

⁴² Court of Appeal of Turin, decision of 29 October 2014.







1.1.2 Protection of rights in criminal proceedings

1.1.2.1. Mutual recognition instruments in criminal matters

- Framework Decision 2002/584/JHA of 13 June 2002 on the *European arrest warrant* and the surrender procedure between member state: all provisions potentially relevant.
- Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition for judgments imposing custodial sentences or measures involving deprivation of liberty, in particular Arts 1, 2, 3, 6, 7, 8, 9, 10,11, 14, 18, 19, 29
- Framework Decision 2008/947/JHA of 27 November 2008 on probation decisions and alternative sanctions, in particular Arts 1, 2, 3, 4, 10, 11, 19
- *Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in criminal proceedings, in particular Arts 1-19.*
- Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence, in particular Arts 1-2-3, 7,8, 10, 11.
- Framework Decision 2006/783/JHA on the application of the principle of mutual recognition for confiscation orders, in particular Arts 1,2,6,7,8,9, 11, 14, 18.

Question 1 – Transposition of the above EU instruments protecting or potential affecting civil rights

How are the EU instruments listed below transposed in the country of study? Have there been notorious failure or defect in the national transposition? Is the national legislative transposition of these EU instruments reinforcing or on the contrary threatening civil rights norms?

The European Arrest Warrant (EAW) replaced the instrument of extradition among European Member States and is one of the most important tools in the framework for mutual recognition and judicial cooperation in criminal matters, which represents a significant development in European integration.

Despite this European trend, the Italian transposition of this instrument proves to be less open towards a proper form of harmonisation and integration as far as constitutional and criminal principles are concerned.

In particular, Framework Decision 2002/584/JHA of 13 June 2002 has been transposed by law no. 69 of 2005, which, on the one hand, is strongly influenced by the Italian constitutional framework and, and on the other hand, goes to some extent beyond a mere implementation of the European instrument.



As to the first aspect, significant issues are linked to the compliance of the European Framework Decision's rules with the principle of legality (*principio di legalità*) embedded in Article 25 of the Italian Constitution, according to which: "no punishment may be inflicted except by virtue of a law in force at the time the offence was committed. No restriction may be placed on a person's liberty save for as provided by law". The same principle is set out in Article 1 of the Italian Criminal Code: "no one may be punished for a fact that is not expressly provided by the law as a crime, nor by a punishment that is not established by the law".

Accordingly, article 2 of the Italian implementation law introduces a general "safeguard clause"⁴³ imposing the respect of the constitutional principle protecting the due process, the rights to defence and equality in order to execute a EAW.

In this respect, problems could arise with reference to Article 2 of the European regulation, which enables to disregard the verification of the double criminality principle, according to which an offense must be considered a crime pursuant to the law of the issuing Member State as well as to that of the executing one, irrespective of the punishment regime.

Double criminality was, for instance, a basic principle in extradition. On the contrary, Article 2 of the European Framework Decision states that some offences, if punishable in the issuing Member State "by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and *without verification of the double criminality* of the act, give rise to surrender pursuant to a European arrest warrant".

The offences are listed in the same article, but in a very general way, such as for instance: participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, computer-related crime, racism and xenophobia, etc.

Therefore, the European instrument provides only for a heterogeneous list of offences and makes a mere reference to their *nomeniuris*, without giving a proper definition to them.

⁴³Report by the Italian Supreme Court, *Rel. n. III/12/2010: Decreto Legislativo 7 settembre 2010, n. 161, recante "Disposizioni per conformare il diritto interno alla Decisione quadro 2008/909/GAI relativa all'applicazione del principio del reciproco riconoscimento alle sentenze penali che irrogano pene detentive o misure privative della libertà personale, ai fini della loro esecuzione nell'Unione europea"* (*Gazz. Uff.*, 1° ottobre 2010, n. 230), Roma, 15 ottobre 2010, at 4.



That is the reason why Italian law, according to the constitutional principle above mentioned, introduced a more detailed list of offences properly defined (Article 8.1 of law no. 69/2005), which can give rise to surrender also without verifying the double criminality.

Anyway, Article 7 of the Italian law clearly imposes the principle of double criminality as the general rule for giving execution to the EAW.

Furthermore, in comparison with the European regulation, the Italian transposition added further mechanisms for control and/or to deny the surrender, which are much more strict. In particular, the Italian law introduces further grounds for non-execution of the EAW and makes them all mandatory, thus removing the difference drawn by Article 3 of the European Framework Decision between optional and mandatory non-execution grounds.

Besides, while pursuant to the European instrument there are only three grounds for mandatory non-execution of the EAW – and namely:

- if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;
- if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;
- if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State;

the Italian law introduces grounds not even mentioned by the European Framework Decisions, by giving relevance to specific factual or procedural situations in which the Court of Appeal is obliged to refuse the execution of the EAW.

These further grounds for non-execution are covered for instance by the following Articles:

- Article 1.3: Italy may execute an EAW under the condition and in accordance with law no. 69/2005, provided that the protective measure on which the EAW is based has been signed by the judge, has a motivation or provided that the decision to execute is a final one;
- Article 8.3: the Italian authority shall ascertain the definition of the offences for which the surrender is requested, pursuant to the law of the issuing Member State and verify whether it corresponds to the offences listed by the same article;
- article 18.1 (cases in which the surrender shall be refused);
 - letter b): if the right has been infringed with the consent of the person who can fully decide on it according to Italian law;
 - letter c) if according to Italian law the offence represents the exercise of a right, the fulfilment of a duty, a pure accident or a force-majeure-type event;
- letter e): if the issuing Member State does not provide for a maximum limit for preventive detention;



- letteri) is related to specific cases where the EAW concerns an underage person;
- letter s) if the EAW concerns a pregnant woman or a mother of children under three years old cohabiting with her unless the protection needs on which the measure is based prove to be of extraordinary seriousness;
- letter t) if the protection measure on which the EAW is based has no motivation.

The Italian law has also transposed recitals no. 12 and 13 of the European Framework decision in three mandatory grounds for refusal concerning the protection of human rights, fundamental freedoms and the prohibition of death penalty, torture or other inhuman or degrading treatment or punishment (Article 18 letters a), d) and h). Another important feature of the Italian transposition is the requirement of serious evidence of guilt (*graviindizzi di colpevolezza*) to which the surrender is subordinate (Article 17.4 of law no. 69/2005). The Italian law thus adds a specific and rather strict condition not covered by the European Framework Decision and, at the same time, different from the traditional principles characterising the fields of extradition on the international level⁴⁴.

The Italian implementation law also requires the EAW to be signed by a judge and adequately motivated.

Article 6.4 introduces a further formal requirement, stating that the issuing Member State shall attach to the EAW also a report with all details (as to time, place and legal qualification) of the alleged facts and evidences on which the surrender is based, thus imposing further duties on other Member States.

Finally, Italy is one of the three Member States (with Austria and France), which used the transitional provision of Article 32 of the European Framework Decision making the required statement as to offences committed before January 2002. According to this rule extradition requests received before the entry into force of the Framework Decision will indeed continue to be governed by existing instruments relating to extradition. Moreover according to Article 40 the rule concerning the absence of the assessment of double criminality can apply only to crimes committed after the entry into force of the Italian implementation law, namely after 2005.

The Italian legislative transposition seems therefore to hinder a full implementation of the European judicial cooperation in the field of the EAW, while at the same time strongly protecting constitutional and criminal principles concerning the rights of the accused person.

⁴⁴ For a general overview see M. Bargis, *Libertà personale e consegna*, in *Manuale di procedurapenale europea*, in R.E. Kostoris (ed.), *Manuale di procedurapenale europea* (Milano, 2014), 249-299; Council of the European Union, *Evaluation report on the fourth round of mutual evaluations "the practical application of the European arrest warrant and corresponding surrender procedures between member states - 5832/2/09 REV 2 – Report on Italy*.



As we will see, the Italian Supreme Court and the Constitutional Court intervened several times on the construction of the Italian regulation trying to improve its compliance with the EU law and at the same time clarifying significant issues as regards constitutional rights, also with reference to Articles 6 of the European Convention on Human Rights (see below answer to question n. 3).

Finally, with reference to decisions rendered in the absence of the person concerned at the trial it is worth mentioning law no. 67 of 28 April 2014 modifying the Italian framework for *in absentia* trials in a way more in compliance with European principles and especially with Article 4bis concerning the refusal to execute the EAW if the person did not appear in person at the trial introduced by *Framework Decision 2009/299/JHA of 26 February 2009*. The reform amended the Italian Code of Criminal Procedure (in particular Article 420 bis) providing for the need for a clear knowledge of the proceeding by the accused person, for the suspension of the trial in cases where this knowledge cannot be proven and for remedies aimed at a higher degree of effective protection of the right to participate. Consequently, the forms for the EAW shall specify also these elements⁴⁵.

Mutual recognition of judgment imposing custodial sentences and measures involving deprivation of liberty

Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union has been transposed in Italy by means of Legislative Decree (*Decreto legislativo*, hereinafter *D.lgs.*) no. 161 of 7 September 2010, in compliance with the mandate given to the Italian Government by the so-called “Community Law” (*Legge comunitaria*) 2008, namely by Article 52 of Law no. 88/2009.

Since procedural rights in criminal proceedings, as stated by the Framework Decision itself, are a crucial element for ensuring mutual confidence among the Member States⁴⁶, this instrument introduces a further important tool within the European framework for judicial cooperation, which should be implemented and applied in compliance with the protection of fundamental rights embedded in Article 6 of the EU Treaty and in the EU Charter of

⁴⁵See for instance E. Zanetti, *Mandato di arresto europeo e giudizio in assenza dell'imputato*, in D. Vigoni, *Il giudizio in assenza dell'imputato* (Torino, 2014), 87-103, at 101.

⁴⁶Recital no.5



Fundamental Rights, and allowing the general principles of equality, fairness and reasonableness to be respected⁴⁷.

As to fundamental rights, Article 1 of the Italian law, similarly to the first Article of the law transposing the EAW Regulation, contains a kind of general “safeguard clause”⁴⁸ imposing that the implementation of the EU instrument shall be possible only as long as its rules are not conflicting with the supreme principles of the Italian constitutional system regarding fundamental rights, freedoms and the right to due process.

With reference to the relationships between this instrument and the EAW, this former Framework Decision applies, *mutatis mutandis*, to the enforcement of sentences in the cases provided for in Article 4.6 and 5.3 of the EAW Regulation. Consequently, the executing State may verify the existence of a ground for non-recognition and non-enforcement set out by Article 9 of this Framework Decision as a condition for recognising and enforcing a judgment, to consider whether to surrender the person or to enforce the sentence in cases pursuant to Article 4.6 of the EAW regulation⁴⁹.

Within this perspective, Article 24 of the Italian law extends the new procedure for recognition set out by D.lgs. no. 161/2010 also to the hypothesis covered by two specific Italian rules. Namely, to Article 18.1 letter r) of Law 69/2005 according to which the Court of Appeal shall refuse surrender “if the European arrest warrant has been issued for the purposes of executing a custodial sentence or a detention order, should the requested person be an Italian citizen, provided that the Court of Appeal order the custodial sentence or detention order be executed in Italy in accordance with its internal legislation”; and to Article 19 letter c) of the same law, which states that if the person concerned by the EAW is an Italian citizen or resides in Italy, the execution by the Italian authorities is subject to the requirement that the person, after having been heard, is sent to the executing Member State to serve the custodial sentence or security measures involving deprivation of liberty established by the issuing Member State.

As to the transmission, Article 2 of the Italian law distinguishes between transmission to the executive State (*trasmissione all'estero*), where the Italian sentence has to be recognised and executed abroad (covered by Chapter II of the Italian law), and transmission from the issuing State (*trasmissione dall'estero*), where the sentence issued abroad is transmitted to Italy in

⁴⁷Recital no.13 and 6.

⁴⁸ Report by the Italian Supreme Court, *Rel. n. III/12/2010, cit.*, at 4.

⁴⁹Recital no.12.



order to be recognised and executed within the Italian territory (covered by Chapter III of the Italian law).

The Italian law includes a longer list of definitions compared to that covered by Article 1 of the Framework Decision. Among them, Article 2 defines the term “*sentenza di condanna*” (similarly to the definition of “judgment” included in the EU instrument) as the final decision by a judicial authority imposing, also jointly, a sentence or a security measure on a natural person. With reference to the Italian system, it means on the one hand that the transfer of the execution cannot deal with a precautionary measure, and on the other hand that it involves also cases in which the decision imposes only a (personal and custodial) security measure without a true punishment (*pena*), such as the acquittal pursuant to Article 530, section 4, of the Italian Code of Criminal Procedure issued together with a security measure⁵⁰.

The definition of “*pena*” (sentence) is equivalent to that included in the EU instrument (any custodial sentence imposed for a limited or unlimited period of time on account of a criminal offence on the basis of criminal proceedings), but in the Italian law it is distinguished from that of “*misure di sicurezza*” (security measures), whereas the definition of “sentence” of the Framework Decision includes also any “measures involving deprivation of liberty”.

Also the Italian law excludes sentences imposed on legal persons and therefore the field covered by D.lgs n. 231/2001.

The term “*riconoscimento*” (recognition) refers to the decision of executive authority by which the procedure intended to execute in a given State a judgment issued in another one is successfully concluded.

Transmission to the executive State

With specific reference to the transmission of an Italian sentence to be executed in another EU Member State, D.lgs no. 161/2010 excludes the application of the rules of the Code of Criminal Procedure concerning the execution of the Italian criminal judgments abroad (i.e. Chapter II of the second Title of Book XI). Nonetheless, from a general perspective, Article 24 of the same law contains a clause that refers to the provisions of the Italian Code of Procedural Code for any aspects not covered by the mentioned D.lgs, provided that they are consistent with the EU instrument.

The order concerning the transmission to the executive foreign authority is put besides the execution order but does not substitute it, as clarified by the explanatory report by the Italian

⁵⁰Report by the Italian Supreme Court, Rel. n. III/12/2010, op. cit., at 5.



Government⁵¹. According to Article 5.1, the transfer of the sentenced person may indeed concern a person detained, as well as cases in which the execution order has still to be issued or carried out. In any case the transmission must be realised within the date in which the remainder of sentence or measures to be served is lower than six month.

This condition is consistent with Article 9.1 letter h) (Grounds for non-recognition and non-enforcement) of the EU Framework Decision, according to which the competent authority of the executing State may refuse to recognise the judgment and enforce the sentence, if “at the time the judgment was received by the competent authority of the executing State, less than six months of the sentence remain to be served”.

Article 5 of the Italian law set out further conditions jointly needed in order to issue the order of transmission, in addition to the absence of a ground for suspension of the executions.

The conditions are the following:

- a) the execution of the sentence or of the measure shall have the purpose of facilitating the social rehabilitation of the sentenced person; this condition recalls a principle included also in the EU Framework Decision;
- b) the criminal offences for which the person has been sentenced shall be punished by a custodial sentence not lower than three years pursuant to the Italian Criminal law;
- c) the sentenced person shall be in the Italian territory or in that of the executing State;
- d) the sentenced person is not subject to another criminal procedure or is not serving another sentence or security measure, unless the competent authority gives a different advice.

Another rule in line with the EU instrument is section 3 of the same Article 5 concerning the States to which the transmission may be ordered.

Similarly to Article 4.1 of the Framework Decision (Criteria for forwarding a judgment and a certificate to another Member State) the judgment may be forwarded to one of the following Member States:

- a) the Member State of citizenship of the sentenced person in which he/she lives;
- b) the Member State of citizenship, to which, while not being the Member State where he/she lives, the sentenced person will be deported, once he or she is released from the enforcement of the sentence on the basis of an expulsion or deportation order included in the judgment or in a judicial or administrative decision or any other measure taken consequential to the judgment;
- c) any Member State which consents to the forwarding of the judgment and the certificate to that Member State.

The Italian law introduces nevertheless a difference setting out the cases in which the consent of the sentenced person is needed to forward the judgment abroad. In the cases pursuant to letter a) and b) the transfer may be realised without the consent, whereas in the latter case the

⁵¹ Quoted also by the Report of the Italian Supreme Court, cit., at 6.



consent is needed and the transfer requires also the consent of the executive State (Article 6.4 d.lgs 161/2010).

Transmission from the executive State

With reference to the transmission of the sentence from the executive State to Italy, where recognition and execution have to be approved by the Court of Appeal (*Corte di Appello*), Chapter III of the Italian law provides for the same models of judicial guarantees adopted by Articles 701 and 730 of the Italian Code of Criminal Procedure for extradition and by Article 5 of Law no. 69/2005 as to the EAW (see in particular article 12 of the D.lgs 161/2010).

According to Article 10, the Court of Appeal has to ascertain the following requirements, which shall be jointly met:

- a) the sentenced person is an Italian citizen;
- b) the sentenced person resides or is domiciled in the State territory or will be deported in Italy on the basis of order included in the sentence or in another or in another linked decision;
- c) the sentenced person is located in the issuing State;
- d) the sentenced person has given his/her consent to the transmission; there are nevertheless some explicit exceptions to this rule pursuant to the same Article.
- e) double criminality: the offence is considered as a crime also according to Italian national law;
- f) the length and the legal nature of the security measure applied in the issuing State are in compliance with Italian law, except for the possibility of their adjustment.

As to ground for non-recognition, the Italian law substantially transposes the rules provided in Article 9.1 of the EU Framework Decision.

The Italian Court of Appeal shall refuse the recognition if:

- the conditions set out in Article 10 are not met;
- the certificate that must be attached is incomplete or manifestly does not correspond to the judgment and has not been completed or corrected within a reasonable deadline set by the competent authority of the executing State;
- enforcement of the sentence would be contrary to the principle of *ne bis in idem*;
- the enforcement of the sentence is statute-barred according to the law;
- there is immunity under Italian law, which makes it impossible to enforce the sentence;
- the sentence has been imposed on a person who, under Italian law, owing to his/her age, could not have been held criminally liable for the acts in respect of which the judgment was issued;
- at the time the judgment was received by the competent authority, less than six months of the sentence remain to be served;
- the judgment was rendered in absentia, unless the certificate states that the person had an effective knowledge of the proceeding and refused to be present or to contest the case;
- the sentence imposed includes a measure of psychiatric or health care or another measure involving deprivation of liberty, which cannot be executed in accordance with the Italian legal or health care system;



- the judgment relates to criminal offences which under Italian law are regarded as having been committed wholly or for a major or essential part within its territory, or in a place equivalent to its territory.

A specific difference between the Italian and European grounds for non-recognition deals with letter e) of Article 13 concerning the case in which in Italy a “nonsuit judgment” (*sentenza di non luogo a procedere*) has been issued, unless the requirement for repealing the judgment are met pursuant to Article 434 of the Italian Code of Criminal Procedure. Although not included in the European Framework Decision, this condition corresponds to that set out by the Italian law on EAW.

Since after the recognition the foreign judgment is considered completely equal to the Italian one, the execution of the sentence follows the Italian rules of criminal procedure, also as regards amnesty and pardon.

Contrary to the European Framework Decision concerning the EAW and the recognition of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, Framework Decision 2008/947/JHA of 27 November 2008 on probation decisions and alternative sanctions, Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in criminal proceedings, and Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence, Framework Decision 2006/783/JHA on the application of the principle of mutual recognition for confiscation orders have not been legislative transposed in Italy yet. Considering that the Framework Decisions 2008/978/JHA and 2003/577/JHA have been substituted by Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, Italy shall take the necessary measures to comply with this Directive by 22 May 2017.

Question 2 – Executive/administrative implementation of EU instruments affecting civil rights

How are the EU instruments below and their national transposition measures implemented through regulatory/executive or administrative measures? Have these EU instruments been implemented in ways which affords further protection or potentially undermine civil rights norms?



The Italian constitutional framework for criminal matters and for criminal procedure is based upon the principle of “*riserva di legge*”, as repeatedly confirmed by the Italian Constitutional Court (see Articles 25 and 111 of the Italian Constitution). As a consequence only primary sources of law may regulate the fields analysed in this study. Besides the law and the legislative decree already mentioned, there are no specific administrative regulations dealing with the transposition of the EU Framework Decisions as far as criminal and criminal procedure principles are concerned.

From a practical perspective, the structure of the Italian judicial system and the rules concerning authorities, offices, criminal policy, staff, and documents build the organizational framework within which the EU instruments are implemented.

In Italy the main source implementing the Code of Criminal Procedure is D.Lgs. no. 271 of July 1989 (*Norme di attuazione, di coordinamento e transitorie del codice di procedura penale*). For a general description of the Italian courts see below answers to Part II.

For purposes of this questionnaire, some practical aspects concerning the EAW and the recognition of judgment in criminal matters imposing custodial sentences or measures involving deprivation of liberty may nevertheless be stressed.

European Arrest Warrant

In Italy the central authority assisting the competent judicial authorities in EAW matters is the Ministry of Justice. It transmits and receives EAWs and is in charge for all other official correspondences relating to them. It also keeps files of both incoming and outgoing EAWs.

With reference to the role of Italy as issuing State, in prosecution cases the competent authority is the investigating judge (*Giudice per le indagini preliminari*) at the trial court or at the Court of Appeal, whereas in conviction cases, the competent authorities are the public prosecutors attached to the Court issuing the order to enforce the custodial sentence referred to in the judgment (Article 28.1 letters a), b) and c) of Law no. 69/2005).

With regard to the role of Italy as executing State, the competent authority for receiving the EAW is the Ministry of Justice (Article 4.2 of Law no. 69/2005).

Practical issues may probably arise from the fact that there is not a proper national register enabling the verification, nationwide, of the existence of multiple arrest warrants⁵². From a general perspective, the EAW is issued by completing the relevant form according to Article

⁵² See Council of the European Union, *Evaluation report on the fourth round of mutual evaluations “the practical application of the European arrest warrant and corresponding surrender procedures between member states”* - 5832/2/09 REV 2 – Report on Italy.



30 of the Italian law. This Article set out, basically by following the European Framework Decision (Article 8), the information that the EAW should contain. The authority has also to fill two other forms and to send them together with the EAW to both the Ministry of Justice and INTERPOL/S.I.Re.N.E. Researchers are indeed made either through INTERPOL (red notices or diffusions) and/or through S.I.Re.N.E by issuing Schengen Information System (S.I.S.) alert. In cases of multiple EAW requests issued by the Italian authorities with regard to the same person, INTERPOL/S.I.Re.N.E will spread the alert only for the most important EAW.

The translation of EAWs into the language of the executing Member State is ensured by the Ministry of Justice when Italy is the issuing State.

The translation is usually made after the person has been arrested. For this task the Ministry of Justice uses internal translators for most frequently used languages, such as English, French, German, Spanish, whereas the translation into other languages is committed to a service of external translators. According to Article 6.7 of Law no. 69/2005, Italian authorities only accept EAWs in Italian, except from cases of urgency (internal translators will be then asked to translate the document).

Pursuant to Article 13.3 of the Italian law the EAW or the SIS alert must be sent by the issuing State to the Italian Ministry of Justice within ten days of the validation of the arrest. If this temporary requirement is not met the order imposing coercive measures becomes null and void. However these measures can be ordered again if the translated EAW is delivered and the conditions for their imposition are met⁵³.

In order to help easing practical problems that may arise from the EAW procedure, the Italian Ministry of Justice has distributed circulars and a *vademecum* on how to issue a EAW and fill in the forms.

Recognition of Judgments

Also in this case the competent authorities are the Ministry of Justice, as well as the single judicial authorities.

More specifically, with reference to the transmission to the executive State, the competent authority is the Public Prosecutor at the office of the judge in charge for the execution, whereas with regard to the transmission from the issuing State, the competent authority is the Court of Appeal.

The transfer of the sentenced person requires a certificate, which has to be attached by the issuing authority and filled with data and information needed for the decision on the

⁵³ Ibid.



recognition of the sentence. If Italy is the executive State, the certificate shall be translated in Italian pursuant to D.lgs no. 161/2010 (and also according to Article 23 of the Framework Decision).

The Ministry of Justice is in charge for transmissions and receptions of decisions and certificates and for the official correspondence linked to them, whereas direct communications among the judicial authorities are allowed only when, and as long as it may make the procedure quicker and efficient. In this case the Ministry of Justice shall be immediately informed because of its duties in collecting statistics and in answering to information requested by EU authorities and Member States.

As to the transmission to the executive State, the Public Prosecutor may act *ex officio* or upon request by the sentenced person or the executing State. Before proceeding the Italian Public Prosecutor confers with the foreign authority to obtain the information needed for the decision.

The decision to transmit to the foreign authority shall specify the executing State, and is communicated to the sentenced person and forwarded together with the sentence to the Ministry of Justice. The latter sends then the decision to the competent executing authority by any means, which leaves a written record.

In specific cases, expressly provided by the law the transmission may be suspended before the execution or even revoked.

The transfer of the sentenced person is regulated by Article 7 of the Italian law. From a general perspective, the procedure must be realized within 30 days from the communication of the recognition by the Ministry of Justice. Within this phase the executive authorities are the Ministry of Justice and the International Police Cooperation Service (SCIP), which is part of the Department of Public Security - Central Directorate of Criminal Police.

The transmission from the issuing State is instead governed by Article 12 of the same law and the procedure may start or on the initiative of the issuing State, which transmits the judgment and the mentioned certificate to the Italian authorities (namely to the Ministry of Justice that will then forward it to the Court of Appeal), or on the initiative of the Ministry of Justice itself if the conditions under Article 10 of the Italian law are met.

The procedure before the Court of Appeal is regulated by Article 127 of the Italian Code of Criminal Procedure concerning the so-called “*ritocamerale*” (in accordance with the regulation for extradition and EAW) and by Article 702 of the same Code, pursuant to which the issuing State can take part to the proceeding through a qualified advocate.



The Court of Appeal may ask for integration or amendment of the certification and for new documents. Similarly to the rule governing the EAW, the Court of Appeal decides by a judgment within sixty days from receiving the sentence and this judgment can be challenged before the Italian Supreme Court according to the same rules which apply to the EAW. The final judgment is then immediately communicate to the Ministry of Justice, which will inform the authorities of the issuing the State and the International Police Cooperation Service.

Question 3 – Judicial interpretation and application of EU instruments affecting civil rights*How are the EU instruments listed below and their transposition and implementation measures, interpreted and applied by courts? Is the judicial interpretation and application of these instruments and their domestic transposition and implementation measures furthering civil rights protection or, on the contrary, raising concerns in that respect?*

As to the judicial practice concerning the EU instrument listed in this section the most interesting field in which the case-law interpretation performed a significant role is that of the EAW, due to the numerous failures characterising the legislative transposition and to the influence of fundamental rights.

With reference to law no. 69/2005 on EAW the Italian courts – especially the Italian Supreme Court and the Italian Constitutional Court – have indeed repeatedly stated on specific aspects of this instrument and on the legislative transposition.

As to the first point there are some important judgment by the Italian Constitutional Court on the relationships between the EAW and fundamental constitutional principles.

For instance the Court, by extending the *ratio decidendi* held in a previous decision regarding extradition, stated that Article 33 of the Italian implementing law is inconsistent with the Italian Constitution if it does not provide that the precautionary detention served abroad according to a EAW may be considered with reference to the maximum limit to provisional detention pursuant to Article 303 of the Italian Code of Criminal Procedure⁵⁴.

In 2010 the Constitutional Court decided on the ground for non-recognition of the EAW pursuant to letter r) of Article 18 of the Italian law (“if the European arrest warrant has been issued for the purposes of executing a custodial sentence or a detention order, should the requested person be an Italian citizen, provided that the court of appeal order the custodial

⁵⁴ Constitutional Court, decision no. 143/2008.



sentence or detention order be executed in Italy in accordance with its internal legislation”). In particular, the Court held this rule inconsistent with the Italian Constitution in the part in which it does not extend the ground to refusal also to the citizen of another EU Member State that resides or is domiciled in the Italian territory⁵⁵.

As to the second point, the case law of the Italian Supreme Court is particularly important since it tries to mitigate same failures in the legislative transposition of the EU Framework Decision on the EAW. The Court tried indeed to construe the Italian transposition law in a manner that is more in accordance to the EU instrument, by applying the principle of conforming interpretation.

For instance with reference to Article 17.4 of the Italian implementing law, according to which a surrender decision is possible only if there exist serious indications of his/her guilt (*gravi indizi di colpevolezza*), the Court has interpreted this requirement stating that the Italian executing authority, when verifying whether there exist such indications, has merely to “check that the EAW, for its inherent content or for other elements collected during the investigations, is grounded on evidence which, according to the issuing judicial authority, refers to a criminal act committed by the requested person”⁵⁶.

As to the condition under letter e) of Article 18 of the Italian law (grounds for non recognition, in particular “if the legislation of the issuing Member State does not set any maximum limit to provisional detention”), some trial courts had difficulties in properly applying it. For instance the Court of Appeal of Venice felt obliged to apply this ground “although the result is alarming as regards criminal policy and disappointing in view of cooperation within the Community. It leads to the paradox that the surrender, which would have been allowed under the usual extradition practice, cannot be allowed under the legal framework relating to the EAW, although the latter aims at speeding up the procedure on the basis of mutual trust”.

In 2007 the Supreme Court clearly stated that this ground for refusal “does not concern the situation where the law of the issuing State, while not setting a strict maximum period of provisional detention, provides nevertheless for a regular examination of the necessity of prolonging such provisional detention”⁵⁷. It means that according to this rule, as interpreted by the Supreme Court the Italian authority has to check whether the law of the issuing State “explicitly lays down a duration for provisional detention until an initial conviction is handed

⁵⁵ Constitutional Court, decision no. 227/2010.

⁵⁶ Cass., Sez. 6, no. 34355 of 23 September 2005. See the Report on Italy, cit.

⁵⁷ Cass., Sezioni Unite, no. 4614 of 30 January 2007.



down; or in the absence of this, whether a time limit may in any case be inferred from other mechanisms of the proceedings which, compulsorily and at predetermined times, institute an effective judicial verification of proper execution of the provisional detention or, alternatively, its termination”⁵⁸.

With reference to motivation, namely to the ground for non-recognition set out by letter t) of the same Article (if the precautionary measure on which the European arrest warrant is based was issued lacking the required justification), the Supreme Court has mitigated also its scope of application holding that it does not have to strictly correspond to the Italian concept of “*motivazione*”. Consequently, according to the Court it is sufficient that the issuing authority accounts for the detention order (precautionary measure) on which the EAW is based, “which can also occur by a detailed exhibition of the factual evidence against the person whose surrender is sought”⁵⁹.

As to the “safeguard clause” embedded in the Italian law with reference to the constitutional guarantees on the “due process”, the Supreme Court has limited this reference to the “common principles” pursuant to Article 6 of the European Treaty⁶⁰.

The Italian judicial practice managed therefore to give an interpretation to the Italian law more in line with the EU Framework Decision and with the ECJ case law.

However, the principle of conforming interpretation, as clarified also by the ECJ, cannot lead to a construction contrary to the law. Therefore, in cases where the Italian transposition law does not leave enough room for interpretation in accordance to EU law, there are still many aspects of the Italian framework for the EAW, which are still not consistent with the EU Framework Decision.

As to the relationships between the EAW and the recognition of judgments to the D.lgs. no. 161/2010, the Italian Supreme Court has recently stated that if the person, whose surrender has been required pursuant to a EAW, calls upon the ground to refusal provided by Article 18 letter r) of law no. 69/2005, he/she is substantially giving his/her consent to the recognition of the foreign judgment according to D.lgs no. 161/2010. Consequently this person cannot challenge this judgment before the Supreme Court complaining about the unfairness of the proceeding decided by it⁶¹.

⁵⁸ Ibid.

⁵⁹ See again Cass., Sez. 6, judgment of 23 September 2005 in case no. 34355.

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1.1.2.2 'Approximation' measures

1.1.2.2.1. Victims' rights

- (Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings).
- Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA
- Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims
- Directive 2011/99/EU on 13 December 2011 on the European Protection Order

Question 1 – Transposition of the above EU instruments protecting or potential affecting civil rights

How are the EU instruments listed below transposed in the country of study? Have there been notorious failure or defect in the national transposition? Is the national legislative transposition of these EU instruments reinforcing or on the contrary threatening civil rights norms?

Rights, support and protection of victims

From a legislative perspective, *Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings* has not been transposed in Italy, although each Member State should have brought into force the laws and regulations necessary to comply with this instrument, within 22 March 2006 as regards Article 10 (Penal mediation in the course of criminal proceedings); by 22 March 2004 as to Articles 5 (Communication safeguards) and 6 (Specific assistance to the victim) and within 22 March 2002 regarding the other provisions.

As to *Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, the Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this instrument by 16 November 2015.

Therefore, on the one hand, the deadline for the transposition of the latter Directive has not yet expired, and on the other hand the implementation of the principles and aims charactering



these two EU instruments may only arise from the application of the principle of conforming interpretation by Italian courts (see below answer to Question no. 2) and, to some extent, from the analysis of certain principles already existing in the Italian legal system as regards the protection of victims of crimes in criminal proceedings.

With reference to the relationships between Italian national law and Directive 2012/29/EU, it must be first of all underlined that the main difficulties in the implementation of the rules included in this EU instruments are connected to the different approach characterising the Italian criminal procedure system, mainly due to the Italian legal and cultural tradition in this fields⁶².

In Italy the criminal procedure is based on an essentially public perspective in which the Public prosecutor is the main authority in charge also for the protection of the victim's interests and the participation of the latter to the proceeding is basically grounded on the claim for compensation (therefore in a private perspective). The development of the Italian criminal procedure system has been – and still is – centred on the rights of suspects and accused persons⁶³.

On the contrary, in the European perspective the victim gains a more autonomous role and is deeply considered and protected during criminal proceedings, as well as during criminal investigations. The European instrument also provides for specific rules concerning victims particularly vulnerable.

The Italian law introduced some significant provisions as regards minors and victims of gender-based crimes (see, for instance, Law no. 38 of February 2006 “*Disposizioni in materia di lotta contro lo sfruttamento sessuale dei bambini e la pedopornografia anche a mezzo Internet*” and Law no. 119 of 15 October 2013 on gender-based crimes; see also Legislative decree no. 39/2014 transposing Directive 2011/92/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA) and the Italian Code of Criminal Procedure contains specific protections for vulnerable victims during questioning and when testifying and rules on the so-called “*incidente probatorio*”, i.e. a procedural mechanism allowing to bring the examination for evidence forward to the criminal investigation phase (so-called “*fase delle indagini preliminari*”). Moreover, further instruments are provided in order to protect the victim during the trial, such as the free legal aid also irrespective of the normal

⁶²See for instance, S. Recchione, *Le vittime da reato e l'attuazione della direttiva 2012/29 UE: le avanguardie, i problemi, le prospettive*, in *Diritto Penale Contemporaneo*, 25 February 2015.

⁶³ Ibid. For a detailed and compared analysis of the status of crime victims in Europe, see L. Luparia (ed.), *Victims and criminal justice. European standards and National good practices*, (Padova, 2015).



limits provided by the law, and a series of information concerning the proceeding (e.g. modification of precautionary measures, closure of investigations, indictment).

Nevertheless, a proper implementation of the European Directive requires a broader reform of the Italian Code of Criminal Procedure' rules that may affect victims of crimes, providing both new forms of protection and new roles the victim may perform.

In this perspective, it is worth mentioning a recent Italian law implementing Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, which introduces some rules that may consider in line also with the aims of Directive 2012/29/EU.

Legislative Decree no. 24 of 4 March 2014 may indeed be considered as a improvement of the Italian legal system as to the protection of vulnerable victims during questioning and when testifying⁶⁴. In particular it introduces section 5 ter in Article 398 of the Italian Code of Criminal Procedure extending the rule pursuant to section 5 bis also to particularly vulnerable adults. The latter rule deals with specific protective measures within the so-called “*incidenteprobatorio*” in cases of expressly mentioned criminal offences concerning children. Before D.lgs no. 24/2014, the mentioned law regarding gender-based crimes (Law. 119/2013) had already introduced a new section (4 quater) in Article 498 of the same Code concerning the hearing of adults victim of specific crimes (expressly mentioned and mainly dealing with the sexual field), thus extending to vulnerable adults the protection set out for children.

Such an extension could also be granted by means of conforming interpretation based on the need to make Italian law comply with Framework Decision 2001/220/JHA and Directive 2012/29/EU on the protection of victims in criminal proceedings.

D.lgs. no. 24/2014 introduces a specific and more efficient legislative amendment in this field, going to some extent also beyond by holding the particular vulnerability as the only condition for having access to special protective measures during deposition. It means that this specific protection may be considered as extended to all vulnerable adults regardless of their status of victim and of the list of criminal offences included the other articles⁶⁵.

This approach seems to be in line with the individual assessment of victims provided for by the European directive, namely in its Article 22 according to which Member States “shall ensure that victims receive a timely and individual assessment, in accordance with national procedures, to identify specific protection needs and to determine whether and to what extent

⁶⁴ S. Recchione, *Le vittime da reato e l'attuazione della direttiva 2012/29 UE*, op. cit., at 4.

⁶⁵ *Ibid.*, at 6ff.



they would benefit from special measures in the course of criminal proceedings”. In particular, this individual assessment shall take into account: the personal characteristics of the victim; the type or nature of the crime; and the circumstances of the crime.

Such an individual assessment of the vulnerability irrespective of the specific crime is an important cultural change in the Italian legal tradition and is expressly included also in the first article of D.lgs. no. 24/2014. Moreover also the explanatory Report forwarded by the Italian Government to the Parliamentary commissions specifies that the new regulation was aimed at extending the protection to all adult victims considered particularly vulnerable on the basis of a individual assessment of their needs.

Although, as already said, a proper reform is still needed in the field of victims protection, these Italian rules are at least likely to set out a significant legislative base for a correct implementation of Directive 2012/29/EU.

Compensation to crime victims

Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims has been transposed by Legislative Decree no. 204/2007.

With reference to this filed it must be stressed that Italy failed to transpose the mentioned directive within the period prescribed and that notwithstanding D.lgs no. 204/2007 the Italian transposition is still incomplete.

As to the first point, according to the directive Italy should have brought into force laws and regulations necessary to comply with it by 1 January 2006 at the latest, with the exception section 2 of Article 12, in which case the date of compliance was 1 July 2005.

Because of this failure the European Commission launched a formal infringement procedure against Italy on 26 February 2007 and in November the ECJ declared that “by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, the Italian Republic has failed to fulfil its obligations under that directive”; the Court therefore fined Italy (Case C-112/07, Commission of the European Communities v Italian Republic).

As to the second point Legislative Decree no. 204/2007 introduces a rather detailed regulation but basically with reference only to the First Chapter of the European directive, i.e. the one concerning the access to compensation in cross-border situations.

In particular the Italian D.lgs covers two specific situations:



- criminal offence, committed in another Member State, which allows the crime victim to claim compensation according to the law of that State, when applicant for compensation is habitually resident in Italy;
- criminal offence, committed in the Italian territory, which allows the crime victim to claim compensation on behalf of the State according to special laws, when the applicant for compensation is habitually resident in another EU Member State.

Article 5 of the decree deals with the linguistic translation, stating that information forwarded by Italy as the assisting authority shall be translated in the official languages or one of the languages of the Member State of the deciding authority to which the information is sent, which corresponds to one of the languages of the Community institutions; similarly as regards the information forwarded by an Italian deciding authority to the assisting authority of another Member State.

The reports drawn up following a hearing made by the Italian authority and the text of the decision on the request for compensation issued by an Italian authority are instead forwarded in Italian.

According to Article 4, services rendered by the assisting authority shall not give rise to a claim for any reimbursement of charges or costs from the applicant.

With reference to compensation for victims of crimes, there are some Italian special law, mainly dealing with the damaging effects of terrorism, organised crime, extortion and usury, which also set out specific procedures for compensation and identifies the authorities responsible for payment.

These laws are:

- 1) Act No 466 of 13 August 1980, sections 3 and 4, establishing rules on special compensation to categories of public officials and citizens who are victims of duty or terrorism;
- 2) Act No 302 of 20 October 1990, sections 1, 3, 4 and 5, establishing rules for victims of terrorism and organised crime;
- 3) Decree-law No 419 of 31 December 1991 – converted into Act No 172 of 18 February 1992 – section 1, on the creation of a support fund for victims of extortion;
- 4) Act No 340 of 8 August 1995, section 1 – which refers to sections 4 and 5 of Act No 302/1990 – establishing rules on the extension of the benefits referred to in sections 4 and 5 of Act No 302/1990 for family members of the victims of the Ustica air disaster;
- 5) Act No 108 of 7 March 1996, sections 14 and 15, establishing rules regarding usury;
- 6) Act No 70 of 31 March 1998, section 1 – which refers to sections 1 and 4 of Act No 302/1990 - establishing benefits for the victims of the “White Fiat Uno gang” (Banda della Uno bianca);
- 7) Act No 407 of 23 November 1998, section 2, establishing new rules for victims of terrorism and crime;
- 8) Act No 44 of 23 February 1999, sections 3, 6, 7 and 8, establishing rules on payments to victims of extortion;
- 9) Presidential Decree No 510 of 28 July 1999, section 1, establishing new rules for victims of terrorism and crime;
- 10) Act No 512 of 22 December 1999, section 4, establishing the creation of the rotation fund for solidarity with the victims of Mafia-style crimes;
- 11) Decree-Law No 13 of 4 February 2003 - converted with amendments into Act No 56/2003 – establishing emergency



- rules for victims of terrorism and organised crime;
- 12) Decree-Law No 337 of 28 November 2003 – converted with amendments into Act No 369/2003—section 1, establishing emergency rules for military and civilian victims of terrorist attacks abroad;
 - 13) Act No 206 of 3 August 2004, section 1, establishing new rules for victims of terrorism or similar acts;
 - 14) Act No 266 of 23 December 2005, 2006 Budget Act, section 1(563-565), lays down rules on the payment of benefits to the persons killed or injured in the line of duty, persons entitled to the same treatment and their families;
 - 15) Act No 91 of 20 February 2006, rules for families of the survivors of Italian airmen who died in the Kindu massacre of 11 November 1961;
 - 16) Presidential Decree No 243 of 7 July 2006, regulation regarding the time limits and procedures for the payments of benefits to persons killed or injured in the line of duty and to persons entitled to the same treatment.

Apart from these specific type of crimes, Italian law does not provides a general regulation concerning violent intentional crimes and therefore fails to transpose the rule embedded in Article 12, section 2 of the Directive, according to which: “All Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims”.

European Protection Order

Directive 2011/99/EU on 13 December 2011 on the European Protection Order has been recently transposed into Italian law by the Legislative Decree no. 9 of 11 February 2015.

It has modified the Italian Code of Criminal Procedure adding section 1-bis to Article 282-*quater* concerning the duties to inform as to specific protective measures, such as the regulation of the removal from the family home (282 *bis*) and the prohibition from approaching the protected person closer than a prescribed distance (Article 282 *ter*). The new rule adds therefore the duty to inform of the possibility to ask for a European Protection Order concerning these two measures.

In cases in which the foreign protection measures contains obligations not covered by the two mentioned Italian rules, the European Protection order cannot be recognised by the Italian authority (Article 9 of the implementing rule).

The competent authority for the recognition of a European Protection order is the Court of Appeal and the decision can be challenged before the Italian Supreme Court.

From a general perspective, the Italian rules concerning definitions, procedures and duties of the competent authorities are in compliance with the European Directive.

Apart from the already mentioned specific ground for non-recognition, also the other grounds included in Article 9 of the Italian regulation are substantially similar to those included in Article 10 of the directive.

Among them:



- the information given by the issuing Authority are not complete;
- the protection measure relates to an act that does not constitute a criminal offence under the law of the executing State;
- recognition of the European protection order would contravene the *ne bis in idem* principle;
- the protection derives from the execution of a penalty or measure that, according to the law of the executing State, is covered by an amnesty and relates to an act or conduct which falls within its competence according to that law;
- under Italian law of the executing State, the person causing danger cannot, because of that person's age, be held criminally responsible for the act or the conduct in relation to which the protection measure has been adopted;
- the protection measure relates to a criminal offence which, under the law of the executing State, is regarded as having been committed, wholly or for a major or essential part, within its territory.

Similarly to the regulation concerning the recognition of judgment and the EAW also in this case, a difference between the Italian and European grounds for non-recognition deals with letter f) of Article 9. 2 concerning the case where in Italy a “nonsuit judgment” (*sentenza di non luogo a procedere*) has been issued, unless the requirement for repealing the judgment are met pursuant to Article 434 of the Italian Code of Criminal Procedure.

Question 2 – Executive/administrative implementation of EU instruments affecting civil rights

How are the EU instruments below and their national transposition measures implemented through regulatory/executive or administrative measures? Have these EU instruments been implemented in ways which affords further protection or potentially undermine civil rights norms?

For a general observation on the role of the sources of law in criminal and criminal procedure matters see above answer to Question no. 2 regarding the EAW and the recognition of judgments.

As to the instruments analysed in this section, considering that Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings and Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA have not been transposed by Italy, there are not relevant regulatory or administrative measures concerning the implementation of these two EU instruments.

The same situation characterises the implementation of Directive 2011/99/EU on 13 December 2011 on the European Protection Order since the Italian Legislative Decree



transposing it entered into force only in February 2015. Therefore, no relevant issue has yet arisen on a regulatory and administrative perspective.

A specific regulatory measure has instead been issued with reference to Directive 2004/80/EC of 29 April 2004 regarding compensation to crime victims.

According to Article 7 of the Italian transposition rule (D.lgs. no. 204/2007), the Italian Government passed an inter-ministerial decree governing the organizational issues concerning the compensation to crime victims (DM Giustizia no. 222/2008 – published in the Italian Official Journal on 12 May 2009).

The decree regulates in details the activities, the competent authorities, the proceeding, the functions performed by the central contact point (the Ministry of Justice), the interchanges with the activities of foreign authorities, and the linguistic issues.

Compensation is provided for the victim as well as for surviving relatives, and even when the applicant for compensation is habitually resident in another EU Member State. The Italian Ministry of Justice must foster a close cooperation and the exchange of information between Italian assisting authorities and deciding authorities of other EU Member States.

The decree also regulates into details the procedures to be followed whether the foreign authorities decide to directly hear the person, specifying that the Italian authorities must provide all information and assistance needed, also by arranging videoconference.

The existence of a regulatory measure may surely help easing practical and linguistic difficulties that may occur in cross-border cases. Nevertheless, the Italian legislation remains incomplete since it mainly deals only with the principles and rules embedded in the first Chapter of the European Directive (access to compensation in cross-border situations).

Question 3 – Judicial interpretation and application of EU instruments affecting civil rights

How are the EU instruments listed below and their transposition and implementation measures, interpreted and applied by courts? Is the judicial interpretation and application of these instruments and their domestic transposition and implementation measures furthering civil rights protection or, on the contrary, raising concerns in that respect?

Since the Italian Legislative Decree implementing Directive 2011/99/EU entered into force only in February 2015, no specific relevant issue has yet arisen as to its legal interpretation.



As already said, some interesting decisions characterise instead the judicial practice concerning Directive 2012/29/EU on rights, support and protection of victims of crime, replacing Council Framework Decision 2001/220/JHA and Directive 2004/80/EC on compensation to crime victims.

Although the European regulation regarding the protection of crime victims has not been transposed into Italian law, the case law shows, together with the normative aspects mentioned above, some features of the Italian system, which seems to be in line with the European principles. This is due to the principle of conforming application according to which national judges construe the domestic law in compliance with EU law, as interpreted by the ECJ.

For instance, in 2008 the Italian Supreme Court acknowledged a so-called “atypical” notion of vulnerability, i.e. the status of vulnerable victim regardless to the connection to a specific crime and therefore based on an individual assessment of the personal needs. In particular, the Court enables a child, which was present to the murder of his father, to access to the “*incidente probatorio*” although that crime was not included in the list provided by the Italian Code of Criminal Procedure for this specific procedural mechanism⁶⁶.

In two other decisions in 2013 the Supreme Court adopted an interpretation in line with the need to avoid repeat referrals, the prevention of secondary victimisation and the protection of vulnerable persons, clearly embedded in the European Directive. In the first one the Court held the repetition clearly redundant notwithstanding Article 190, section 1-bis of the Italian Code of Criminal Procedure⁶⁷.

In the second judgment the Court repealed a decision by the Court of Appeal issued without taking into account the analysis of the videoconference made during the “*incidente probatorio*”, thus underlining the importance of the permanent availability of videoconference in line with the protection of vulnerable persons during questioning and when testifying acknowledged by the EU directive⁶⁸.

In a recent and significant judgment the trial court of Turin expressly refers to the European directive and to the role that national judges may perform also before the deadline for transposition, underlining the fact that according to the European directive the victims’ right to participate during criminal proceedings, as well as during criminal investigations is considered as a “macro-right” (“*macro diritto*”). Consequently the judge stated their exclusion

⁶⁶ Cass., decision no. 23705/2008.

⁶⁷ Cass., decision no. 6095/2013.

⁶⁸ Cass., decision no. 43723/2013.



from the “*udienzacamerale*” for the “plea bargain” (*patteggiamento*) to be inconsistent with the principles embedded in the European directive and allowed them to participate⁶⁹.

With reference to the compensation to victims of crimes the same trial court issued an important judgment in 2010, which can be considered as a “leading case” in this field. The case concerned a young girl victim of a violent crime.

As already said, according to section 2 of Article 12 of Directive 2004/80/EC “all Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims”. Article 18 of the same Directive expressly imposed July 2005 as date of compliance for this specific rule.

Considering that Italy failed to fulfil the obligations under the EU Treaty to take all the measures necessary to achieve the result prescribed by a directive, the Italian Court, in compliance with the ECJ case law in the *Francovich* decision (according to which “the principle whereby the State must be liable for loss and damage caused to individuals by breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty”), required Italy to make good loss and damage caused to individuals by failure to transpose the directive.

According to the case law, the incomplete transposition of this directive may therefore lead to judicial decisions holding the Italian State responsible for loss and damages this failure may have caused to individuals.

⁶⁹ Court of Turin, decision no.



1.1.2.2.2. Rights of suspects and accused persons

- *Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings*
- *Directive 2012/13/EU of 22 May 2012 on the Right to Information in Criminal Proceedings*

Question 1 – Transposition of the above EU instruments protecting or potential affecting civil rights

How are the EU instruments listed below transposed in the country of study? Have there been notorious failure or defect in the national transposition? Is the national legislative transposition of these EU instruments reinforcing or on the contrary threatening civil rights norms?

Right to interpretation and translation

Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings has been transposed into Italian law by means of Legislative Decree no. 32 of 4 March 2014, entered into force in April of the same year, after the deadline imposed by the EU instrument (December 2013).

The Italian implementation decree covers four main aspects.

First of all it completely modifies Article 143 of the Italian Code of Criminal Procedure and introduces a new section in Article 104 of the same Code. These changes are meant to acknowledge and protect the right to an adequate linguistic assistance, with particular reference to interpretation and translation of documents (Article 143) and as regards the communications with the legal counsel in cases of preventive detention (*custodia cautelare*), arrest (*arresto*) or police custody (*fermo*) covered by Article 104.

Secondly, D.lgs. no. 32/2014 modifies two rules of the D.Lgs. no. 271 of July 1989 (*Norme di attuazione, di coordinamento e transitorie del codice di procedura penale*), namely Articles 67 and 68, in order to include professional interpreters and translators in the register (*albo*) of “experts” (*periti*).

Moreover the Italian transposition law modifies Article 5 of Presidential Decree (*Decreto del Presidente della Repubblica*, hereinafter D.P.R.) no. 115/2002 on judicial expenses clarifying that the costs for the interpretations and translations provided for by Article 143 of the Code of Criminal Procedure remain at the expense of the State. In compliance with the European



directive, the Italian State meets indeed the costs of interpretation and translation resulting from the application of the new rules irrespective of the outcome of the proceedings.

Finally the Italian decree provides for new financial rules in the field covered by the implementation of the European directive⁷⁰.

From a general perspective it must be underlined that in Italy, although the framework for criminal and criminal procedure matters is based on the use of the Italian language, the right to an interpreter, as well as to due information is a constitutional principle embedded in Article 111 (right to due process) of the Italian Constitution, which states, among other principles, that “the defendant is entitled to the assistance of an interpreter in the case that he or she does not speak or understand the language in which the court proceedings are conducted”.

The new Article 143 of the Code of Criminal Procedure distinguishes between compulsory and discretionary translation. The first one concerns documents defined as fundamental, while the second regards other documents considered essential to enable the accused person to know the charges that are brought. In the latter case, the translation is ordered by the judge, also at request of the accused person, and the decision can be challenged together with the judgment.

Unlike the European directive the Italian rule specifically lists the fundamental documents whose translation is compulsory. On the one hand this provision increases protection through the imposition of the highest level of linguistic assistance, namely the complete and written translation of the documents considered as fundamental to the right of defence. On the other hand, it has also been argued that, since some important acts are not specifically included in the list, the concrete protection of the right to consciously participate in the proceeding may basically depend on the judicial construction of the expression “essential document” included in the rule concerning non-compulsory translation⁷¹.

A significant difference of the Italian implementation decree regards the right to challenge a decision finding that there is no need for the translation of documents or to complain about the quality of the translation if it is not sufficient to safeguard the fairness of the proceeding.

According to the Italian law, as to the decision denying the need for the translation, Article 143 only provides for the possibility to challenge it together with the judgment and only with

⁷⁰ M. Gialuz, *Il decreto legislativo di attuazione della direttiva sull'assistenza linguistica (n. 32 del 2014): un'occasione sprecata per modernizzare l'ordinamento italiano*, in *Diritto Penale Contemporaneo*, 10 April 2014.

⁷¹ S. Recchione, *L'impatto della direttiva 2010/64/UE sulla giurisdizione penale: problemi, percorsi interpretativi, prospettive*, in *Diritto Penale Contemporaneo*, 15 July 2014, at 7.



reference to documents considered essential to the knowledge of the charges against the accused person. Moreover, nothing is provided as regards the possibility to challenge the quality of translations.

This Italian rule is therefore not in compliance with the European directive, which clearly states that “Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for the translation of documents or passages thereof and, when a translation has been provided, the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings” (Article 3.5). Consequently, in this case the protection ensured by Italy seems to be lower compared to European principles.

On the contrary, the Italian legislative transposition does not provide for an alternative to the written and complete translation, thus ensuring, at least from a formal perspective, a higher level of protection in comparison to the minimum standard imposed by the European directive, whose Article 3, section 7 states that “as an exception to the general rules [...] an oral translation or oral summary of essential documents may be provided instead of a written translation on condition that such oral translation or oral summary does not prejudice the fairness of the proceedings”.

Nevertheless it must be stressed that the Italian law does not provide any rule specifically concerning the waivers to the right to translation of documents. Therefore, according to the general rule of the Italian Code of Criminal Procedure an implicit waiver is likely. The protection given by the European directive is thus higher since section 8 of Article 3 clearly states that “any waiver of the right to translation of documents referred to in this Article shall be subject to the requirements that suspected or accused persons have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily”.

Furthermore, one of the most significant failures in the Italian legislative transposition concerns the quality of interpretations and translations.

In this respect the European directive impose to Member States to “take concrete measures to ensure that the interpretation and translation provided meets the quality required”. In particular to foster the adequacy of interpretation and translation and efficient access thereto, Member States shall establish registers of independent interpreters and translators who are appropriately qualified. Moreover, such registers shall be made available to legal counsel and relevant authorities and Member States shall also ensure that “interpreters and translators be



required to observe confidentiality regarding interpretation and translation provided under this Directive” (Article 15 “Quality of the interpretation and translation”).

The European legislator underlines therefore the role of an official register of professionals properly qualified through a specific professional training and subject to the respect of professional codes of conduct. On the contrary, the Italian law simply provides for a rule including professional interpreters and translators in the register (*albo*) of “experts” (*periti*), thus acknowledging the need for a professional quality of these tasks, but without explicitly taking the other concrete measures required by the European directive. Furthermore the Italian does not impose the duty to appoint only interpreters and translators included in official professional registers⁷².

Finally, the new Article 143 of the Code of Criminal Procedure does not explicitly define the language of the interpretation and translation, differently from the Recital no. 22 of the European directive, according to which “interpretation and translation under this Directive should be provided in the native language of the suspected or accused persons or in any other language that they speak or understand in order to allow them fully to exercise their right of defence, and in order to safeguard the fairness of the proceedings”.

Right to Information in Criminal Proceedings

In Italy *Directive* 2012/13/EU of 22 May 2012 *on the Right to Information in Criminal Proceedings* has been transposed by Legislative Decree no. 101 of July 2014.

The implementation statute modifies the following articles of the Italian Code of Criminal Procedure in order to strengthened the right to information, through specific rules concerning duties to inform, timely delivery of documents, proper ways of drafting acts and communications, etc.: 293 (amendment of section one and insertion of sections 1-bis and 1-ter); 294 (amendment of section 1-bis); 369 (insertion of section 1-bis); 369 bis (amendment of sections 1 and 2); 389 (amendment of sections 1, 3 and insertion of section 1-bis); 391 (amendment of section 2).

The Italian decree also modifies Article 22 of Law no. 69/2005 concerning the EAW and surrender procedures, imposing that the information referred to by this article shall be written. From a general perspective, it must be stressed that the European directive covers three specific aspects of the right to information in criminal procedure:

⁷²See on this point, M. Gialuz, *Il decreto legislativo di attuazione della direttiva sull'assistenza linguistica (n. 32 del 2014): un'occasione sprecata per modernizzare l'ordinamento italiano*, op. cit., and S. Recchione, *L'impatto della direttiva 2010/64/UE sulla giurisdizione penale*, op. cit.



- right to information of procedural rights;
- right to information about the charges, according to which all persons accused of having committed a criminal offence should be given all the information on the accusation necessary to enable them to prepare their defence and to safeguard the fairness of the proceedings;
- right to access to the material evidence in the possession of the competent authorities, whether for or against the suspect or accused person.

The Italian law seems to concentrate the transposition more on the first two aspects, whereas the third one is not properly addressed. Italy chose therefore a minimalist approach to the implementation of this EU instrument without providing for a systematic regulation of the matters covered by this European directive.

Moreover, as far as fundamental rights are concerned, it must be stressed that the Italian law does not properly deal with the right to be informed with reference to the modification of the nature and legal classification of the criminal offence, which is likely to raise issues especially after the *Drassich case* by the European Court of Human Rights⁷³.

Question 2 – Executive/administrative implementation of EU instruments affecting civil rights

How are the EU instruments below and their national transposition measures implemented through regulatory/executive or administrative measures? Have these EU instruments been implemented in ways which affords further protection or potentially undermine civil rights norms?

In Italy there are no administrative or regulatory measures specifically meant at the transposition of these two EU instrument.

Nevertheless with reference to the Italian D.lgs. no. 32/2014 implementing Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings, it is worth mentioning the interesting guidelines issued by Court of Appeal of Milan after a debate among the offices of the trial court and the Court of Appeal itself.

⁷³Case of *Drassich v. Italy* (Application No. 25575/04, judgment of 11 December 2007, final on 11 March 2008).



These guidelines are interesting on the one hand because they confirm how the concrete implementation of some relevant aspects of the Italian regulation are left to practice and, on the other hand, because they clarify some significant points, especially with reference to the waiver of translations.

As to the procedure and mechanism to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter, the guidelines impose specific and concrete elements precisely listed distinguishing between the case where the accused person is present and the case where he/she is absent⁷⁴.

It is also stated that the decision not to translate must be synthetically justified.

With reference to the waiver, the guideline clarify that the right to interpretation and translation can be renounced by only provided that the judge explains to the accused person the consequences of such waiver and ascertain he/she effectively understand Italian language or, through the interpreter, the consequences of the waiver. Moreover, in case of waiver the guideline impose a specific formula on the record of the hearing.

As to the translation of the judgment, it is clarified that the waiver may concern the translation of the sentence provided that the accused person is questioned on it after the reading of the judgment and the waiver is recorded. The translation of the acquittal is instead translated only at the request of the person.

The waiver concerning orders of precautionary measures or judgments issued with reference to more accused persons may be partially translated provided that the accused person accept that the act is translated only in the part related to him/her.

These rules are therefore likely to integrate the Italian law in a manner more in compliance with the stronger protection ensured by the European directive in this field mitigating the possibility of an implicit waiver.

The guidelines also provide for specific rules concerning each acts and stages of the proceeding in which an interpretation or translation may be needed.

Such instruments are therefore useful in ensuring uniformity in the concrete and practical implementation of the rights protected at the legislative level, also by fostering more certainty in their implementation.

⁷⁴ In the latter case, there is a presumption of no-knowledge of the Italian language, which can be overcome by evidence given by the prosecutor.



Question 3 – Judicial interpretation and application of EU instruments affecting civil rights

How are the EU instruments listed below and their transposition and implementation measures, interpreted and applied by courts? Is the judicial interpretation and application of these instruments and their domestic transposition and implementation measures furthering civil rights protection or, on the contrary, raising concerns in that respect?

There are no specific issues concerning the case law interpretation of these instruments and this is mainly due to the fact that their transposition is rather recent.

With reference to the right to interpretation it is nevertheless interesting to mention that since 1993 the Italian Constitutional Court stressed the importance of the conscious participation to the proceedings as part of the fundamental rights to defence protected by Article 24 of the Italian Constitution. Consequently the judge has a duty to give a broad interpretation to the rules concerning the right to a proper information and understanding of the charges.

Moreover, the Italian Supreme Court decided on different aspects concerning the rights to interpretation and translation, for instance as regards the acts whose translation was needed or with reference to the waiver or the consequences of the lack of translations, before the entry into force of the regulation implementing the European directive. Nonetheless there was not a proper uniformity in the case law.

As to the decisions specifically concerning the recent national instruments implementing European directives, the Supreme Court has stated for instance that the lack of translation concerning the notice of the scheduling of the hearing for the “revision” (*avviso di fissazione dell’udienza di riesame*) does not imply the nullity of that act, nor of those depending on it. The decision is based on the fact that this act is not included in the list of fundamental documents whose translation is compulsory pursuant to Article 143, as modified by decree implementing the European directive, and on the observation that such an act does not perform an informative role as regards the charges against the person.

Similarly, the Supreme Court stated as regards the written translation of the order of a precautionary personal measure issued by the judge during the hearing for validation (*udienza di convalida*) to which the foreigner unable to properly understand the Italian language participated without an interpreter.



These decisions confirm how, following the specific list of fundamental documents provided by the Italian law, the concrete right to translation depends also on the legal interpretation of what can be considered as an “essential” documents for the protection of the right to defence. In January 2015 the Supreme Court held also that Article 143 of the Code of Criminal Procedure, as modified by the Italian transposition regulation applies also to law no. 69/2005 concerning the EAW. Therefore, the accused person unable to understand the Italian language has the right to translation of the documents regarding the surrender procedure only if he/she makes a specific and justified request for it.



1.2. EU legislation related to the protection of personal data

Question 1 – Transposition of the above EU instruments protecting or potential affecting civil rights

How are the EU instruments listed below transposed in the country of study? Have there been notorious failure or defect in the national transposition? Is the national legislative transposition of these EU instruments reinforcing or on the contrary threatening civil rights norms?

Before analysing in detail the transposition of European directives on personal data protection it is worth to provide some information with reference to the beginning of the debate on the existence of privacy rights in Italian legal system.

The right to privacy struck in the Italian legal landscape after the end of World War II. The first cases regarded the diffusion of facts concerning the private life of famous people in the media or movie plots⁷⁵. In the first case, the Italian *Corte di Cassazione* denied the right on subject and established that it was not part of our legal system (see among others the case regarding the tenor Caruso)⁷⁶. Only in 1975 the *Corte di Cassazione* recognised the existence of the right to privacy. In the decision of May 27, 1975, n. 2129, the Supreme Court stated that the circulation of false information, not relevant for the public opinion, constitutes an injury to the privacy of a person (the case was about pictures that portrayed the ex-empres SorayaEsfandiari with a man inside her house)⁷⁷. In this period, the right to privacy meant “the right to be let alone”.

The story of the right to privacy continues and the new change was due to the technology development. There is a complex relationship between the history of ideas and technological change. A rather deterministic view perceives technological changes as provoking economic changes, thereby transforming social institutions. But the relationship between technology and

⁷⁵ As regarding to the cases development, see G. PASCUZZI, *Il diritto dell'era digitale*, III ed., Il Mulino, Bologna, 2011, 40 ff.

⁷⁶ In *Foro it.*, 1957, I, 4. As regarding the doctrinal debate see ex plurimis G. PUGLIESE, *Il diritto alla riservatezza nel quadro dei diritti della personalità*, in *Riv. dir. civ.*, 1963, I, 605; B. FRANCESCHELLI, *Il diritto alla riservatezza*, Napoli, 1960; F. CARNELUTTI, *A proposito della libertà di pensiero*, in *Foro it.*, 1955, IV, 143.

⁷⁷ In *Foro it.*, 1976, I, 2895. For closer analysis, see R. TOMMASINI, *Osservazioni in tema di diritto alla privacy*, in *Dir. fam. e pers.*, 1976, 242; A. PIZZORUSSO, *Sul diritto alla riservatezza nella Costituzione Italiana*, in *Prassi e Teoria*, 1976, 29; T. AULETTA, *Riservatezza e tutela della personalità*, Milano, 1978.



ideas also acts in reverse. In other words, technology not only affects new paradigms but also assumes, reflects, and serves these paradigms.

The final acknowledgment of the privacy in the Italian legal system occurred at the same time with the beginning of widespread distribution of personal computers⁷⁸. Around the same time, in Europe we had a proliferation of statutes enacted with the intention of regulating the computer processing of personal data⁷⁹. We have the first cases of legal intervention in West Germany: the statutes of Assia (October, 7, 1970) and Bavaria (October, 12, 1970), followed by a federal statute of 1977 on data protection (*Bundesdatenschutzgesetz, BdsG*). By 1981, in all the German Länders we find specific statutes on data protection. Then we have statutes in Sweden (1973)⁸⁰, France (1978)⁸¹, Luxembourg (1979), Denmark (1979), Austria (1980), Norway (1980), Iceland (1982), Great Britain (1984)⁸², Finland (1988), The Netherlands (1990), Portugal (1991), Spain (1993)⁸³, Belgium (1993), and Switzerland (1993). Furthermore Spain, Portugal, Austria, the Netherlands, Germany and Greece have amended their own Constitution to include privacy clauses. The Italian statute of December, 31, 1996, n. 675 (“Tutela delle persone e di altri soggetti rispetto al trattamento dei dati personali”) represents one of the last legislative interventions on privacy in Europe (it came first only with respect to Greece)⁸⁴.

⁷⁸The temporal subdivision may be taken by PASCUZZI, *Il diritto dell'era digitale*, cit., 43 ff.. For closer analysis, see also S. RODOTÀ, *Elaboratori elettronici e controllo sociale*, Bologna, 1973; R. FRANK, *Tutela della riservatezza e sviluppo tecnologico*, in *Giust. civ.*, 1984, IV, 26; E. ROPPO, *Informatica, tutela della privacy delle persone*, Padova, 1984.

⁷⁹ For a chronological mapping, see PARDOLESI (edited by), *Diritto alla riservatezza e circolazione dei dati personali*, cit., 32; M. G. LOSANO, *Il diritto pubblico dell'informatica*, Torino, 1986, 54; E. GIANNANTONIO, M. G. LOSANO, V. ZENO-ZENCOVICH, *La tutela dei dati personali. Commentario alla Legge 675/1996*, Padova, 1997, 24.

⁸⁰ Statute May, 11, 1973 (Data Lag).

⁸¹ Loi n. 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés, amended many times (the last one by Loi n. 2004-64 du 23 janvier 2006). This statute established the *Commission nationale de l'informatique et des libertés* with monitoring function on the enforcement of the regulation. See L. GUERRINI, *Prime informazioni in margine alla nuova legge francese sulla protezione dei dati personali*, in *Dir. informazione e informatica*, 2004, 645; M. DECKER, *Aspects internes et internationaux de la protection de la vie privée en droits français, allemand et anglais*, Aix-en-Provence, 2001, 85; P. CENDON, *Profili della tutela della vita privata in Francia*, in *Riv. dir. civ.*, 1982, I, 76. The French legislator amended in 1970 art. 9 of *Code Civil*, recognising explicitly the “*droit a la vie privée*”.

⁸² In 1984 Great Britain modified the Data Protection Act in order to harmonise it with the European Directive. See P. CAREY, *Data protection: a practical guide to UK and EU law*, New York, 2004; J. McDERMOTT, *Privacy: An Overview of Recent English Law Developments*, 3 *Tolley's Communications Law* 163 (1998); S. CHALTON, S. GASKILL, *Data Protection Law*, London, 1988.

⁸³ See T. E. FROSINI, *La nuova legge spagnola sui dati personali*, id., 2000, 769; M. G. LOSANO, *La legge spagnola sulla protezione dei dati personali*, in *Dir. informazione e informatica*, 1993, 867; O. ESTADELLA-YUSTE, *Spain's Data Protection Act Enters into Force*, 23 *Privacy Laws and Business* 2 (1993).

⁸⁴ See *ex plurimis* T. M. UBERTAZZI, *Il diritto alla privacy: natura e funzione giuridiche*, Padova, 2004; V. ZENO-ZENCOVICH, *Una lettura comparatistica della legge 675/96 sul trattamento dei dati personali*, in *Riv. trim. dir. e*



The European Union has enacted its own acts, including⁸⁵:

- Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the Protection of individuals with regard to the processing of personal data and on the free movement of such data;
- Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector;
- Directive 2002/58/EC of the European Parliament and the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), abrogating directive of 1997.

In particular, these regulations include:

- the definition of general principles with regard to the processing modalities,
- the acknowledgment of specific rights to every data subjects:
 - the right of access to his/her personal data;
 - the right to object to a data processing;
 - the right to delete his personal data;
 - the right to have inaccurate personal data updated or deleted;
 - the right to prevent that personal data are used to achieve purposes different from those for which the consent has been given;
- specific regulation of the so called “sensitive data”.

The technology development imposed the implementation of specific protection mechanisms, since the pivotal point was no longer simply to safeguard the private life of famous people from the inquisitiveness of the media. It was represented by the necessity to avoid the, more or less manifest, risks to every citizen deriving from the ease of collating and processing data by means of information and communication systems.

An Italian author wrote: “the digital revolution involves even the change of the notion itself and of the content of the right to privacy: no more right to be let alone, but the right to maintain control on our data”⁸⁶.

proc. civ., 1998, 733; G. BUTTARELLI, *Banche dati e tutela della riservatezza. La privacy nella Società dell'Informazione*, Milano, 1997.

⁸⁵See L. A. BYGRAVE, *Data Protection Law. Approaching Its Rationale, Logic and Limits*, The Hague – London – New York, 2002. At the European level, the Charter of fundamental rights of the European Union stated at article 8: “Everyone has the right to the protection of personal data concerning him or her”.



With regard to the current context, the Italian “Data Protection Code” (Legislative Decree June 30th, 2003, no. 196) embodies the new rules on privacy matters (also having incorporated the provisions of the Directive on electronic communications of 2002). It gathers up all the old Italian acts on data protection and provides for new rules in a systematic way. It shall ensure that personal data is processed by respecting data subjects’ rights, fundamental freedoms and dignity, particularly with regard to confidentiality, personal identity, and the right to personal data protection.

The Code can be divided into three main sections.

The first one concerns the general provisions and defines the main principles of the regulation. These principles include: the right to data protection, which becomes a fundamental right established and guaranteed also at the European level; the data minimization principle, established by art. 3 and aimed at reducing the process of personal data; the concept of “high protection level”, important because it involves a level of hierarchy, and, at the same time, imposes to measure this level. The Data Protection Code guarantees that the data process takes place respecting the rights and the fundamental freedoms of the data subject, with particular attention to privacy, personal identity, and the new data protection right (art. 2). All the definitions are gathered together in a unique article (art. 4), in order to simplify the understanding of them. In the first part, the Code establishes systematically the rules to follow in order to process data, specifying which are the measures to be taken, depending on if the process is carried out by private or public parties and on the specific kinds of processing. The provisions referring to data and systems security are based on former statute n. 675 of 1996 and on d.p.r. no. 318 of 1999, but they introduce relevant innovations, in particular concerning the adoption of specific security measures. Another innovation regarding the notice procedure to the Data Protection Authority is that it has been significantly simplified: it is now compulsory only for a few specifically identified cases (see art. 37 and 38)⁸⁷.

⁸⁶PASCUZZI, *Il diritto dell’era digitale*, cit., 47.

⁸⁷ Art. 37 establishes the compulsory notification for: genetic data, biometric data, or other data disclosing geographic location of individuals or objects by means of an electronic communications network; data disclosing health and sex life where processed for the purposes of assisted reproduction, provision of health care services via electronic networks in connection with data banks and/or the supply of goods, epidemiological surveys, diagnosis of mental, infectious and epidemic diseases, seropositivity, organ and tissue transplantation and monitoring of health care expenditure; data disclosing sex life and the psychological sphere where processed by not-for-profit associations, bodies or organisations, whether recognised or not, of a political, philosophical, religious or trade-union character; data processed with the help of electronic means aimed at profiling the data subject and/or his/her personality, analysing consumption patterns and/or choices, or monitoring use of electronic communications services except for such processing operations as are technically indispensable to



The second section of the Code is dedicated to the regulation of specific sectors and includes, among other things: processing operations for purposes of justice and by the police; processing operations in the public sector; processing of personal data in the health care sector; processing of job and employee data.

In the third section of the Code, we find the provisions regarding the procedure to safeguard the data subject. There are three remedies to be claimed before the Privacy Authority: the circumstantial claim (*reclamocircostanziato*), used to report an infringement to the regulation regarding personal data processing; the report (*segnalazione*), that is used when you cannot claim by a “*reclamo*” to ask for the monitoring of the Privacy Authority; and the claim (*ricorso*), when you claim specified rights (art. 141).

With reference to data retention, which represents an exception to the ordinary retention period of personal data, motivated by the desire to establish and contrast specific criminal cases, the issue met with considerable interest, especially at the EU level. After long debates on the subject, it was decided to finally promulgate a directive: directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive (Data Retention Directive). It established an obligation for telephone operators and Internet service providers (ISP) to retain data for each telephone communication and on-line connection for periods of not less than six months and not exceeding two years from the date of communication. The information to be retained are those necessary to trace and identify the source and destination of a communication, to determine the date, time and duration of a communication, and the type and communication equipment used by users, to track finally the location of mobile communication equipment. The storage of the contents of communications was, however, absolutely prohibited. The directive was clearly originated in the climate of uncertainty following the terrorist attacks in London in July 2005. Anyway the new discipline presented many critical aspects. First, the transaction costs felt entirely on the telephone operators and ISPs (and, therefore, in return on users: any form of reimbursement for expenses incurred for data retention is provided). Moreover, doubts are also raised about the purpose for which it will be possible to access the data stored: initially designed to combat international terrorism

deliver said services to users; sensitive data stored in data banks for personnel selection purposes on behalf of third parties, as well as sensitive data used for opinion polls, market surveys and other sample-based surveys; data stored in ad-hoc data banks managed by electronic means in connection with creditworthiness, assets and liabilities, appropriate performance of obligations, and unlawful and/or fraudulent conduct.



and organized crime, the directive was then, however, extended to other, different crimes. Finally, it is not demonstrate the effectiveness of this type of instruments to fight against such a evident compression of the privacy of individuals.

The European discipline was transposed into Italian law by legislative decree 30 May 2008, no. 109, which, as well as modifying articles of Italian Data Protection Code dedicated to data retention, provided, in a definitely more accurate way than in the past, a description of the categories of data to be retained for telephone operators and electronic communications (art. 3, Law no 109/2008). Thus, article 132, sec. 1, of the Italian Data Protection Code states that telephone traffic data shall be retained by the provider for twenty-four months as from the date of the communication with a view to detecting and suppressing criminal offences, whereas electronic communications traffic data, except for the contents of communications, shall be retained by the provider for twelve months as from the date of the communication with a view to the same purposes. Data on unanswered calls are, however, kept for only thirty days (art. 132, sec. 1-bis). The data may be acquired from the provider by means of a reasoned order issued by the public prosecutor also at the request of defence counsel, the person under investigation, the injured party, or any other private party (art. 132, sec. 3, IDPC).

On 8 April 2014, the Court of Justice of the European Union declared the Directive invalid in response to a case brought by Digital Rights Ireland against the Irish authorities and others. The EU Court of Justice has stated that the Data Retention Directive entails a wide ranging and particularly serious interference with the fundamental rights to respect for private life and to the protection of personal data, without that interference being limited to what is strictly necessary. The Directive, although pursuing a legitimate aim, constituted a wholly disproportionate restriction on these rights and therefore declared it invalid with immediate effect. As for the consequences of the judgment on national laws, the ineffectiveness of the Directive does not automatically determine the abrogation of regulation in contrast, although it may be set aside by the courts immediately. The Supreme Courts of the Member States may suspend the national legislation, if it not pass the test of proportionality, as identified by the EUCJ. Obviously, national legislation should only be changed with regard to the aspects in conflict with European law. Therefore it is desirable that Data Retention Directive is subject to review and modification at European level, implementing the recommendations of the EUCJ, and that, as a result of this, the national legislators modify their internal provisions. To date, in the Italian context we are faced with a legal vacuum on this very crucial issue.



The EU scenario on privacy is under review. On 25th January 2012 the European Commission presented a package of proposals for the modernisation of the European data protection framework, consisting of: a Communication outlining the strategy of the reform, a Regulation intended to replace Directive 95/46/EC, and a Directive to take the place of the Framework Decision 2008/977/GAI on the protection of data processed in the framework of police and judicial cooperation in criminal matters⁸⁸. Technological progress and globalisation have profoundly changed the way our data is collected, accessed and used. In addition, the 28 EU Member States have implemented the 1995 rules in different ways, resulting in divergences in their enforcement. The initiative will help to reinforce consumer confidence in online services, providing a much needed boost to growth, jobs and innovation in Europe.⁸⁹

We do not know precisely when this regulatory intervention will come into force. The debate on the text seems to be very much alive.

Question 2 – Executive/administrative implementation of EU instruments affecting civil rights

How are the EU instruments below and their national transposition measures implemented through regulatory/executive or administrative measures? Have these EU instruments been implemented in ways which affords further protection or potentially undermine civil rights norms?

In dealing with the question of the executive/administrative implementation of EU instruments affecting data protection regulation, a definitely prominent role is played by the Italian Data Protection Authority (IDPA), with respect to the definition and establishment of data protection right standards. This activity is structured in a series of interventions aimed at giving concrete implementation of those principles which are laid down, in a necessarily general and abstract way, in constitutional and/or in ordinary provisions. The IDPA is an administrative actor with a whole range of tasks, among others duly recognized and described

⁸⁸ See the http://ec.europa.eu/justice/newsroom/data-protection/news/120125_en.htm.

⁸⁹ On the proposed General Data Protection Regulation, see Paul de Hert, Vagelis Papakonstantinou, 'The proposed data protection regulation replacing directive 95/46/ec: a sound system for the protection of individuals' (2012) 28 Computer law & security review 130; Françoise Gilbert, 'Proposed EU Data Protection Regulation: the Good, the Bad and the Unknown' (2012) 15 Journal of Internet Law 1.



in the Italian Data Protection Code. It is an independent administrative authority established by the so-called Privacy law (Law 31 December 1996, no. 675) - which has implemented into Italian law the EU Directive 95/46/EC - and today governed by the already mentioned Italian Data Protection Code (legislative decree 30 June 2003, no. 196). The Authority is responsible for all areas, public and private, where we need to ensure the correct processing of data and respect of the rights of persons connected with the use of personal information.

It is concerned, among others tasks, with:

- checking that the processing of personal data complies with laws and regulations and, where appropriate, prescribing to data controllers and data processors for the measures to be taken to properly carry out the treatment;
- investigating complaints and allegations and deciding appeals under article 145 of the Code regarding the protection of personal data;
- prohibiting, in whole or in part, or stopping the processing of personal data which, by their nature, by the manner or by the effects of their treatment, may represent a significant injury to the person concerned;
- adopting the measures envisaged by the legislation on personal data, including, in particular, general authorizations for the treatment of sensitive data;
- promoting the signing of ethics and good conduct codes in various areas (consumer credit, journalism, etc.);
- reporting, when appropriate, to the Government of the need to adopt specific regulatory measures in economic and social life;
- joining the discussion on regulatory initiatives with hearings held in Parliament;
- delivering opinions requested by the Chairman of the Board or by each minister on regulations and administrative measures likely to affect matters covered by the Code;
- preparing an annual report on its activities and on the implementation of privacy legislation to be submitted to Parliament and the Government;
- participating in community activities and international trade, as well as a member of the Article 29 Working Party and the common control authorities



provided by international conventions (Europol, Schengen, Customs Information System);

- ensure the maintenance of the register of the treatments formed on the basis of the notifications referred to in article 37 of the Code regarding the protection of personal data;
- ensuring the information and public awareness with regard to the processing of personal data and on the security measures of the data;
- involving citizens and all stakeholders in the results of the public consultations, taking them into account in the preparation of measures in general.

Without any pretence of completeness, it may be worth listing below some examples of guidelines implemented by the IDPA that have significantly (and positively) affected the implementation of data protection regulation.

Referring, for example, to e-Health see⁹⁰:

- Guidelines on the Electronic Health Record and the Health File – 16 July 2009 (available at: <http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1672821>).
- ‘Guidelines on Online Examination Records - 19 November 2009’, hereinafter: GL Records (available at: <http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1683328>)

For what concerns, instead, privacy in the employment context see:

- **Guidelines on data processing of employees data - 23 November 2006** (available at: <http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1364099>)
- **Guidelines concerning the processing of personal data of employees for management purposes of employment in the public sector - 14 June 2007** (available at: <http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1417809>)
- **Guidelines applying to the use of e-mails and the Internet in the employment context - 1 March 2007** (available at:

⁹⁰ For further analysis on these two provisions see P. Guarda, *Fascicolo sanitario elettronico e protezione dei dati personali*, Trento 2011 (available at: <http://eprints.biblio.unitn.it/archive/00002212/>).



<http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1408680>).

Question 3 – Judicial interpretation and application of EU instruments affecting civil rights

How are the EU instruments listed below and their transposition and implementation measures, interpreted and applied by courts? Is the judicial interpretation and application of these instruments and their domestic transposition and implementation measures furthering civil rights protection or, on the contrary, raising concerns in that respect?

Even the court system obviously plays a key role in the interpretation and application of legal instruments dedicated to the protection of personal data. The cases are not so many yet, if compared to the complexity of the matter and to the heterogeneity of the possible cases of application. What is struggling to establish itself, or rather, what is slowly developing, is the sensitivity and attitude of public opinion with regard to this fundamental aspect of their lives and their dignity.

That said, as an example of the intervention of case law in this context we can cite at least two paradigmatic cases on issues of interest.

Relationship between data protection regulation and copyright law: the Peppermint case.

On April 2007, Peppermint Jam Records GmbH (hereinafter "Peppermint"), a German music label, sent out thousands of notices of copyright infringements to alleged Italian file-sharers informing them that they have been found guilty of uploading copyrighted songs. The notices, sent by an Italian Law Firm, requested the Italian swappers to stop persisting in their infringements of copyright laws and requested them to immediately remove from their PCs all songs belonging to the Peppermint label. The notices also invited users to wire transfer EUR 300.00 to the Italian Law Firm's bank account within May 14, 2007, if they wanted to avoid a criminal and/or a civil lawsuit brought against them. The amount represented a symbolic compensation for damages caused by sharing that song, including legal and investigation expenses. Attached to the notices Italian users also received a draft settlement agreement, to be signed and returned to the Italian Law Firm in case of acceptance. The acceptance of the



draft settlement agreement as well as payment of the requested amount, would avoid users from being subject to a criminal judgement for copyright infringements.

Anyway, in the legislative framework of the adoption and the transposition into the national laws of EU Member States of Directive 2004/48/EC on the enforcement of intellectual property rights, 30 April 2004 (hereinafter: IPRs Enforcement Directive), that has strongly encouraged and facilitated purposes of effective enforcement targeted at individuals, it is unclear how the protection of confidentiality of information sources and the prohibition of the processing of user personal data commanded under Article 8(3)(e) of the IPRs Enforcement Directive (“Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which [...] (e) govern the protection of confidentiality of information sources or the processing of personal data”) will interplay in the on-line environment with the powerful measures of investigation and enforcement created by the above-mentioned provisions.

In interim measures proceedings in July 2007, the Trial Court of Rome⁹¹ held that the protection of confidentiality in electronic communications, as laid down in Article 5 of the Directive 2002/58/EC on privacy and electronic communications took priority over digital copyright enforcement undertaken through precautionary measures aimed at compelling disclosure of the identity and other personal data of unauthorised file-sharers. The Rome Court rejected the claim of two copyright owners (i.e., Techland and Peppermint Jam Records) who sought to compel an ISP (i.e., Wind Telecomunicazioni) to reveal the personal data of a few subscribers that were supposedly infringing copyright in their videogames and music works. The Court emphasised that the phrasing of Article 8(3) of the IPRs Enforcement Directive provided explicitly that the civil proceedings remedies made available under Article 8(1) should apply “without prejudice to other statutory provisions which [...] govern the protection of confidentiality of information sources or the processing of personal data”. As a result, the Rome Court concluded that, in the EU legal system, access to users’ confidential communications and personal data and their retention and processing was permitted only under the exceptional circumstances spelt out under Article 15(1) of Directive 2002/58, which does not include the enforcement of subjective rights (e.g. copyrights) through civil proceedings. This provision, instead, makes it clear that national laws may provide for the retention of personal data for a limited period in order to enable prevention, investigation, detection and prosecution of criminal offences. Article 15 of Directive 2002/58/EC provides

⁹¹See *Techland and Peppermint Jam Records v. Wind Telecomunicazioni*, Tribunale Ordinario di Roma, N. 26125/2007, 16 July 2007, available at: http://www.altroconsumo.it/images/17/173003_Attach.pdf.



that Member States may adopt legislative measures to restrict user privacy-related rights “when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorized use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC”⁹².

Non-pecuniary damages for privacy invasion: the Vieri case.

This case has had great media resonance for the reputation of the parties involved, which include former footballer Christian Vieri, the football club Internazionale and the largest Italian provider Telecom. Christian Vieri played for Inter for six seasons, from 1999 to 2005, before moving briefly to Milan and from there to Monaco, in France, where he suffered a bad injury that ended his international career. In September 2006, the press turned out, with a stir, that since 2000 Inter, through Giuliano Tavaroli, official of Telecom Italia (and before that of Pirelli, a company closely linked with Inter which was sponsoring), tapped the phone of his player. Then, Vieri sued his former team and Telecom Italia, both in the civil and criminal proceedings. He claimed Telecom, as responsible for the activity of Mr Tavaroli, for compensation of 12 million euro, while he formulated a request against Inter of just over nine million euro for pecuniary and non-pecuniary damage. In particular, Vieri claimed to have been spied at the request of Inter team, interested in being aware of the people he met and his habits, through the illicit acquisition of its telephone records, and to have been monitored for 6 to 7 months, 24 hours a day, by four or five people. The actor argued, among other things, that the story had caused to him a deep depression, which in fact determined the end of his football career. He was claiming also damage to image and social life too, in view of the enormous resonance of the story, as well as substantial pecuniary damages, alleging that, because of the unlawful conduct of the defendants and the relative consequences, his career had been ruined and he had lost the opportunity to earn lucrative engagements by other clubs.

⁹²For further details, R. CASO, *Il conflitto tra copyright e privacy nelle reti peer to peer: in margine al caso Peppermint. Profili di diritto comparatore*, in *Diritto dell'internet*, 2007, 471, available at <http://eprints.biblio.unitn.it/archive/00001334/>; F. GIOVANELLA, *Effects of Culture on Judicial Decisions. Personal Data Protection vs. Copyright Enforcement*, in R. CASO, F. GIOVANELLA (eds.), *Balancing copyright law in the digital age. Comparative perspectives*, Berlin, Springer, 2015, 65 – 98.



The third civil section of the *Corte di Cassazione*, by the decision 15 July 2014, no. 16133, has addressed the issue of compensation for non-pecuniary damage resulting from the violation of the rules protecting privacy. The Supreme Court affirmed the principle of law that the non-pecuniary damage, compensable pursuant to art. 15 of the Italian Data Protection Code, does not avoid the verification of the severity of the injury and the seriousness of the damage, requested, in general, pursuant to art. 2059 of the Civil Code: it is necessary, in fact, that the so called “compensation threshold” (*soglia di risarcibilità*) is exceeded. Such a finding, pertaining to the trial judge, will be conducted through a balance between the right protected by article 15 of Legislative Decree no. 196/2003 and the principle of solidarity in art. 2 of the Constitution, which is the point of mediation, since it enables to safeguard the rights of the individual within a community of people.

Although famous for the reputation of the parties involved, to date the Vieri case represents an isolated and peculiar legal solution with respect to the current majority case-law. It will be interesting to see what will happen in the next degrees of judgment.



2. Enforcement of selected civil rights

2.1 Right 1 Freedom of Religion

2.2 Right 2 Self-determination and consent to medical treatments

2.3 Right 3 Right to respect for private and family life with reference to reproductive freedom

2.1 Right 1: FREEDOM OF RELIGION

2.1.1 Source of protection

What are the sources of protection of each of this right? Do you see any problems in this regard? (eg the right is recognized only in a lower level norm, or multiple sources with different authority and meanings, etc.)

In the Italian constitutional system the main provision protecting fundamental rights is Article 2, according to which the Italian Republic “recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed”.

Freedom of religion is also protected by several other articles of the Italian Constitution:

- Article 19 according to which anyone has the right to profess freely their religious faith in any form, individually or in association, to disseminate it and to worship in private or public, provided that the religious rites are not contrary to public morality;

- Articles 7 and 8 regarding the relationships between the Italian State and the religion confessions, which also provide for the method of such cooperation. Article 7 concerns the relation with the Catholic Church, stating that: “the State and the Catholic Church are independent and sovereign, each within its own sphere. Their relations are regulated by the Lateran pacts. Amendments to such Pacts which are accepted by both parties shall not require the procedure of constitutional amendments”. Article 8 regards instead the equality of all religious denominations and the relations between the State and denominations other than Catholicism: “all religious denominations are equally free before the law. Denominations other than Catholicism have the right to self-organisation according to their own statutes, provided these do not conflict with Italian law. Their relations with the State are regulated by law, based on agreements with their respective representatives”;

- Article 18 on freedom of association;



- another important norm is Article 20 according to which: “No special limitation or tax burden may be imposed on the establishment, legal capacity or activities of any organisation on the ground of its religious nature or its religious or confessional aims”;
- Also Article 21 on freedom of expression may offer protection as far as religious issues are concerned.

The main constitutional provision concerning the principle of equality and non-discrimination is Article 3, which states that “all citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions”. Moreover “it is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country”.

Important sources of protection are covered by the law concerning the “Concordat” between Italy and the Catholic Church and the agreements (*intese*) between the Italian State and denominations other than Catholicism, which also provide for significant facilities. On the contrary, there is still a lack of a general regulation concerning denominations without an “intesa” with Italy: the only applicable norm is indeed law no. 1159/1929 on allowed worships (*legge sui “culti ammessi”*).

Specific issues concerning the freedom of religious are finally protected by ordinary laws, such as, for instance Articles 19 and 29 of the Law no. 286/1998 (and subsequent amendments) on immigration and the status of foreigners. There are also specific laws enabling the conscientious objection, although with no specific reference to religion, but to the more general concept of conscience, such as Article 9 of Law no. 194/1978 on abortion; Article 16 of law no. 40/2004 concerning medical assisted reproduction; and law no. 431/1993 enabling the conscientious objection in the field of trial involving animals.

With reference to sources of protection it must be underlined that there is no special provision for children as holders of the right to freedom of religion according to their maturity, which on the contrary exists in other European countries⁹³.

⁹³For a comparative analysis see for instance, European Parliament, Committee on Civil Liberties, Justice and Home Affairs, “Religious practice and observance in the EU Member States”, 2013, at 21.



2.1.2 Scope and limits of the right (including balancing with other rights)

What is the scope and what are the limits of this right? Are there any deficiencies in this regard (eg non-compliance with EU or ECHR standards)? How are they balanced against other rights, values or interests?

According to the Italian Constitution, freedom of religion is protected individually and also when professed in association; it includes the right to disseminate, as well as that to worship in private or public. The so-called “negative” dimension of the freedom of religion, although not directly mentioned by the Italian Constitution, is also included in the scope of this civil right: freedom from worship and freedom from religion (atheism). In this perspective the leading case is decision no. 117 of 1979 by the Italian Constitutional Court⁹⁴.

Moreover, freedom of religion is protected by the right not to be discriminated on ground of religious beliefs. From a comparative perspective it must be underlined that the Italian Constitution proclaims this principle in an explicit way in the already mentioned Article 3, which indeed explicitly refers to religion when guaranteeing equality before the law and the principle of non-discrimination.

In this respect, equality before the law of all religious confessions (Article 8.1 Const.) shall be considered too.

A further guarantee is the right to be “a conscientious objector”, laid down by some specific laws (see above).

With reference to the balance against other rights, values or interest, public morality is expressly considered by the Constitution (Article 19). Also law no. 1159/1929 is based on a general freedom of acknowledgment provided that public policy and morality are respected.

One of the fundamental principles of the Italian constitutional order that shall be considered is secularism understood in terms of *laicità positiva* (see below). Freedom of religious shall also be balanced with other public interests, such as, for instance the State’s interest in protecting lives and health of its citizens and, from a generally perspective, religious beliefs may not justify the failure to comply with the laws.

The principle of separation between Church and State shall be mentioned too.

In general, sensitive issues arise from the balance between the positive and negative dimensions of freedom of religion (for instance, the right to education according to one’s religious convictions, state neutrality in organising religious education in public schools, the

⁹⁴Constitutional Court, no. 117/1979, 10 October 1979, see below. In a previous decision (no. 58 of 1960) the Court held instead that “*l’ateismo comincia dove finisce la vita religiosa*” (atheism starts when religious life ends).



display of religious symbols or the wearing of religious attire and the principle of non-indoctrination).

2.1.3 Interpretation and application

How is this right interpreted and applied by courts? Are there any deficiencies in this regard?

From a general perspective, the Italian Constitutional Court defined secularism (*laicità*) as one of the fundamental principles of the Italian constitutional order⁹⁵. It must also be stressed that such principle cannot be amended and that a revision would in any case be under the control of the Constitutional Court⁹⁶.

As far as freedom of religion is concerned, it is important to consider that the principle of secularism has been developed by the Court in term of the so-called “*laicità positiva*”. It means that such principle “implies non-indifference by the state with regard to religions but a state guarantee for safeguarding religious freedom in a régime of denominational and cultural pluralism”⁹⁷.

Moreover, Italian courts decided on different issues concerning freedom of religion, thus further specifying the scope and limits of this civil rights from a variety of perspectives.

Just to give a few example, with reference to the display of religious symbols, in the Lautsi case⁹⁸ the Council of State underlined, for example, the link between the crucifix and the religious origins of Italian traditions and values such as tolerance, mutual respect and non-discrimination, which are embedded also in the Constitution. The Grand Chamber of the ECtHR decided that there was not breach of the Convention, since there was no evidence that the display of the crucifix, considered as a basically passive religious symbol, could be a form of indoctrination, also considering that in Italy such display is not linked to compulsory teaching about Christianity. Member States have indeed a margin of appreciation in this field⁹⁹.

⁹⁵ Constitutional Court, decision no. 203/1989.

⁹⁶ According to decision no. 1146 of 1988 by the Italian Constitutional Court. See also European Parliament, Committee on Civil Liberties, Justice and Home Affairs, "Religious practice and observance in the EU Member States", 2013, at 26.

⁹⁷ Ibid. See Constitutional Court, decision no. 203/1989 and, among others, O. Chessa, *La laicità come uguale rispetto e considerazione*, in *Rivista di Diritto Costituzionale*, 2006, 27.

⁹⁸ Council of State, decision no. 556/2006.

⁹⁹ *Lautsi v Italy* (App no 30814/06) ECHR 18 Mar 2011.



With reference to physical integrity, Italian judges acknowledge that under certain circumstances religious beliefs may prevail over the State interest in preserving life, like for instance in the case of the refusal of blood transfusions by Jehovah's Witnesses¹⁰⁰. Issues in this respect may arise as regards the evidence of the refusal¹⁰¹ and above all with reference to minors. In the latter case the religious beliefs of parents cannot prevail.

As to religious association, the Constitutional Court held inconsistent with the Constitution (articles 3 and 18) a law imposing to Jews the registration with the Jewish community of the their place of residence as members with all rights and duties, including the payment of a tax to the Community for some religious services¹⁰². The Court therefore confirmed the freedom from mandatory religious affiliation.

The Court gave protection to freedom of religion also with reference to the religious oath in judicial proceedings. In this perspective, a significant judgment is the overruling made by the Italian Constitutional Court in 1979 on the unconstitutionality of the mandatory oath before bearing witness, whose refusal could be considered a crime. This decision dealing with direct discrimination is interesting also because it was related to atheists, thus underling this aspects of freedom of religion's protection too¹⁰³.

As to education, in two decisions (no. 203/1989 and no. 13/1991) the Italian Constitutional Court stated that non attending students were not compelled to attend an alternative teaching, since their choice was to be considered as an expression of religious freedom constitutionally protected by Article 19 of the Italian Constitution.

2.1.4 Case law protecting civil rights

When the right in question is recognised through case law, how are they enforced? Is there a relevant doctrine of precedent? Can violation of judge-made principle be invoked in courts? Must judges bring up of their own motion civil rights violations? Etc.

In Italy there is no rule of binding precedent. It means that formally judges are not bound by previous judge-made principles. It must anyway be stressed that according to the Basic Law on the Judiciary of 30 January 1941 no. 12 (Article 65) one of the main function performed by the Italian Supreme Court is to ensure "the exact observance and uniform interpretation of the

¹⁰⁰ See, for instance, Appeal Court of Milan (decision of 19 August 2011, no. 2359). C. Casonato, *Introduzione al biodiritto*, op. cit., at 210.

¹⁰¹ See, for instance, Italian Supreme Court, III Civilsection, decision no. 23676/2008, 15 September 2008.

¹⁰² Constitutional Court, decision no. 239/1984.

¹⁰³ Italian Constitutional Court, no. 117/1979.



law, the unity of the national law, the respect of the limits of the various jurisdictions”. The Court performs therefore a “nomophilatic” function, aiming at giving some certainty to the construction of Italian law. Although principles laid down by the Supreme Court are not formally binding, judges of lower courts often follow its decisions, especially when issued by the “*Sezioni Unite*”, which may play a more significant role as leading cases.

As to the case law protecting fundamental rights, it is also worth mentioning that national judges shall adopt, where possible, a constitutionally oriented interpretation of the law. Similarly, in cases concerning the application of EU law national judges shall apply the principle of conforming interpretation.

As far as fundamental rights are concerned, it must also be stressed that ECHR’s rules act as “interposed norms” (*parametrointerposto*) in the constitutional legitimacy judgment with reference to the parameter of international obligations, pursuant to Article 117.1 of the Italian Constitution¹⁰⁴.

2.1.5 Judicial enforcement institutions and bodies

<p>✓ Which institutions are responsible for the enforcement of this rights in your country? Please expose here the structure of the judicial system of the country under study. Indicate, in particular, whether the country under study has a constitutional court or equivalent body. If not, how is compliance with international, European (including EU) and national (constitutional) civil rights guaranteed. Explain the role of other relevant bodies (eg ordinary courts, specialised courts, etc.)</p> <p>✓ How are these institutions regulated at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other)</p> <p>✓ Is the independence of these institutions and organs guaranteed? If so, how? Have they been concerns related to the independence of the judiciary in the country of study, which could undermine the effective enforcement of the selected civil right? Please indicate the different modes and modalities of enforcement of civil right carried out by the different judicial institutions involved.</p> <p>✓ What are currently the main judicial procedures available to sanction, remedy or compensate for violations of the selected civil right (eg judicial review, damages, emergency measures, etc.). Indicate for each of them important information related in particular to time limits, costs, legal aid availability, length of proceedings, type of actions (eg collective action, class action), admissibility criteria (including standing conditions, delays, etc) as well as merits conditions (acceptable grounds, substantive conditions, degree of control, evidential aspects, burden of proof, etc.). What are the consequences of successful or unsuccessful legal actions under each of the procedures (annulment, compensation, sanctions, etc.)</p> <p>✓ Is the judiciary effective and/or trusted to protect civil rights, or do people turn to alternative modes of action in order to protect these rights (ie demonstration, media involvement, social network activities, lobbying, etc)</p> <p>Please indicate particular weaknesses and deficiencies, or on the contrary, elements of good practice, which are worth</p>

¹⁰⁴ Constitutional Court, decisions no. 348 and 349 of 2007.



highlighting in that they are likely to have a particular impact on the enforcement of civil rights in the EU.

The main institution responsible for the protection of fundamental rights is the Constitutional Court, especially through the judicial review.

As a general rule, in Italy judicial proceedings are exercised by ordinary magistrates, which are empowered and regulated by the provisions concerning the Judiciary.

With reference to the structure of the Italian judicial system, there are several courts/judges responsible for the administration of the ordinary criminal and civil justice, which may also be competent as regards the enforcement of these rights in cases where their infringement is considered a criminal offence or a civil tort.

“*Tribunali ordinari*” (Trial Courts) judge in first instance (they may also act as appeal courts in respect of certain judgments given by a “*giudice di pace*” - Justice of the peace, which is an honorary position adjudicating individually on smaller claims). “*Corti di Appello*” (Courts of Appeal) are situated in the main town of each judicial district and are organised in divisions.

The “*Corte di Cassazione*” (Supreme Court) is the court of last instance and ensures the observance and uniform construction of Italian law. It is also called the “judge of legitimacy” (*giudice di legittimità*), because its role is to ascertain whether the law has been applied in the correct way by the lower courts deciding on the merit.

The so-called “*Tribunale per imminorenni*” (Juvenile Court) concerns cases involving minors.

In criminal matters, with reference to very serious crime the competent judge is the “*Corte di Assise*” (Court of Assize), which is composed of 2 professional judges and 6 lay judges. As far as sentences are concerned the “*Tribunale di sorveglianza*” is the Court responsible for their enforcement.

Administrative judges are the “*Tribunali amministrative regionali*” (TAR – Regional administrative Courts) situated in each Region and the “*Consiglio di Stato*” (Council of State), which is a legal-administrative consultative body and oversees the administration of justice.

According to the Italian Constitution “extraordinary or special judges may not be established. Only specialised sections for specific matters within the ordinary judicial bodies may be established, and these sections may include the participation of qualified citizens who are not members of the Judiciary”.

With reference to the independence of the Judiciary, the Italian Constitution states that it is a branch “autonomous and independent of all other powers”(Article 104) and that “judges are subject only to the law”(Article 101). Moreover, the jurisdiction for employment, assignments and transfers, promotions and disciplinary measures of judges is attributed to a self-governed body, independent from the Government: the High Council of the Judiciary.

As to the Constitutional Court the Constitution provides for its institution, its basic functions (Art. 134), its composition (Art. 135), and the effects of its decisions on statutes (Art. 136).

Further subsequent constitutional and ordinary laws govern regulation concerning the Court and its activities, and namely: Constitutional Law No. 1/1948 on the judicial review and the guarantees of independence of the Court, Constitutional Law No. 1/1953 and ordinary Law No. 87/1953, which completed the regulation of the Court’s functioning.

The composition of the Court and the method of appointment are important with reference to the guarantees of its independence and impartiality. The composition shows also a balance aimed at harmonizing different needs: to ensure impartiality and independence of judges; to



guarantee the necessary level of technical legal expertise; to bring different knowledge, political sensibility, cultures, and experiences to the Court. The Constitutional Court is indeed composed of fifteen judges, one third nominated by the President of the Republic, one third by Parliament in joint sitting and one third by the ordinary and administrative supreme Courts. The judges of the Constitutional Courts are chosen among judges, including those retired, of the ordinary and administrative higher Courts, university professors of law and lawyers with at least twenty years practice. Constitutional judges are appointed for nine years (beginning in each case from the day of their swearing in), and, as a further guarantee, they may not be re-appointed. Moreover the office of constitutional judge is incompatible with membership of Parliament, of Regional Council, the practice of the legal profession, and with every appointment and office indicated by law (Article 135 Const).

As to the tasks of the Constitutional Court, according to Article 134 Const., it shall pass judgement on:

- controversies on the constitutional legitimacy of laws and enactments having force of law issued by the State and Regions;
- conflicts arising from allocation of powers of the State and those powers allocated to State and Regions, and between Regions;
- charges brought against the President of the Republic and the Ministers, according to the provisions of the Constitution.

The expression “laws and enactments having force of law” means that not only statutes enacted by Parliament or Regions may be subject to constitutional review but also legislative decrees (*decretilegislatividelegati*, enacted by the Government according to authority delegated by Parliament) and decree-laws (*decreti-legge*, which are emergency decrees adopted by the Government and need to be converted into law by Parliament within a given period in order not to expire).

On the contrary, administrative regulations and, more generally, sources subordinated to law are not subject to constitutional judicial review.

The constitutional review is referred to as “incidental” because the question of constitutionality is raised by the judge during an ordinary proceeding. It must also be stressed that in Italy the law cannot be challenged directly before the Constitutional Court by parties, but only by the judge presiding over the case.

This latter has to verify two conditions giving a motivated decision as to whether the question is relevant in the case at stake and as to whether it is not “manifestly unfounded”.



With reference to the effects of the judicial review, when the Court declares the constitutional illegitimacy of a law (or enactment having force of law), the law ceases to have effect the day following the publication of the decision, except from situations where the effects of such norm are already entrenched (for example: final judgment or prescription)¹⁰⁵.

The Constitutional Court is generally trusted to protect civil rights, although it must be underlined that questions may be raised after the entry into force of the law and only during a proceeding. As to other courts the main complain regarding the protection of rights concerns the excessive lengths of the proceedings, for which Italy has also be often condemned by the European Court of Human Rights.

2.1.6 Non-judicial enforcement institutions and bodies relevant for the enforcement of the selected civil right

- ✓ Are there non-judicial/administrative procedures available to enforce the selected right against public authorities or private actors involved in public policy activities (eg delivery of public services, quasi-regulatory bodies, etc.) ?
- ✓ Are there non-judicial procedures available to uphold these rights against private actors (eg employers, landlords, etc.)?
- ✓ Which organs, institutions, or bodies contribute to promoting and enforcing the selected civil right? (eg equality body, ombudsperson, governmental supervisory authorities, etc.)
- ✓ How are procedures before these bodies regulated at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?
- ✓ What is their respective mandate? Were/are they discussions as to expanding, or reducing their mandate?
- ✓ What are their powers? (eg consultation, information-gathering, reporting, adjudication/decision-making, regulatory powers, etc)? Were they/are they discussions as to expanding, reducing their powers?
- ✓ How independent are they from government, parliament, stakeholders, others? Please pay particular attention to powers of appointment, and termination of the mandate of actors, as well as the bodies' decision-making procedures?

There are no specific administrative bodies or procedures aimed at generally protecting this right.

As a general rule, when the exercise of a given right can be subjected or influenced by the activity of the public administration (for instance through bans), the person can challenge the act on the basis, for instance, of a “legitimate interest” (*interesselegittimo*) to the regular launch of it¹⁰⁶.

¹⁰⁵ R. Bin, G. Pitruzzella, *Diritto costituzionale*, (Torino, 2012), at 437ff.

¹⁰⁶ *Ibid.*, at 495ff.



As far as the public administration is concerned, the sources of protection embedded in the Constitution are:

- Article 97, according to which “public offices are organised according to the provisions of law, so as to ensure the efficiency and impartiality of administration”. Moreover “the regulations of the offices lay down the areas of competence, the duties and the responsibilities of the officials”.
- Article 95.3: “the Ministers are collectively responsible for the acts of the Council of Ministers; they are individually responsible for the acts of their own ministries”.
- Article 28: “officials of the State or public agencies shall be directly responsible under criminal, civil, and administrative law for acts committed in violation of rights. In such cases, civil liability shall extend to the State and to such public agency”.

With specific reference to conscientious objection, it must be stressed that data and declarations concerning this choice are considered “sensitive data” (*datisensibili*) to which the Italian Code of Data Protection confers special protection. An independent authority, the Data Protection Authority (*Garante per la protezione deidatipersonali*) supervises the compliance with the norms protecting them.

For the role of this authority in protecting fundamental rights, freedoms and individuals’ dignity as to the processing of personal data, see above Part 1.

2.1.7 Access to Justice

- ✓ Are access to justice rights (fair trial, due process, right to an effective remedy...) respected when it comes to the enforcement of the selected right? Are there particular problems in that respect. Please develop.
- ✓ Does the principle have a broad scope of application, or are there exceptions?

With reference to the enforcement of this rights there are not specific concerns about the access to justice rights.

The Constitutional principles of “due process” are set out in Article 111 of Constitution as amended by constitutional law no. 2/1999:

- jurisdiction is implemented through due process regulated by law;
- all court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position.
- the law provides for the reasonable duration of trials;
- in criminal law trials, the law provides that the alleged offender shall be promptly informed confidentially of the nature and reasons for the charges that are brought and shall have adequate time and conditions to prepare a defence;



- the defendant shall have the right to cross-examine or to have cross-examined before a judge the persons making accusations and to summon and examine persons for the defence in the same conditions as the prosecution, as well as the right to produce all other evidence in favour of the defence;
- the defendant is entitled to the assistance of an interpreter in the case that he or she does not speak or understand the language in which the court proceedings are conducted. In criminal law proceedings, the formation of evidence is based on the principle of adversary hearings;
- the guilt of the defendant cannot be established on the basis of statements by persons who, out of their own free choice, have always voluntarily avoided undergoing cross-examination by the defendant or the defence counsel. The law regulates the cases in which the formation of evidence does not occur in an adversary proceeding with the consent of the defendant or owing to reasons of ascertained objective impossibility or proven illicit conduct;
- all judicial decisions shall include a statement of reasons;
- appeals to the Court of Cassation in cases of violations of the law are always allowed against sentences and against measures affecting personal freedom pronounced by ordinary and special courts.

The term “sentence” used in the latter provision is interpreted in a broader way, thus including not only a proper formal judgment (*sentenza*), but also any decision with the substantial content of a judgment.

The main problem concerning these principles is the length of proceedings. Italy has been fined many times at the European level and is currently passing some reforms of the judicial system aiming at strengthening its quality and efficiency, as well as at granting quicker proceedings (number of courts, telematic civil procedure, etc).

The principles of due process as protected and interpreted by the ECtHR are considered to be applicable not only to judicial procedures but also to administrative proceedings.

2.1.8 “Support structures”

- ✓ What is the role of NGO or other civil society actors (eg legal entrepreneurs, etc.) in bringing awareness about modes of enforcement of the selected civil right and in supporting actions to uphold the selected right using judicial or non-judicial means? Please give as many details as possible and identify the most relevant actors
 - Does the organization and structure of the legal professions support the selected civil right claims? In particular, are there developed legal aid systems or pro bono schemes, or any other relevant support system which purports to enable public interest litigation aimed at promoting/supporting the development and effective enjoyment of the selected civil rights.
 - Does legal training contribute or undermine the effective protection of the selected civil rights? Please give evidence based on standard law-school and/or bar-exams curricula?
 - What are the relationship between legal elites, political/governmental elites and civil society organizations? Do they contribute or undermine civil rights litigation and enforcement?
 - What is the role played by academic scholars in promoting and supporting the effective enforcement of the selected civil rights?

Civil society actors and NGO usually perform an important role in the concrete enforcement of rights, especially in fields characterized by on-going changes, and therefore by new needs for protection and for balancing of rights and interests potentially conflicting. Freedom of religion, as well of freedom of conscience, as expression of the increasing pluralistic character of modern societies, both at the national and at the European level, are certainly characterised



by such on-going processes. Moreover, different religions often correspond to different cultures and this adds further complexity, which requires specific measures and professional expertise to be dealt with. “Support structure” may therefore help in understanding how to concretely protect these rights.

As far as religion is involved it is worth mentioning the role of the representatives of recognised confessions, which can stipulate agreements with the Italian State in favour of their religious community.

The Italian Government has also created some specific commissions set up to help in the coordination between State and religious confessions:

Commissione interministeriale per le intese con le Confessioni religiose (Interministerial Commission for the agreements with the religious confessions).

- Its main task is the arrangement of studies and operational guidelines for the Secretary of the Presidency of the Council of Ministers, which is responsible for conducting negotiations with representatives of religious denominations.
- It also agrees with the delegations of the concerned religious denominations on the text of the agreements.

Commissione consultiva per la libertà religiosa (Advisory Commission for Religious Freedom)

Tasks:

- study, information and proposal for all issues related to the implementation of the principles of the Constitution and on the laws on freedom of conscience, religion or belief;
- reconnaissance and examination of issues related to the preparation of agreements with the religious confessions and formulation of a preliminary opinion on the draft agreement;
- processing of the preliminary (provisional) orientation (guidance) in view of the stipulation of the agreement;
- statement of opinions on issues relating to the relations between the state and religious confessions in Italy and in the European Union, at the request of the President of the Council of Ministers;
- reporting problems in the application of the existing legislation, also internationally derived.

Commissione governativa per l'attuazione delle disposizioni dell'Accordo tra Italia e Santa Sede, firmato il 18 febbraio 1984, e ratificato con legge 25 marzo 1985, n. 121 (Government Commission for the implementation of the provisions of the Agreement between Italy and the Holy See).

- Reconnaissance and examination of issues related to the implementation of the Agreement of 1984;
- Proposition of guidelines for the drafting of agreements, conventions and agreements provided for by single provisions of the Agreement;
- Study of possible legislative changes to harmonize the Italian system with legal provisions of the Agreement and verification of compliance of draft legislation to the Agreement itself;
- Statement of opinions on issues relating to the relations between the state and religious confessions;
- Research and studies possibly entrusted to the Commission by the President of the Council of Ministers for the revision of existing legislation on religious denominations and on the right to freedom of conscience and religion, also with reference to the EU Treaties.

Comitato di coordinamento per le celebrazioni in ricordo della Shoah (Coordination committee for the celebrations in memory of the Shoah)

- The Committee's task is to coordinate and rationalise all initiatives proposed and organized in order to perpetuate the memory of the Holocaust and, in particular, to raise awareness of the younger generation on the facts



relating to it.

Commissione governativa avente il compito di procedere alla revisione dell'importo deducibile ed alla valutazione del gettito della quota IRPEF al fine di predisporre eventuali modifiche (Government commission with the task of carrying out the review of “deducibili” and the assessment of the IRPEF fee revenue in order to predispose any changes).

With reference to the legal profession, the role of the “*Ordine*” (Bar Association) and of the Code of conduct fosters the protection of fundamental rights. Also the University curricula include many exams, which may deal with the protection of this right from different perspectives.

Nonetheless as said before, the complexity characterising the different types of relationships, interests, values, cultures, and legal issues in the field of freedom of religion in a pluralistic society requires a specific and interdisciplinary training. In this respect legal scholars may play a role in fostering the dialogue and research in a multidisciplinary way focusing on specific and practical problems. This is still a task mainly depending on single research groups’ choices and not on a general university and research policy at the national level.

2.1.9 Further practical barriers to the effective enjoyment of the selected civil rights

- ✓ Can you identify further barriers to an effective enjoyment of the selected civil rights in practice?
- ✓ Please, include here (or repeat) particularly problematic barriers towards the enforcement of the selected civil rights (such as overbearing costs, judicial corruption, unavailability of legal aid in practice, lack of information about the rights, lack of expertise on the part of attorneys or other legal actors, intimidation towards people who want to enforce their rights, etc.)
- ✓ Can you identify linguistic barriers, and/or barriers related to difference between legal and judicial culture and practices which could undermine the effective enforcement of the selected civil rights, in particular for mobile EU citizens/Third Country Nationals?
- ✓

Please, make sure to point out right-, gender-, or minority-specific differences with regard to an effective enjoyment of the selected civil rights.

Practical barriers may be linked to specific aspects of freedom to religion, which, as already seen, involves many fields of protection and balance with other rights (non discrimination, physical integrity, state-churches relations, freedom of association, education, marriage, family, etc.).

A common barrier concerns beliefs that are not linked to recognised confessions or, more generally, religious confessions that do not rely upon a recognised representative which can easily conclude agreements with the Italian State, pursuant to Article 8 of the Constitution. Only Confessions whose legal status has been acknowledged under law no. 1159/1929 may indeed conclude such agreements (*intese*).



Difficulties may also arise from the lack of tests and manuals properly translated in order to permit the balance between accommodating education in a specific religious and the public principles and aims of public state curricula. Similar issues concerning translation may characterise also public security matters.

Another barriers can be the lack of adequate training of teachers as to the complexity connected to the accommodation of pluralistic religious needs in education.

2.1.10 Jurisdictional issues in practice

- Personal
 - Is there any de jure or de facto difference in the effective enjoyment of the selected civil rights in your country depending on the status of the person? (differences between natural and legal persons; citizens of that state; EU citizens; third country nationals; refugee; long term resident; family members; tourists; etc.)
- Territorial
 - Are there any de jure or de facto differences in the effective enjoyment of the selected civil rights in different parts, provinces or territories in your member states?
- Material
 - Are rights enforced differently in different *policy areas* (e.g. security exceptions, foreign policy exclusion, etc.)? Please, make an assessment on the basis of practice, too (eg more deference accorded in the balancing to the executive when it comes to these policy areas, though the legal framework – what you described in the response to the D7.1. questionnaire — is itself not different from other areas).
- Temporal
 - What is the temporal scope of protection in the enforcement of the selected civil rights? Are there any notorious or systematic deficiencies in how deadlines are determined or related to the length of proceedings in practice? Please, answer this question from the viewpoint of the practical application of the rules on deadlines for both initiating proceedings, reviews, etc., and for the court’s duty, if there is any (next to Art 6 ECHR), to complete proceedings.

Please offer details as to how different rights are enforced to different *categories of persons* in *different location and policy contexts over time*?

As a general rule, from a formal perspective some constitutional rights are specifically recognised to all persons, whereas others are acknowledged to citizen. For instance, Article 19 concerning freedom of religious refers to “anyone”, whereas Article 18 (freedom of association, which can play a role also in religious matters) concerns “citizen”. As to the legal status of foreigners, Article 10.2 of the Italian Constitution states that it is regulated by law in



conformity with international provisions and treaties. There is therefore *ariserva di leggerinforzata* (reinforced) with regard to the possibility to extend rights of citizens to foreigners. Also the second section of Article 3 on the principle of equality refers to citizens. Nevertheless the Constitutional Court extended, on the basis of Article 2 (referred to the human being, without distinction between citizens and foreigners), inviolable rights also to non-citizen. Rights other than those considered inviolable are recognisable to foreigners only pursuant to Article 16 of the *Preleggi*, i.e. on reciprocity conditions. Equality as regards the foreigner is anyway a principle and not a peremptory rule; therefore exceptions may be reasonably introduced by the legislator as stated by the Constitutional Court¹⁰⁷.

As far as freedom of religion is concerned it must however be underlined that Italian law on immigration (legislative decree no. 286/1998) specifically excludes deportation on the basis of religion and provides for the possibility of requesting a residence permit (and also facilities as regards family reunification) on religious grounds.

With reference to jurisdiction there are not specific issues.

Concrete differences concerning religious communities may anyway arise, as already stated, in relation to non-recognised confessions. No specific general differences are instead connected to territory.

From a practical perspective, there are some specific local (regional, provincial or municipal level) initiatives regarding integrations and specific policies adopted by certain schools (issues arose for instance with regard to traditions linked to Christmas festivity when some school decided to suspend them).

2.1.11 Systematic or notorious lack or deficient enforcement of the selected civil rights in the country under study?

Please, discuss here in detail any ‘revealing’ cases of weaknesses in the effective exercise of selected civil rights in your country. Try to identify the reasons (eg. political influence, financial hurdles, lack of expertise, etc.). Feel free to either repeat here, or refer back to points elaborated upon in previous replies.

As already said, there is not a general and systematic regulation for denominations other than Catholicism which do not have a so-called “*intesa*” with the Italian State.

From a general perspective, the role of the Catholic Church and of the catholic cultural heritage is still predominant and still characterises also public environments and life, such as schools (crucifix or traditions related to religious festivities) or holidays. Nevertheless it seems to fall into the margin of appreciation recognised by the ECtHR.

¹⁰⁷ Constitutional Court, decisions no. 104/1969 and no. 144/1970.



In other context it is anyway likely to influence legislative choices especially in very sensitive issues such as bioethics and sexual identity.

2.1.12 Good practices

Please highlight legal frameworks, policies, instruments or practical tools which facilitate the effective exercise of the selected civil rights in the country under study.

Besides the constitutional framework already outlined, the main instruments affecting freedom of religion are the Concordat, the norms implementing it and the agreements with other religious confessions.

- Agreement between the Italian State and the Holy See (1984);
- Tavolavalde – Law no. 449/1984, modified by law no. 409/1993; Law no. 68/2009;
 - Assemblee di Dio in Italia (ADI) – Law no. 517/1988;
 - Unione delle Chiese Cristiane Avventiste del 7° giorno [Seventh-day Adventist Church]- Law no. 516/1988, modified by law no. 637/1996, Law no. 67/2009;
 - Unione Comunità Ebraiche in Italia (UCEI) [Union of Italian Jewish Communities]- Law no. 101/1989, modified by law no. 638/1996;
 - Unione Cristiana Evangelica Battista d'Italia (UCEBI) [Baptist Evangelical Christian Union of Italy] – Law no. 116/1995, modified by law no. 34/12;
 - Chiesa Evangelica Luterana in Italia (CELI) [Lutheran Evangelical Church in Italy]- Law no. 520/1995;
 - Sacra Arcidiocesi ortodossa d'Italia ed Esarcato per l'Europa Meridionale – Law no. 126/12;
 - -. 128/12;
 - Unione Buddista Italiana (UBI) [Italian Buddhist Union] - Law no. 245/12;
 - Unione Induista Italiana [Italian Hindu Union]- Law no. 246/12;

2.2 Right 2: SELF-DETERMINATION AND CONSENT TO MEDICAL TREATMENTS

2.2.1 Source of protection

With reference to the role of Articles 2 and 3 of the Italian Constitution see above answer 2.1.1.

According to the Italian Constitutional Court the right to self-determination and informed consent to medical treatment is a fundamental right based not only on Articles 2 and 32 (right



to health) but also on Article 13 concerning the protection of personal freedom (also understood as physical integrity).

Legislative sources protecting the right to informed consent in the medical field are Laws no. 833 and 180 of 1978 (on the Italian National Health Service and the Italian Mental Health Act of 1978 reforming the psychiatric system).

Important provisions are included in the Code of medical professional ethics, in particular in Articles 33 and 35, and Article 20 as regards communication within the patient-physician relation. This code also provides for principles concerning vulnerable person, such as children.

Problems concerning the Italian sources of protection of the right to self-determination in medical treatments may be: the absence of a general law on consent and physician-patient relationship (clearly regulating also issues concerning the refusal of medical treatments and the content in cases of incompetent person), which on the contrary exist in other European countries; the absence of specific rules concerning children; the existence of multiple sources with different authority and, to some extent, with different meanings and scope of the right to self-determination and content to medical treatments.

2.2.2 Scope and limits of the right (including balancing with other rights)

The essence of therapeutic freedom and choice is based on the personal beliefs of the patient, on his/her self-image, thus on his/her dignity. Informed consent is therefore a fundamental right and an essential prerequisite for all medical interventions on the person, also according to the “*principio personalista*” (“personalist principle”) which characterizes the Italian constitutional system.

Informed consent shall be considered as a process consisting in two phases. The first one concerns information, i.e. the communication and, possibly, explanation of medical, clinical and technical data. The second one is the consent understood as the moral choice of the person.

This freedom includes also the right to refuse medical treatments, even if life-saving. In this respect it must be nevertheless underlined that in Italy assisted suicide and consensual mercy killing are crimes. On the contrary, the right to refuse is protected by Article 32 of the Italian Constitution. However a sensitive issue is related to the extension of this right, and namely to the type of treatments covered by constitutional protection. Without a legislative intervention in this field, there has been a huge debate regarding the possibility to consider as medical



treatments, which can thus be withdrawn, also life-sustaining treatments, such as artificial nutrition and hydration. Thorny problems arise in particular as regards incompetent patients, which cannot give or confirm their wishes. In this respect the Italian Code of medical professional ethics gives some provisions, but a general legislative legislation is still needed.

Therapeutic freedom may be balanced with the professional autonomy of the physician, which cannot be forced to act in a manner contrary to his/her clinical or ethical convictions. In some cases the physician has a legislative protected right to be “a conscientious objector”. In other cases the Code of medical professional ethics provides for a so-called clause of conscience (*clausola di coscienza*). However the freedom of conscience of the physician can be exercised provided that it does not make the right of the patient impossible or that it does not cause a serious damage to the health of the patient¹⁰⁸.

In any case the self-determination and therapeutic freedom of the person cannot be a ground for futile treatments¹⁰⁹.

Another limit to the freedom of therapeutic choice of the patient may be the danger for another person, which indeed may also influence the rules on confidentiality.

Furthermore the right to self-determination as expression of personal freedom can be limited by the so-called “compulsory medical treatments” (*trattamenti sanitari obbligatori, TSO*), which can be imposed by the State (only by means of a law, which must nevertheless respect personal dignity, according to the “riserva di legge” included in Article 32 Const.) for specific purposes, such as in cases of mental illness. In this situation special procedural safeguards are taken to apply such a limitation to personal freedom, also by means of the validation by the judicial authority (i.e. the so called “jurisdictional reservation”, “*riserva di giurisdizione*” in Italian).

Compulsory vaccinations are another case in point as regards limits to freedom of therapeutic choice.

Right to physical integrity and individual self-determination are at stake also in cases concerning blood transfusions in Jehovah Witnesses, although the refusal is based on religious grounds (see above).

¹⁰⁸ See for instance Article 22 of the Italian Code of medical professional ethics; Article 9 of Law no. 194/1978 on abortion; Article 16 of law no. 40/2004 concerning medical assisted reproduction; and law no. 431/1993 enabling the conscientious objection in the field of trial involving animals.

¹⁰⁹ For a general analysis see C. Casonato, *Introduzione al biodiritto*, (Torino 2012), at 122ff and 206ff; Id., *Informed Consent and End-of-Life Decisions: Notes of Comparative Law*, in *Maastricht Journal of European and Comparative law*, v. year 2011, vol. 3, (2011), 225-256.



2.2.3 Interpretation and application

As already said, the Italian Constitutional Court stated in 2008 (decision no. 438, 23 December 2008) that the principle of informed consent is a fundamental right, based on Article 2 (inviolable rights), Article 13 (personal freedom) and Article 32 (health as a fundamental right) of the Constitution and therefore an essential condition for the legitimacy of any medical activity.

The Italian case law has repeatedly confirmed this principle, also clarifying that the consent of the person is not enough to exclude medical liability if the information given by the physician as regards the clinical situation and the risks was not adequate to allow a conscious exercise of the person's therapeutic freedom.

With reference to the role of State or regional legislation on therapeutic choices, the Italian Constitutional Court has clearly stressed that the basic rule in this field shall be the autonomy and responsibility of the physician together with the consent of the patient (decisions no. 282 of 2002 and 338 of 2003).

Furthermore, in the decision on a very sensitive case (the so-called Englaro case, 2007) the Italian Supreme Court (*Corte di Cassazione*) underlined the link between respect of dignity and right to refuse, clarifying that “informed consent is strictly related (...) to the refusal of the therapy and to its withdrawal in any phases of life, even in the terminal one. This complies with the “*principio personalista*” at the core of the Italian Constitution, which considers the human person as an ethical value per se, and prohibits any manipulation for any heteronomous purpose”¹¹⁰. The Court also held that artificial nutrition and hydration are medical treatments, and while acknowledging the possibility to withdraw them also in cases of an incompetent person, imposes a rigorous probative obligation as regards the will of that patient, based on clear and convincing evidence.

2.2.4 Case law protecting civil rights

See answer 2.1.4

2.2.5 Judicial enforcement institutions and bodies

¹¹⁰ Translated by C. Casonato in *Informed Consent and End-of-Life Decisions: Notes of Comparative Law*, op. cit., at 230.



See answer 2.1.5.

With particular reference to therapeutic freedom and principle of informed consent another body to be mentioned is the CCEPS (*Commissione centrale per gli esercenti le Professioni Sanitarie*), which judges on appeal in the field of disciplinary responsibility of physicians, based on violations of the Code of medical professional ethics.

Since, on the one hand, the principle of consent is based on the duties of the physician to duly inform and to respect patient's fundamental rights and, on the other hand, the Code of medical professional ethics is one of the sources of protection of that freedom, punishments of breaches to it might perform a role in granting protection. The CCEPS, when deciding as second instance, is a judicial body and its decisions on disciplinary responsibility can be challenged before the Italian Supreme Court¹¹¹.

2.2.6 Non-judicial enforcement institutions and bodies relevant for the enforcement of the selected civil right

With reference to therapeutic freedom, it is worth mentioning the function performed by the Italian medical professional association (*Ordine professionale*, hereinafter “Ordine”) in protecting also public interests and fundamental rights.

First of all, since in Italy the registration to the professional register (*Albo professionale*) is mandatory, the “Ordine” shall grant, nationwide but also at the regional level, the necessary degree of professional expertise and the compulsory respect of a Code of professional ethics which includes specific provisions protecting the rights of patient, and among them the principles of self-determination and informed consent. Considering also the lack of a general law in this field, professional ethics and the organization of the professional category proves to play an important role in the protection of this fundamental right.

Secondly, the “Ordine” (Medical Association) is competent for the disciplinary responsibility of physicians and, therefore, also for the breach of those rules included in the professional code and protecting fundamental rights. The complaint can be lodged with the “Ordine” also by the patient. The first degree of the disciplinary procedure has administrative nature. The decision may then be challenged before the CCEPS.

Anyway it must be said that the patient cannot take part to the disciplinary proceedings. Moreover proceedings and decision are not public.

¹¹¹D.Lgs.C.P.S. 13 September 1946, no. 233 on Professional Associations for healthcare professionals (Ricostituzione degli Ordini delle professioni sanitarie e per la disciplina dell'esercizio delle professioni stesse).



Another body aimed at fostering, although only on a voluntary basis, the protection of rights in the medical field are the “*Tribunali per idiritti del malato*” (Courts for the patient’s right), composed of citizens and professionals and aimed at helping patients in solving problems connected to the their relationships with the public health system.

2.2.7 Access to Justice

From a general perspective there are no specific limits to the access to justice rights as regards the enforcement of this right.

Nevertheless as far as disciplinary proceedings are concerned it must be stressed that, differently from other countries, some principles are limited with reference to the patient (for instance: public hearing, access to documents, possibility to challenge decisions).

2.2.8 “Support structures”

Civil society actors and NGO usually perform an important role in the concrete enforcement of rights, especially in fields characterized by new rights or new challenges for fundamental rights, as in medicine. They can help in understanding how to better protect rights and they also play a role in increasing social perception of the problems connected to their effective protection.

For general considerations as to legal profession and legal scholar see above answer 2.1.8.

In the specific context of self-determination in the medical field it is worth mentioning the role that interdisciplinary Ethics committees may play in deciding on the more sensitive issues or in preparing forms, guidelines and recommendations that can be used in order to concretely implement the right to therapeutic freedom and informed choice of the patient.

In Italy there is the National Bioethics Committee and other committees are organized at the local level by hospitals or other health institutions. Despite the role that such bodies may perform, there is not a general and systematic organization of them and as regards the legal natures of their advices, nor with reference to the relationships with the professional “*Ordine*”.

2.2.9 Further practical barriers to the effective enjoyment of the selected civil rights.



As far as therapeutic relationship is concerned language is an essential tool and therefore barriers may arise as to interpretation or translation.

A barrier to the effective implementation of this right is connected to the time dedicated to information, which is often not enough and, above all, on bureaucratic fulfillments which are likely to replace a proper informed consent.

A further obstacle in this field is connected to the so-called “defensive medicine” and to the subsequent phenomena of “over-medicalisation” and “over diagnosis”, which do not allow the patient to be properly informed.

Just to give an idea of the phenomenon of “defensive medicine” in Italy, its costs for the State correspond to the 0,75% of the PIL (“*Prodotto Interno Lordo*”, Gross Domestic Product).

Barriers to the proper exercise of the right to self-determination and informed consent concern minors since there is not a specific national regulation concerning their right to consent with reference to their degree of maturity.

2.2.10 Jurisdictional issues in practice

No specific personal or territorial differences characterize the general jurisdictional protection of the principle of informed consent to medical treatment.

Some special practical differences may be linked to the set of forms adopted in certain hospitals or clinics and in some cases they also provide for tools concerning children. As regards incompetent persons, some regions (for instance Friuli Venezia Giulia and the Provinces of Trento and Bolzano) provide for regulation of living wills.

2.2.11 Systematic or notorious lack or deficient enforcement of the selected civil rights in the country under study?

The main problematic issues concerns:

- Lack of general legislation on sensitive issues (lack of certainty);
- Defensive medicine;
- Lack of proper interdisciplinary dialogue between the actors involved (professionals, patients, lawyers, society actors, etc...);
- Difficulties concerning the ascertainment of the effectiveness of disciplinary responsibility's instruments;



- Law of proper national legislation regarding communication to children.

See above answers no. 2.2.1-2-3-6.

2.2.12 Good practices

Besides the Constitutional framework, the most significant instrument are set out by the professional dimension (rules of professional conduct and professional ethics) and by the policies eventually adopted by hospital or other health institutions.

2.3 Right 3: RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE WITH REFERENCE TO REPRODUCTIVE FREEDOM

2.3.1 Source of protection

As to the role of Articles 2 and 3 of the Italian Constitution see above answer 2.1.1.

With specific reference to the protection of reproductive rights and to issues concerning medical assisted reproduction, on the European level these rights are covered by the concept of “respect of private and family life”. This principle applies, for instance, also in the case in which the ECtHR has condemned Italy with reference to the law on medical assisted reproduction on the basis of Article 8 of the Convention (see below).

In Italy the right to self-determination in the field of reproduction, although not expressly mentioned in the Constitution, is protected by Articles 2, 3, 29 and 31 regarding family and Article 32 on the right to health.

For instance, the Italian Constitutional Court has expressly mentioned procreative rights in its decision no. 332 of 2000 dealing with rules relating to the military field, which has been considered as interference in private and family life not in compliance with the Italian constitutional principles. Reproductive exigencies are expressly mentioned also by the Court also in its decision no 151/2009 concerning medical assisted reproduction.

The main Italian legislative sources concerning these rights are Law no. 40/2004 on medical assisted reproduction and Law no. 194 of 22 May 1978 on the social protection of motherhood and the voluntary termination of pregnancy.



From a legislative perspective the main problems arise from law no. 40/2004 itself, namely as regards equality, non discrimination, and the principle of reasonableness as to the balancing test with other constitutional principles and State interests.

Moreover, following numerous decisions challenging such law, these rights are mainly protected at the judicial level, especially through decisions by the Constitutional Court and the ECtHR. New legislative or regulatory interventions are therefore needed, in order to ensure legal certainty and full, and coherent implementation of rights.

2.3.2 Scope and limits of the right (including balancing with other rights)

The choice to become a parent and to create a family with children is considered as a fundamental and general freedom to self-determination, based on Articles 2, 3 and 31 of the Constitution and concerning the right to private and family life. Consequently limitations to this freedom, and particularly the prohibition of its exercise must be reasonably justified.

This freedom shall be balanced with the protection of embryos. Another limitation is the best interest of the child, as well as his/her legal status and parental relationship.

Issues related to reproductive rights may also be limited by public policy.

From a general legislative perspective the limitations introduced by law no. 40/2004 proved not to be in compliance with ECHR and European principles (the ECtHR held that Italy has infringed Article 8 of the Convention¹¹²).

2.3.3 Interpretation and application

The Italian Constitutional Court has stressed not only the fundamental right to self-determination in reproductive choices but also the need for a proper balance between the limits to this freedom and the other interests protected through such limitations¹¹³.

¹¹² Costa and Pavan v. Italy (App. no. 54270/10) ECHR 11 February 2013. See, for instance, Id., *The Italian regulation on Assisted Reproductive Technologies facing the European Court of Human Rights: the case of Costa and Pavan v. Italy*. Nota a: Corte Europea dei Diritti dell'Uomo, caso Costa e Pavan c. Italia, 28 agosto 2012, in *Revista de Derecho y Genoma Humano*, n. 37/2012 (2012), 155-178.

¹¹³ See for instance, Constitutional Court no. 162/3014. For a general analysis see, among others, C. Tripodina, *Il "diritto" a procreare artificialmente in Italia: una storia emblematica, tra legislatore, giudici e Corti*, in *BioLaw Journal*, 2, 2014, 67; S. Penasa, *Fecondazione assistita in: "Trattario di diritto civile. Famiglia"*; II (Milano, 2014), 626-664; Id., *La Corte Europea dei Diritti dell'Uomo di fronte al fattore scientifico: analisi della recente giurisprudenza in materia di procreazione medicalmente assistita e interruzione volontaria di gravidanza*, in *Revista Europea de Derechos Fundamentales*, v. n. 21/2013, n. n. 1 (2013), 235-270.



As far as the protection of the embryo in law no. 40/2004 is concerned, the Court expressly states that it is not absolute and must therefore be balanced with reproductive exigencies (decision no. 151/2009).

With particular reference to Law no. 40/2004 Italian trial courts raised many questions of constitutionality before the Constitutional Court, which, together with the ECtHR, has challenged several Articles of this act.

Just to give a few example, with judgment no. 151/2009 the Court held Article 14.3 inconsistent with the Italian Constitution, insofar as it did not provide that the transfer of embryos, to be implemented as soon as possible, should be made without prejudice to the woman health. Moreover it declared the unconstitutionality of Article 14.2 with reference to the words "to a unique, contemporary implantation, in any case no more than three", underlining not only the violation of Article 32 (health as a fundamental right) but also of the principle of equality (article 3) and reasonableness.

With judgment no. 162/2014 the Court stated that the ban on assisted reproduction with gamete donation is unconstitutional. In this decision the Italian Court underlined the multiplicity of constitutional rights involved in the field of medical assisted reproduction and therefore the need for reasonable and properly balanced limitations.

The Italian case law tried therefore to mitigate the failures characterising the legislative intervention on reproductive freedom in a way more in compliance with the principles of equality, non discrimination, reasonableness and with the respect of private and family life, as interpreted by the ECtHR.

2.3.4 Case law protecting civil rights

See answer 2.1.4

2.3.5 Judicial enforcement institutions and bodies

See answer 2.1.5.

2.3.6 Non-judicial enforcement institutions and bodies relevant for the enforcement of the selected civil right



There are no specific administrative bodies or procedures aimed at generally protecting this right. See answer 2.1.6.

With reference to the role of Professional Associations (*Ordiniprofessionali*, see answer 2.2.6) as to disciplinary responsibility and code of conduct (as well as for conscientious objection), in the specific fields of assisted reproduction it must be stressed that professional categories involved are also those of biologists.

2.3.7 Access to Justice

With reference to the enforcement of this rights there are not specific issues o limits as to the access to justice rights. See answer 2.1.7.

It is worth underlying that the large amount of cases dealing with law no. 40/2004 and aiming at mitigating the failures characterising the legislative intervention on reproductive freedom testify the broad scope of application of the principle of access to justice rights.

2.3.8 “Support structures”

See answer 2.2.8

2.3.9 Further practical barriers to the effective enjoyment of the selected civil rights

The main barriers concerning this right are linked to the Italian law, which excludes, especially in the original version, different types of couple and techniques. One of the main problems is therefore the access to reproductive rights. Although the case law has mitigated these failures, a proper certainty as to the scope of the protection of reproductive rights is still missing. As a consequence many citizens move to countries where there are more concrete possibilities to realize their wishes and rights, thus creating further discriminations on the basis of economic possibilities (see also Constitutional Court, decision no. 162/2014).

Furthermore, it must be mentioned that conscious objection may become a concrete barrier. For instance the in the collective complaint International Parenthood Federation European Network (IPPF EN) v. Italy (no. 87/2012) the IPPF EN asks the European Committee of Social Rights to declare “that Italy is in violation of Art. 11 of the European Social Charter ... due to the inadequate formulation of Art.9 of Law no. 194 of 1978 and thus, the protection of



the right to access procedures for the termination of pregnancy”. This complaint is based on the evidence that “the lack of specific legal provisions regarding the actual means with which to ensure a proper balance between objecting and non-objecting medical personnel unreasonably sacrifices a woman’s right to freedom of self-determination in choices concerning procreation, physical and mental health, and life”.

No specific language problems are linked to assisted reproduction.

2.3.10 Jurisdictional issues in practice

From a jurisdictional point of view no specific issue arise from the exercise of this rights.

The main substantial differences connected to this right are related to the discriminations arisen by law no. 40/2004 (for example: same-sex couples, couples with different medical situation, single woman, etc.; see above). Some regional guidelines provide also for different age limits.

2.3.11 Systematic or notorious lack or deficient enforcement of the selected civil rights in the country under study?

The main problematic issues are:

- Lack of reasonableness in balancing reproductive freedoms with other rights and interests;
- Discriminations in the concrete exercise of reproductive freedom;
- Reproductive tourism;
- Lack of a proper legal certainty of the exact scope of the protection in some specific aspects, due to the intervention of case law, which tried to mitigate the failures of the law.

See above answers no. 2.3.1-2-3-6.

2.3.12 Good practices

Besides the Constitutional provisions, law no. 40/2004 as amended by constitutional adjudication, the case law (national and European), other regulation concerning reproductive matters are the guideline of the Italian government (no. 191/2004 and 101/2008) and special regional rules. Moreover a National Register



(*Registro Nazionale Procreazione Medicalmente Assistita*) has been established in 2005 and is available at the website of Istituto Superiore di Sanità (<http://www.iss.it/rpma>) and contains information as to the national and regional centres for assisted reproduction and to all regulations issued at the national and regional level.





ANNEXES

National provisions

Relevant legislation:

- Protection of rights in civil proceedings (mutual recognition instruments)
 - Law no. 218/1995
 - Legislative decree n. 150/2011
 - Law no. 219 of 2012 (entered into force in January 2013)
 - Legislative Decree no. 154 of 2013 (entered into force in April 2014).
 - Royal Decree no. 1368 of 18 December 1368
 - Ministerial Decree no. 55 of 2014
 - Presidential Decree no. 123 of 13th February 2011 (Regulation on the use of IT and telecommunication tools in the civil trial, in the administrative process and in the process before the judicial panels of the Court of Auditors)
 - Ministerial decree no. 44/2011
 - Legislative Decree no. 82/2005 (the so-called Digital Administration Code)
 - “Stability Law 2013” no. 228 of 24th December 2012.
 - Presidential Decree (D.P.R.) no. 396 of 3 November 2000

- Protection of rights in criminal proceedings
 - Legislative Decree no. 161 of 7 September 2010
 - Law no. 69/2005
 - Legislative decree no. 39/2014 transposing Directive 2011/92/EU of 13 December 2011
 - Legislative Decree no. 24 of 4 March 2014
 - Legislative Decree no. 204/2007
 - Legislative Decree no. 9 of 11 February 2015.
 - DM Giustizia no. 222/2008 – published in the Italian Official Journal on 12 May



2009

- Legislative Decree no. 32 of 4 March 2014
- Presidential Decree no. 115/2002
- Legislative Decree no. 101 of July 2014

Protection of Personal Data

- “Data Protection Code” (Legislative Decree June 30th, 2003, no. 196)
- Decree 30 May 2008, no. 109

○ Enforcement of selected civil rights

- Legislative decree no. 286/1998
- Laws no. 833 and 180 of 1978 (on the Italian National Health Service and the Italian Mental Health Act of 1978 reforming the psychiatric system).
- Law 40/2004
- Law no. 1159/1929 on allowed worships
- Law no. 286/1998
- Law no. 194/1978
- Law no. 431/1993
- Basic Law on the Judiciary of 30 January 1941 no. 12
- Constitutional Law No. 1/1948
- Constitutional Law No. 1/1953
- Ordinary Law No. 87/1953
- Constitutional law no. 2/1999
- D.Lgs.C.P.S. 13 September 1946, no. 233

Relevant Constitutional Court case law:

○ Protection of rights in civil proceedings (mutual recognition instruments)

- Cass., Plenary Session, 7th May 2003, no. 6899
- Cass., decisions no. 7854 of 11 June 2001 and no. 6238 of 11 July 1997.
- Cass., Plenary Section, 11th February 2003, no. 2060.
- Cass., no. 24438 and 27648 of 2011
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The Netherlands report 7.2.

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¹ The author would like to express her gratitude to Ms. Reshmi Rampersad for her valuable research assistance.



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1. Question 1 – Transposition of EU instruments protecting or potential affecting civil rights

- ✓ How are the EU instruments listed below transposed in the country of study? Have there been notorious failure or defect in the national transposition? Is the national legislative transposition of these EU instruments reinforcing or on the contrary threatening civil rights norms?

2. Question 2 – Executive/administrative implementation of EU instruments affecting civil rights

- ✓ How are the EU instruments below and their national transposition measures implemented though **regulatory/executive or administrative measures**? Have these EU instruments been implemented in ways which affords further protection or potentially undermine civil rights norms?

3. Question 3 – Judicial interpretation and application of EU instruments affecting civil rights

- ✓ How are the EU instruments listed below and their transposition and implementation measures, interpreted and applied by courts? Is the judicial interpretation and application of these instruments and their domestic transposition and implementation measures furthering civil rights protection or, on the contrary, raising concerns in that respect?

1.1 EU legislation affording protection or potentially undermining civil rights in judicial proceedings



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1.1.1. Protection of rights in civil proceedings (mutual recognition instruments)

The EU has adopted a number of instruments enabling the mutual recognition of judgments in civil rights matters. Whilst these should respect EU fundamental rights norms and often include safeguard provisions, they may also undermine the civil rights of EU citizens, their families and affected third country nationals.

- Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Regulation') – in particular articles 1, 2, 3, 4, 5, 6, 7, 31, 32-56 ; 57-58, 61.

Regulation 44/2001 has been transposed by the Act concerning the judicial jurisdiction, recognition and execution of decisions in civil and commercial matters (*Wet van 2 juli 2003 tot uitvoering van de verordening (EG) Nr. 44/2001 van de Raad van de Europese Unie van 22 december 2000 betreffende de rechterlijke bevoegdheid, de erkenning en de tenuitvoerlegging van beslissingen in burgerlijke en handelszaken (PbEG L 12) (Uitvoeringswet EG-executieverordening)*).

Regulation (EC) No 2201/2003 is transposed in an Act of 16 February 2006, which amended the Dutch Civil Code and the Execution Act Child Abduction². Moreover, an adjustment of the Dutch Civil Code was made. Article 113 of the Civil Code acknowledges the applicability of Regulation 2201/2003 to the rights of the child (together with international and national law that protects the rights of the child).

² Wet van 16 februari 2006 tot uitvoering van het op 19 oktober 1996 te 's-Gravenhage tot stand gekomen verdrag inzake de bevoegdheid, het toepasselijke recht, de erkenning, de tenuitvoerlegging en de samenwerking op het gebied van ouderlijke verantwoordelijkheid en maatregelen ter bescherming van kinderen alsmede van de verordening (EG) nr.2201/2003 van de Raad van de Europese Unie van 27 november 2003 betreffende de bevoegdheid en de erkenning van beslissingen in huwelijkszaken en inzake de ouderlijke verantwoordelijkheid, en tot intrekking van Verordening (EG) nr. 1347/2000 (PbEU L 338), en wijziging van het Burgerlijk Wetboek, het Wetboek van Burgerlijke Rechtsvordering en de Uitvoeringswet EG-executieverordening (Uitvoeringswet internationale kindbescherming).



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Regulation No 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters is transposed by an Act of 4 March 2015 (*Uitvoeringswet verordening wederzijdse erkenning van beschermingsmaatregelen in burgerlijke zaken*³).

1.1.2. Protection of rights in criminal proceedings (due process, right to a fair trial, etc.)

1.1.2.1. Mutual recognition instruments in criminal matters

The European Arrest Warrant is transposed in the Dutch Act Surrender ('Overleveringswet').⁴ Framework Decision 2008/909/JHA on the application of the principle of mutual recognition for judgments imposing custodial sentences or measures involving deprivation of liberty is implemented in the Dutch Act of 29 April 2004, which implements different framework decisions, including 2008/947/JHA on probation decisions and alternative sanctions and Framework Decision 2006/783/JHA on the application of the principle of mutual recognition for confiscation orders.⁵ The (*Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties*) and the Execution Act mutual recognition

³ Wet van 4 maart 2015 tot uitvoering van Verordening (EU) Nr. 606/2013 van het Europees parlement en de Raad van 12 juni 2013 betreffende de wederzijdse erkenning van beschermingsmaatregelen in burgerlijke zaken.

⁴Wet van 29 april 2004 tot implementatie van het kaderbesluit van de Raad van de Europese Unie betreffende het Europees aanhoudingsbevel en de procedures van overlevering tussen de lidstaten van de Europese Unie (Overleveringswet).

⁵ Wet van 12 juli 2012 tot implementatie van kaderbesluit 2008/909/JBZ van de Raad van de Europese Unie van 27 november 2008 inzake de toepassing van het beginsel van wederzijdse erkenning op strafvonnissen waarbij vrijheidsstraffen of tot vrijheidsbeneming strekkende maatregelen zijn opgelegd, met het oog op tenuitvoerlegging ervan in de Europese Unie (PbEU L 327), van kaderbesluit 2008/947/JBZ van de Raad van de Europese Unie van 27 november 2008 inzake de toepassing van het beginsel van de wederzijdse erkenning op vonnissen en proeftijdbeslissingen met het oog op het toezicht op proeftijdvoorwaarden en alternatieve straffen (PbEU L 337) en van kaderbesluit 2009/299/JBZ van de Raad van de Europese Unie van 26 februari 2009 tot wijziging van kaderbesluit 2002/584/JBZ, kaderbesluit 2005/214/JBZ, kaderbesluit 2006/783/JBZ, kaderbesluit 2008/909/JBZ en kaderbesluit 2008/947/JBZ en tot versterking van de procedurele rechten van personen, tot bevordering van de toepassing van het beginsel van wederzijdse erkenning op beslissingen gegeven ten aanzien van personen die niet verschenen zijn tijdens het proces (PbEU L 81) (Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties).



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and application of criminal sanctions (*Uitvoeringsbesluit wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties*) transpose 2008/947/JHA and 2009/299/JHA. With regard to the jurisdiction to decide on a EAW the Dutch system introduced a specific division of the Court in Amsterdam (*de Overleveringskamer*), which decides on all the cases concerning the European Arrest Warrant. Since May 2014 the Division of the Court of Amsterdam has the exclusive jurisdiction with regard to the EAW and surrender issues.

With regard to the transposition of the European Arrest Warrant in the Dutch legal system, some particularities have been introduced. In the Netherlands there is a particular issue with regard to the option grounds of refusal. In the Netherlands the option of Article 4(6) of the European Arrest Warrant is used to refuse to surrender Dutch nationals. According to Article 6.5 of the Dutch Act (*Overleveringswet*) a Dutch national is only surrendered for the purpose of a criminal investigation, if the sanction that might eventually be imposed, can be executed by the Netherlands. Basically, Dutch nationals may therefore be surrendered only for the purpose of investigation, but not for the purpose to execute a sanction. For non-Dutch nationals this refusal ground may apply only when three additional criteria are met. The Dutch legislature provided that a foreign suspect with a residency permit for indefinite time can be only be refused to be surrendered by the Dutch authorities, if the potential sanction can be executed in the Netherlands and if the sanction will not lead deprive the foreign national of its residence in the Netherlands (Article 6 (5) *Overleveringswet*).

In the light of EU citizenship the question has been raised whether this distinction between Dutch nationals and foreign nationals would be in accordance with the right to equal



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treatment of EU citizens.⁶ In the case of *Wolzenburg* the condition of having a residence permit for an indefinite period of time was discussed and ruled upon by the CJEU. In that case the CJEU held that a five years residency period may be indeed appropriate in order to have a real link with the host Member State. In that case *Wolzenburg*, a German national, residing in the Netherlands was found guilty by two German courts of importing soft drugs in Germany. Subsequently, the German authorities requested the Dutch authorities to surrender *Wolzenburg* to Germany. Since *Wolzenburg* had exercised his right to move to and reside in another Member State, on the basis of Article 21 TFEU, his situation fell within the scope of Union law, triggering the scope of application of Article 18 TFEU, which prohibits discrimination on the ground of nationality. *Wolzenburg* therefore invoked his right to equal treatment as a Union citizen with regard to the refusal ground in the Dutch law. The national court referred the case to the CJEU. The CJEU held that the additional requirement of having a residence permit for an indefinite duration was, in principle, not in conformity with EU law, but such unequal treatment may be justified by the Member State. In that light the CJEU continues that a Member State may require a certain real link with the society, also with regard to the purposes of re-socialisation in that society. In that light the CJEU also refers to the fact that a EU citizen has a right to permanent residence after five years in a host Member State, based on Directive 2004/38 (Article 16). The Court ruled that a Member State may, therefore require that a EU citizen has been residing on its territory for a certain period of time, in order to distinguish between those EU citizens who are sufficiently integrated in the host society and those who are not.⁷

⁶ See the case of *Wolzenburg* and *V. Glerumand K. Rozemond*, *Het Wolzenburg-arrest, de interpretatie van het Kaderbesluit betreffende het Europees aanhoudingsbevel en de gevolgen voor de Nederlandse overleveringspraktijk*, *Delikt en Delinkwent* (2010).

⁷ H. van Eijken en T.P. Marguery, 'The federal imbedding of citizens in the European Union Member States' *Criminal Law – or – How EU citizenship is shaping criminal law*, in D. Kochenov (ed.), *EU Citizenship Rights Shaping EU Federalism*, Cambridge University Press (2015) (forthcoming).



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Moreover, also with regard to the condition that a foreign national should fall under the extraterritorial jurisdiction of the Dutch authorities the question has been raised whether this constitutes discrimination on grounds of nationality, since this condition is not imposed on Dutch nationals. In that light a judgement of the District Court in Amsterdam is telling. In that case the court refused the surrender of a Polish national, who was convicted to two years imprisonment for possession and selling 1 gram amphetamine and 101,87 gram of marihuana in Poland.⁸ The Court held that the Framework Decision EAW is incorrectly transposed by the Dutch legislature, since it creates unequal treatment between Dutch nationals and foreign nationals. For those nationals with another nationality, who have a residence permit for indefinite time, the fact that they do not have the Dutch nationality is the solely decisive factor of surrender. If the person at stake would be a Dutch national, he or she would fall within the extraterritorial jurisdiction of the Netherlands, and would not be surrendered, based on the Dutch ground of refusal. However, a foreign national in the same situation does not fall, based on his or her nationality, within the extraterritorial jurisdiction of the Netherlands and does not benefit from the ground for refusal. The Court of Amsterdam, amongst others, refused therefor the surrender of the Polish national to Poland. In reaction to this decision an Advocate General requested the Supreme Court (*De Hoge Raad*) to review this judgment (*'cassatie in naam der wet'*). In March 2014 the Supreme Court ruled that the difference in treatment may be justified, because a real link with the Netherlands may be required.⁹ Moreover, since according to the Dutch criminal code nationals may be sentenced based on their status as Dutch nationals, when they are convicted for crimes in other states, to which a imprisonment of minimal 8 years is set (Article 5 *Strafrecht*). For non-nationals, who were lawfully residing in the Netherlands there was only territorial jurisdiction in very specific and rare situations. It meant that in practice, non-nationals could almost never fall under the additional protection of their imprisonment being executed in the Netherlands. Since July

⁸ Rechtbank Amsterdam, 25 June 2013, ECLI:NL:RBAMS:2013:3852.

⁹ Hoge Raad, 18 March 2014, ECLI:NL:HR:2014:650.



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2014, however, the criminal code has been amended and extended the scope of jurisdiction with the Act extraterritorial jurisdiction in criminal matters (*Wet herziening extraterritoriale rechtsmacht in strafzaken*). Article 7 (3) of the Dutch Criminal Code is now amended and provides that also foreign nationals, who have their common place of residence in the Netherlands fall under the scope of criminal law for (certain specified) crimes committed abroad. Although the condition for non-nationals to fall under the extraterritorial criminal jurisdiction is still valid, in practice it seems that this requirement would not constitute actual issues anymore, because of the widening of extraterritorial jurisdiction in the Dutch criminal code.

Framework Decision 2008/978/JHA of 18 December 2008 on the *European evidence warrant* for the purpose of obtaining objects, documents and data for use in criminal proceedings is implemented in the Dutch Code of Criminal Procedures (*Strafvordering*) in Articles 552eee, 552yy and 522ww. Article 552eee contains a general recognition of the European Evidence Warrant. Article 552eee defines the objects that can be subject to a European evidence warrant. Article 552yy provides for exceptions to the execution of a European evidence warrant. It contains four grounds for refusal: if the execution of the warrant would support the prosecution of a person in violation of *ne bis in idem*, if the offence would not have been criminal behaviour if the act was committed in the Netherlands (except of the offences mentioned in Article 14 of the Framework decision), if the execution of the evidence warrant would violate certain specific Dutch immunities, if the warrant is not submitted by a judicial authority.



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Framework Decision 2003/577/JHA on the execution in the EU of orders freezing property or evidence is transposed in the Netherlands by an Implementing Decision (*Uitvoeringsbesluit*).¹⁰

Outside the scope of these specific instruments there is and has been a lively debate with regard to the Directive on the right of access to a lawyer in criminal proceedings in the Netherlands. Council Directive 2013/48/EU 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 confers the right to have access to a lawyer from the beginning of a criminal charge.¹¹ The Directive applies “from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they (suspects or accused persons)¹² are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty”.¹³ Some of the highlights are that Member States must respect the confidentiality of communication between a suspect and lawyer, including in meetings, correspondence and telephone conversations;¹⁴ suspects have the right to have someone, of their choosing, informed of their arrest and to communicate personally with at least one person of their

¹⁰ Besluit van 1 juli 2005, houdende regels ter uitvoering van de artikelen 552kk, 552ll en 552ss van het Wetboek van Strafvordering en vaststelling van het tijdstip van inwerkingtreding van de wet van 16 juni 2005 tot implementatie van het kaderbesluit nr. 2003/577/JBZ van de Raad van de Europese Unie van 22 juli 2003 inzake de tenuitvoerlegging in de Europese Unie van beslissingen tot bevrozing van voorwerpen of bewijsstukken (PbEG L 196) (Stb. 310) (*Uitvoeringsbesluit wederzijdse erkenning*).

¹¹ Council Directive 2013/48/EU 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 confers the right to have access to a lawyer from the beginning of a criminal charge, especially at the first police interrogation, OJ L294/1.

¹² Added HvE.

¹³ Article 2 of Council Directive on access to a lawyer.

¹⁴ Article 3 (a) of Council Directive on access to a lawyer.



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choice, such as a relative or employer;¹⁵ and that suspects arrested under a European Arrest Warrant have the right to a lawyer in both the country of the arrest and the country that issued the warrant.¹⁶ The biggest change for the Netherlands would nevertheless be that from now on, Member States must ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned.¹⁷

According to the Dutch Criminal law, a suspect can be held for 6 hours by the police to be heard with regard to criminal behaviour (Article 61 *Strafvordering*). Accordingly, during that period it is not required to grant the suspect the possibility to be represented by a lawyer. During the 6 hours a police interrogation can take place. Since it is not required to be represented by a lawyer during the first 6 hours, this is problematic in the light of Council Directive on the access to a lawyer.

If a suspect is held into police custody, without having a lawyer, then a lawyer is automatically appointed by the state based on the duty lawyer service (*piket-dienst*). Especially for minor offences, it will cost a lot to arrange that each suspect will be represented by a lawyer, as prescribed by this Directive. The Dutch delegation therefore negotiated to have an exemption from the scope of the Directive for what is called “minor offences” (being referred to as the Dutch clause). Preamble 17 somewhat reflects this Dutch clause. This preamble states that “certain minor offences, in particular minor traffic offences/ minor offences in relation to general municipal regulations and minor public order offences, are considered to be criminal offences. In such situations, it would be unreasonable to require that the competent authorities ensure all the rights under this Directive. Where the law of a Member State provides in respect of minor offences that deprivation of liberty cannot be

¹⁵ Article 5 (1) of Council Directive on access to a lawyer.

¹⁶ Article 10 of Council Directive on access to a lawyer.

¹⁷ Article 3 (b) of Council Directive on access to a lawyer.



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imposed as a sanction, this Directive should therefore apply only to the proceedings before a court having jurisdiction in criminal matters.”

The ECtHR ruled in the case of *Salduz*¹⁸ that a suspect has a right of access to a lawyer during police custody should be guaranteed in order to have a fair trial. Based on this ruling, the Netherlands slightly changed its policy by establishing a guideline of the public prosecutor. At this moment, a suspect has only the right to consult his lawyer before entering a police interrogation. This seems to be not in accordance with the *Salduz* judgment. In that judgment the ECtHR ruled that each suspect has the right to be represented by a lawyer from the start of a criminal investigation, unless there are reasons that justify the restriction of the access to a lawyer.¹⁹

The main argument in the Dutch debate against the presence of a lawyer during police interrogation, especially the first interrogation, is that this would hamper the establishment of the truth.²⁰ The rationale behind this argument would be that the suspect would use its right to be silent more often due to the presence of the lawyer.²¹

The draft Act that would implement Council Directive on the access to a lawyer in criminal proceedings is now under discussion.²² There remains many questions with regard to the role of the lawyer during the first hearing in police custody: whether the lawyer may actually advise the suspect how to answer questions or whether the lawyer may only be present is still

¹⁸ ECtHR, 27 November 2008, App. No. 36391/02, *Salduz v. Turkey*.

¹⁹ ECtHR, 27 November 2008, App. No. 36391/02, *Salduz v. Turkey*, paras. 51 – 52.

²⁰ T. Scheltema, *Rammelen Met koffiekopjes is zinloos*, *Advocatenblad* 15, 12 November 2010, pp. 566-567; W.J. Verhoeven and L. Stevens, *Rechtsbijstand bij politieverhoor*, The Hague: Boom Lemma Uitgevers, 2013, p. 29.

²¹ T. Scheltema, *Rammelen Met koffiekopjes is zinloos*, *Advocatenblad* 15, 12 November 2010, pp. 566-567; W.J. Verhoeven and L. Stevens, *Rechtsbijstand bij politieverhoor*, The Hague: Boom Lemma Uitgevers, 2013, p. 247.

²² TK 2015, No. 34157,

<http://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?id=2015Z02976&dossier=34157>.



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unclear. According to the draft Act it seems that the role of the lawyer is limited, in the sense that there is not much discretion to advise or speak with the suspect.²³ This seems not in accordance with Article 3 (2) of the Directive. To recall, this Article dictates that a lawyer can participate effectively during an interrogation. The Directive should be implemented in November 2016.

1.1.2.2.1. Victims' rights

Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings²⁴ is implemented in an Act that amends the Dutch criminal code and Dutch criminal procedural law.²⁵ The Act does, however, not refer to the Framework Decision explicitly. Nevertheless, the Act adjusted Criminal Law, Criminal Procedural Law, and the Act compensation for victims of violent crimes in order to safeguard specific rights of victims.

Framework Decision 2001/220 is replaced by Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.²⁶ An highlight of this Decision is the right of victims to be heard in criminal proceedings, as laid down in preamble 41. This preamble states that “The right of victims to be heard should be considered to have been fulfilled where victims are permitted to make statements or explanations in writing”. Article 10 of the Directive prescribes that it must be “ensured that victims may be heard

²³ See on this issue also Van Boksem, *Recht op toegang tot een advocaat in het strafproces*.

Enkele gedachten naar aanleiding van de implementatie van Richtlijn 2013/48/EU, *Nederlands Tijdschrift Europees recht* (2014).

²⁴ Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, OJ L082.

²⁵ Wet van 17 december 2009 tot wijziging van het Wetboek van Strafvordering, het Wetboek van Strafrecht en de Wet schadefonds geweldsmisdrijven ter versterking van de positie van het slachtoffer in het strafproces.

²⁶ Council Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L315/57.



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during criminal proceedings and may provide evidence”. The Preamble and the Article remain unclear whether Member States should offer victims both the opportunity to make statements or write an explanation. It is clear that the Directive does not limit the right to be heard to only certain crimes.

In the summer of 2014 a draft Act to implement Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime has been adopted. The government requested for advice of *the Raad voor de rechtspraak* (the Dutch Council of Judicial Review, which is the overarching organisation of Dutch courts).²⁷ One of the issues that has been raised is that the definition of victims would be changed, so that the personal scope of criminal laws would be increased. A victim is defined in the Act as anyone who has been disadvantaged caused by a criminal act. Even though in its advice the council pointed out that the workload would be increased by this broader definition, it was positive on the draft Act in general.

In the current Dutch law, victims have the right to be heard only in certain criminal proceedings. According to Article 51e of the Dutch Criminal Code, victims have the right to be heard in criminal proceedings concerning criminal acts on which a imprisonment of 8 years or more can be posed or criminal acts that are listed in the Article.²⁸ The victim’s right to be heard, as laid down in preamble 41 and Article 10 of Directive 2012/29, can cause for a bottleneck in the Dutch implementation. The Directive has to be implemented by 16 November 2015.

Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims is implemented in the Act amending the Act compensation to crime victims (*Wet van 14*

²⁷The Advice can be found at: <http://www.rechtspraak.nl/Organisatie/Raad-Voor-De-Rechtspraak/Wetgevingsadviesing/Wetgevingsadviezen2012/2012-07-Advies-wetsvoorstel-Implementatie-richtlijn-vertolking-en-vertaling-in-straftprocedures-29-02-2012.pdf>.

²⁸ Article 51e of the Dutch Criminal Code mentions: Articles 240b, 247, 248a, 248b, 249, 250, 285, 285b, 300 (2 -3), 301 (2-3), 306, 307 308 and of the Dutch Criminal Code and Article 6 van de Wegenverkeerswet 1994.



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december 2005 tot wijziging van de Wet schadefonds geweldsmisdrijven ter uitvoering van richtlijn nr. 2004/80/EG betreffende de schadeloosstelling van slachtoffers van misdrijven) which entered into force on 1 January 2006.

Directive 2011/99/EU on 13 December 2011 on the European Protection Order is transposed by an Act of 28 January 2015 concerning the implementation of the European Protection Order (*Wet van 28 januari 2015, houdende implementatie van richtlijn 2011/99/EU van het Europees Parlement en de Raad van de Europese Unie van 13 december 2011 betreffende het Europees beschermingsbevel*). The amendments provided for in this act entered into force on 1 March 2015.

1.1.2.2. Rights of suspects and accused persons

Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings was transposed by the Act concerning the implementation of the right to interpretation and translation (*Wet van 28 februari 2013 tot implementatie van richtlijn nr. 2010/64/EU van het Europees Parlement en de Raad van 20 oktober 2010 betreffende het recht op vertolkingenvertaling in strafprocedures*). It entered into force on 1 October 2013.

Directive 2012/13/EU of 22 May 2012 on the Right to Information in Criminal Proceedings is implemented by the Act of 5 November 2014 concerning the implementation of the Directive (*De Wet van 5 november 2014 tot implementatie van de richtlijn nr. 2012/13/EU van het Europees Parlement en de Raad van 22 mei 2012 betreffende het recht op informatie in strafprocedures*). The Act entered into force on 1 January 2015.

1.2. EU legislation related to the protection of personal data



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Directive 95/46 on the protection of individuals with regard to processing of personal data and on the free movement of such data (Data Protection Directive) [1995] OJ L281/3 is implemented in the Netherlands in the Act protection of personal data (*Wet beschermingpersoonsgegevens*), which entered into force at 1 September 2001. In the Act protection of personal data the Data Protection Authority (*College Bescherming Persoonsgegevens*) is established and its mandate is laid down. Its mandate is to provide advice to the government and parliament and investigate data protection problems (either requested or on own motion) and provide for information. In its enforcement task the Authority investigates possible infringements of data protection. If a breach of the data protection Act is established, the Authority may order a '*last onder bestuursdwang*', which is an order to remediate non-compliance (Article 65 of the Act Protection Personal Data). The Authority can, moreover, impose a fine of maximum EUR 4 500 if the personal data processing is not notified. The fines increase, and may be added with imprisonment, when the non-notification is intentional (article 75 Act Protection Personal Data). The data protection authority provides for guidelines, as to support data protection in practice. The Authority wants to bridge the gap between legal obligations, and knowledge of more technical aspects of data protection by providing these guidelines. So far 6 guidelines have been published. As example, a guideline on how to protect personal data and a guideline for elementary schools to deal with data protection in their obligation to report on the children, who start in the subsequent year on secondary school are published by the Dutch Personal Data Authority. In the year 2014 the Authority investigated in 85 cases, it provided for 33 opinions on national legislation and it dealt with 7.468 questions or hints. In April 2015 the Dutch Council of State referred questions to the CJEU with regard to the discretion of the Data Protection Authority to prioritize its' investigations. According to Article 28(4) of the Privacy Directive every individual should have the possibility to submit a complaint at the Data Protection Authority. In the Netherlands this possibility is also provided for in the Act transposing the Directive. However, in the policy rules of the Dutch Data Protection Authority it is submitted



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that only complaints concerning structural infringements, concerning a large group of individuals, which fall within the particular focus of the Data Protection Authority will be investigated and enforced.²⁹ The particular case at stake concerned a man, who used to work and live in the USA, but moved to the Netherlands after he became disabled. Being unable to work he was granted social benefits by an insurance company in the USA, to which he had paid contribution. After his migration to the Netherlands the man was investigated by a detective agency, which was hired by the insurance company. Subsequently, based on the information gathered, the insurance company stopped its payments. However since it concerned not a systematic breach of the data protection Directive, and did not concern a large group of individuals, the Dutch Data Protection Authority refused to investigate the case. Eventually the case came before the Council of State in appeal. Despite the fact that Article 28(4) of the Directive is, in a formal sense, implemented correctly, the question rises whether there is an effective protection of data protection due to the policy rules of the Dutch Data Protection Authority. In that context the Council of State referred two questions to the CJEU.³⁰

In order to implement Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector the Act on telecommunication has been modified by an Act of May 2012 (*Wet van 10 mei 2012 tot wijziging van de Telecommunicatiewet ter implementatie van de herziene telecommunicatierichtlijnen*).

In the Netherlands Directive 2006/24 (Data Retention Directive) is implemented in the Act data retention (*Wet bewaarplicht telecommunicatiegegevens*).

The obligation for providers to collect and retain data is rather broad in the Netherlands and it is laid down in Article 13.2a of the Act Telecommunication. According to that Act telecom

²⁹ See for the policy rules: <https://cbpweb.nl/nl/over-het-cbp/bestuur-en-beleid/beleidsregels>.

³⁰ Council of State, 15 April 2015, ECLI:NL:RVS:2015:1185. The pending case at the CJEU: C-192/15, Rease en Wullems.



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providers are obliged to collect and storage different aspects of the communication, such as the duration of the communication, the time and destination, including the details of attempted calls (Article 13.2.a (4) of the Act Telecommunication). Moreover, the obligation to collect and store data applies to telecommunication as well as internet. According to the Dutch Act implementing the Data Retention Directive there is an obligation to storage data with regard to telecommunication for a period of 12 months. For internet data the period of storage is six months (Article 13.2a (3)). On the ground of Article 13.5. the providers are, moreover, obliged to ensure that the data they storage is protected against destruction, accidental loss or alteration, or unauthorised or unlawful storage, processing, access or disclosure. This obligation is very similar to Article 7 (b) of the Data Retention Directive. The privacy of the individuals of whom data is restored should be ensured, according to the Act. After the period of obliged storage expires the providers have the obligation to destroy the data.

Even though the CJEU held in the case *Digital Rights Ireland*³¹ that the Directive was invalid, because of a lack of guarantee of civil rights, the Netherlands still upheld the obligation of data retention. More recently the preliminary injunction court in The Hague held that telecommunication operators have no obligation to collect and retain data, based on the judgement of the CJEU in *Digital Rights Ireland*. This is discussed below in more detail in the second part of this report in the context of the right to privacy and data protection.

2. Enforcement of selected civil rights

As observed in the previous report, Deliverable 7.1, in the Dutch legal order there are two specific constitutional rules, which have as a result that the Dutch legal order is very open to

³¹ C-293/12, *Digital Rights Ireland*, ECLI:EU:C:2014:238.



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international and European standards of civil rights. First of all, there is a prohibition of constitutional review of Acts of Parliament, in the sense that Dutch judges are not allowed to review the constitutionality, the conformation with the Dutch constitution.³² Second, according to the Dutch constitution provisions of international law with a general binding character are directly applicable in the Dutch legal order. The combination of these two constitutional provisions result in much room for European and international civil rights, which are largely applied by Dutch courts. In the past there has been a huge role for the ECHR in Dutch case law, which was criticized by some scholars. Certain scholars have raised concerns that the influence of the ECHR would be too large.³³ In general terms the debate on civil rights in the Netherlands has been centred around the influence of the ECHR in the Dutch legal system. Nowadays the EU Charter is becoming more and more visible in Dutch case law, although the ECHR is still very important for civil rights in the Netherlands. Within this broader context of enforcement and sources of civil rights I will hereafter discuss more specific selected issues. First of all, in the context of political freedom questions of civil rights have been raised. I will discuss these issues under section 2.1. Under Section 2.2. I will discuss the right to privacy and its enforcement in the Dutch legal system.

2.1. Source of protection

³² The prohibition of constitutional judicial review is now under discussion. A proposal for legislation that should allow judges to actually constitutionality of Acts of Parliament is submitted by Taverne (Voorstel van rijkswet van het lid Taverne houdende verklaring dat er grond bestaat een voorstel in overweging te nemen tot verandering in de Grondwet, strekkende tot aanpassing van de procedure voor vaststelling van rechtstreekse werking van een ieder verbindende bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties, met memorie van toelichting.). It has been discussed by the House of Representatives of the Dutch parliament in Spring 2015. For more information:

<http://www.tweedekamer.nl/vergaderingen/commissievergaderingen/details?id=2014A00168>.

³³ For instance: T. Zwart, 'Bied dat mensenrechtenhof weerwerk', NRC Handelsblad, 17 January 2011 and T. Zwart, 'Politici kunnen problemen van het Hof oplossen', NRC Handelsblad, 31 January 2012.



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2.1.1. Selected rights in the Dutch legal order: the right to freedom of political parties, Freedom of association and Freedom of Speech and equality rights

In the past years in the very specific context of political freedom civil rights issues have been raised in the Netherlands. Hereafter I will discuss the important cases and procedures in that respect.

2.1.2. Interpretation and application

In the Netherlands the right to freedom of political parties is an important principle of the democratic society. However there are certain limits to this freedom, which seem to be reached in certain specific situations. In that context there have been several controversial cases before the Dutch courts in the previous years. The case of Geert Wilders is one example, in which the freedom of speech had to be balanced with the freedom of religion. Moreover, the procedures against the SGP, a political party, is interesting. Furthermore, outside the context of political freedoms, there has been a procedure on the prohibition of an association of paedophiles in the Netherlands. These case all have in common that the freedom of political parties or the freedom of association needs had to be balanced with other civil rights, *e.g.* the right not to be discriminated against on grounds of gender or the freedom of speech and religion. Hereafter the three mentioned cases are discussed, since these cases are exemplary for the debates in Dutch courts, but also in the Dutch media and the public opinion. As addressed in the Dutch report in Deliverable 7.1. civil rights have no formal hierarchy and need to be balanced by the courts. These cases have been selected since they provide a good overview of the debate in the Netherlands with regard to civil rights, recently.

I. The case of SGP



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In the sphere of political freedoms and civil rights the case of the Dutch political party SGP is noteworthy. According to internal rules of the SGP, a confessional political party firmly rooted in historical Dutch Reformed Protestantism, women could not stand as a candidate in the elections. According to the Party's principles "The notion of [the existence of] a right to vote for women which results from a revolutionary striving for emancipation is incompatible with woman's calling. The latter equally holds true for the participation of women in both representative and administrative political organs." (Article 10 of the Party Principles). Since 1997, the statutes of the party provide that only men are able to stand as a candidate in elections and may become member of the party.

Several parties submitted a complaint and started proceedings before the Dutch court against the Netherlands (Clara Wichmann test case foundation, the Netherlands section of the International Commission of Jurists (*Nederlands Juristen Comitévoor de Mensenrechten*), the Humanist Committee on Human Rights (*Stichting Humanistisch Overleg Mensenrechten*), the Netherlands Association for Women's Interests, Women's Labour and Equal Citizenship (*Nederlandse Vereniging voor Vrouwenbelangen, Vrouwen arbeid en Gelijk Staatsburgerschap*), the Women's Network Association (*Vereniging Vrouwennetwerk Nederland*) and other private associations and foundations). They complained that the Dutch government by granting subsidies to the political party infringed its' obligation to protect women's rights based on, in particular, Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The subsidy granted to the SGP is based on the Political Parties Subsidies Act (*Wet subsidiëring politieke partijen*). In 2005 the *Rechtbank Den Haag* (the District Court The Hague) decided that the State should refrain from granting subsidy to SGP.³⁴ The case was brought before the District court by the different NGO's and other institutions in the field of equal treatment based on class action (*collectieve actie*). In its' judgement the District Court refers to Article 7 of the CEDAW,

³⁴ Rechtbank Den Haag, 7 September 2005, ECLI:NL:RBSGR:2005:AU2088.



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which obliges the States that are party to the Convention to ensure that women have the right in equal terms to be, amongst others, eligible for election to all publicly elected bodies. One of the questions was whether Article 7 of CEDAW has vertical direct effect, in the sense that the organisations, such as the Clara Wigmann test case foundation would be able to invoke Article 7 CEDAW against the Dutch state. Article 93 of the Dutch constitution provides that provisions of international Treaties and regulations of international organisations that according to their content may be binding on all persons are directly applicable after their publication in the Dutch Official Journal of the State (*Staatscourant*). Although the Dutch government argued in front of the District Court that Article 7 CEDAW does not have general binding, but provides solely an obligation to the State, the District Court held that Article 7 CEDAW can be relied upon and has vertical direct effect. The District Court after assessing the obligation of the state following Article 7 CEDAW that the Netherlands infringed the right to equal treatment in political participation rights. The court ordered therefor the Netherlands not to take account requests for subsidy of the SGP as long as the party does exclude women to have the right to stand as a candidate in elections. Consequently, the Dutch government decided not to grant any subsidy to SGP anymore. The SGP appealed to that decision and the case came before the Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*).³⁵ That court held that the State should be very cautious taking measures that would restrain the freedoms of political parties, because such freedom is essential for the sound functioning of a pluralistic democratic polity. However, also an appeal procedure at the Court of Appeal and subsequently a procedure at the Supreme Court (*De Hoge Raad*) followed. Whereas the *Raad van State* (The Council of State) ruled that the subsidising of the State was allowed, because limitation of political freedom should be restrictive, the *Hoge Raad* (Supreme Court) held that the State violated Article 7 of CEDAW by granting subsidy.

³⁵ The Council of State is divided in two divisions, as noted in deliverable 7.1. One of the divisions is the judicial division of the Council of State, the second is an advisory body.



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In July 2012 this case led to a judgment by the European Court of Human Rights (ECtHR).³⁶ The SGP in its complaint before the ECtHR argued that its individual members were violated in their right to freedom of religion, their right to freedom of expression and their right to freedom of assembly and association. The ECtHR ruled that the principles of the SGP indeed violated the principle of equal treatment. It held that “The Supreme Court, in paragraphs 4.5.1 to 4.5.5 of its judgment, concluded from Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women and from Articles 2 and 25 of the International Covenant on Civil and Political Rights taken together that the SGP’s position is unacceptable regardless of the deeply-held religious conviction on which it is based (...). For its part, and having regard to the Preamble to the Convention and the case-law (...), the Court takes the view that in terms of the Convention the same conclusion flows naturally from Article 3 of Protocol No. 1 taken together with Article 14.”³⁷ The ECtHR also held that it cannot decide which actions should be taken by the Dutch government to prevent these discriminatory principle of the SGP. The SGP included after that judgment the possibility that women would be able to stand as a candidate in its regulations. The principle that women are not suitable to full fill public tasks remains in the principles of the party.

II. The case against Geert Wilders

In 2010 and 2011 Geert Wilders, the leader of the extreme right political party *Partij van de Vrijheid* (the Freedom Party), on the ground of hate speech, was subject to judicial procedures on the ground of insulting religious and ethnical groups. As the leader of this political party Geert Wilders made several statements against the Islam in interviews, in an online article, in columns and in the film ‘Fitna’. Wilders stated for instance: “I am fed up with Islam. No Islam-migrations should entered the Netherlands”, “We should prohibit the Islam”, “One in

³⁶Staatkundig Gereformeerde Partij against the Netherlands, Application no. 58369/10.

³⁷Staatkundig Gereformeerde Partij against the Netherlands, Application no. 58369/10, par. 77.



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five Moroccan boys is registered with the police as a suspect. Their behaviour results from their religion and culture. You cannot separate the one from the other”, “The Islam is a fascistic religion”, “The Koran is the Mein Kampf of a religion that intends to eliminate others”.³⁸ Mr Wilders was also prosecuted on the basis of the inflammatory movie on Islam, *Fitna*, posted on the Internet on 27 March 2008. The question in different national procedures was whether Geert Wilders would be subject to criminal proceedings.

In the Dutch criminal law system the principle of opportunity is one of the basic principles. According to this principle the public prosecutor may decide whether it is opportune to start criminal charges. Initially, the public prosecutor decided not to prosecute Geert Wilders. In the Netherlands it has been made possible to start an individual complaint procedure based on Article 12 of the Dutch Criminal Procedure. According to this procedure, individuals who have an interests in the prosecution of a person, can complain to the Court of Appeal in Amsterdam (*Gerechtshof Amsterdam*). This Court will then assess if there are legitimate reasons to prosecute. Several citizens and lawyers complained and asked the Court of Appeal to order the prosecution of Geert Wilders on the ground of, *inter alia*, Article 137c of the Dutch Criminal Law on racial group insult. The Court of Appeal in Amsterdam declared the complaint admissible.

The Court assessed the complaint from three aspects: whether the statements made by Geert Wilders fall within the scope of Dutch criminal law, whether the ECHR allows prosecution of politicians for having hate speech, and, lastly, whether prosecution is desirable. In its judgment the court weighed the interest of freedom of speech of Geert Wilders with the several civil rights, such as non-discrimination, protection against hate speech and group insulting. On the one hand the freedom of speech and the freedom of political parties was at

³⁸ Free translated HvE; See also: European Commission against Racism and Intolerance, ECRI report on the Netherlands, fourth monitoring cycle, June 2013



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stake while on the other hand the right not to be discriminated against based on religion and ethnical background was at issue.

It is interesting to note that concerning the first aspect, the Court disagreed with the arguments of the public prosecutor. The public prosecutor argued that the statements made by Geert Wilders do not fall under the scope of criminal law because they contribute to the social debate and the statements criticize the religion and not the followers of the religion. The Court disagrees. The Court established that the statements are characterized as biased and prejudiced with a radical tenor that did not fade but became more fierce. Therefore the statements made by Geert Wilders contribute to hate speech, which not only affects the religion 'Islam', but also Muslims.³⁹

That court ruled that the public prosecutor should take up criminal proceedings against Geert Wilders.⁴⁰ Even though the public prosecutor did not want to take judicial action against Mr. Wilders, based on the judgment of the court in Amsterdam, they started proceedings.⁴¹

The case was brought in substance to the District court of Amsterdam (*Rechtbank Amsterdam*). The charges against Wilders were group insulting hatred and discrimination against Muslims because of their religion and inciting hatred and discrimination against non-western immigrants and Moroccans because of their race. The four charges were based on Article 137c (group insult) and Article 137d (hate speech) of the Dutch Criminal Code. During the process, Wilders requested to substitute the judges, because he held that one of the judges was not impartial, because one of the judges had a dinner with one of the witnesses. That request was awarded and subsequently the procedure was subject to a retrial. Geert Wilders was, finally, acquitted by the court of Amsterdam of all of the charges

³⁹ Gerechtshof Amsterdam, ECLI:NL:GHAMS:2009:BH0496, para. 12.1.4.

⁴⁰ Gerechtshof Amsterdam, ECLI:NL:GHAMS:2009:BH0496, para. 14.

⁴¹ Gerechtshof Amsterdam, 21 January 2009, ECLI:NL:GHAMS:2009:BH0496.



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(discrimination and hate speech).⁴² The court ruled that Geert Wilders' statements and his film 'Fitna' criticized the Islam seriously, but could not be seen as hate speech or another criminal offence. According to the court the statements of Wilders should be seen in their context, that is statements of a politician within the context of a public debate. Moreover, the public prosecutor, forced to file criminal charges, requested the court to acquit Geert Wilders. As observed, Wilders was finally acquitted on all accounts.

After this proceedings, in March 2014, Geert Wilders at a party meeting called upon the audience to speak out whether they wanted more or less Moroccans in the city. The audience scanned "Less, less, less". Wilders replying "we will arrange that". This led to a new discussion whether Geert Wilder had exceeded the boundaries of freedom of speech and could be subject to criminal prosecution. Thousands of complaints (more than 6000) were submitted by individuals regarding this public statements and call for the audience to scan in the context of hate speech.⁴³ In October 2014 the public prosecutor announced that it will start proceedings against Wilders with regard to this particular incident.⁴⁴ The procedure is at the time of writing pending.

It is interesting to note how the cases of Wilders relate to judgments of the European Court of Human Rights (ECtHR). First case to mention is the landmark ruling concerning *Féret v. Belgium*. This ruling concerned statements made by Mr Daniel Féret, the chairman of the political party "Front National-Nationaal Front" (the "Front National") and editor in chief of

⁴² Rechtbank, 23 June 2011, ECLI:NL:RBAMS:2011:BQ9001 See also international press: <http://www.theguardian.com/world/2011/jun/23/geert-wilders-cleared-anti-islam>, <http://www.theguardian.com/commentisfree/2011/jun/23/geert-wilders-acquitted-incitement-hatred>, <http://news.nationalpost.com/full-comment/geert-wilders-hails-acquittal-as-a-victory-for-free-speech> and <https://www.rnw.org/archive/wilders-acquittal-makes-world-headlines> for instance.

⁴³ E. de Lange, Wilders, waardigheid en de grenzen van het politiek debat, Nederlands Juristenblad (2014).

⁴⁴ See: <https://www.om.nl/algemeen/english/engelstalige/to-prosecute-geert/>.



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the party's publications and owner of its website.⁴⁵ Between July 1999 and October 2001 leaflets and posters of his party were distributed and those led to complaints by individuals and associations for incitation of hatred, discrimination and violence. The ECtHR pointed out that tolerance and respect for the equal dignity of all human beings is the foundation of a democratic and pluralistic society. The Court further stated that it is of the highest importance to fight against racial discrimination in all its forms and manifestations. The ECtHR concluded that sanctioning and preventing all forms of expression which spread, encourage, promote or justify hatred based on intolerance (including religious intolerance) can be initially considered to be necessary in democratic societies, if the "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued.⁴⁶

The ECtHR held that limiting a politician's freedom of expression by a criminal conviction can be legitimate in order to pursue the protection of the reputation or the rights of others. This ruling is cited in subsequent case law, like *Le Pen v. France*.⁴⁷

The judgment of *Le Pen v. France* concerned the statements made by Mr Jean-Marie Le Pen. Mr Le Pen was fined 10.000 euros for statements he had made about Muslims in France in an interview with a well-known paper 'Le Monde'.⁴⁸ Those statements were characterised by the court as "incitement to discrimination, hatred and violence towards a group of people because of their origin or their membership or non-membership of a specific ethnic group, nation, race or religion".

⁴⁵ ECtHR, *Féret v. Belgium*, no.16515/07, 16 July 2009, § 63.

⁴⁶ ECtHR, *Féret v. Belgium*, no. 16515/07, 16 July 2009, § 64 and 72-74.

⁴⁷ ECtHR, *Le Pen v. France* [Decision on the admissibility], no.18788/09, 20.04.2010.

⁴⁸ ECtHR, *Le Pen v. France* [Decision on the admissibility], no.18788/09, 20.04.2010, principle facts.



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The Paris Court of Appeal sentenced him to another fine, after Mr Jean-Marie Le Pen commented on the initial fine in another interview: “When I tell people that when we have 25 million Muslims in France we French will have to watch our step, they often reply: ‘But Mr Le Pen, that is already the case now!’ – and they are right.” The Court of Appeal considered that Mr Le Pen’s statements aimed at convincing the French people to reject the Muslim community. The Court held that the applicant’s freedom of expression was no justification for statements that were an incitement to discrimination, hatred or violence towards a group of people.

Mr Le Pen lodged an appeal at the Court of Cassation, but the Court dismissed his appeal. As a result, Mr Le Pen started procedures with the ECtHR. In sum, the ECtHR stated that the interference by a criminal conviction was necessary, as the applicant’s comments had negatively presented the “Muslim community” as a whole. The statements were likely to give rise to feelings of rejection and hostility. The ECtHR furthermore held that the applicant had opposed the French to a community whose religion was explicitly mentioned and criticized and whose rapid growth was presented as a threat to the dignity and security of the French people.⁴⁹

There is an important difference between the first case against Wilders and this second process. In the first process the court of Amsterdam held that the statements of Wilders insulted a religion as a whole but did not affect Muslims. This is contrary to the finding of the Court of Appeal in Amsterdam. This Court held that the statements of Mr Wilders did not only affect the religion ‘Islam’, but also Muslims. The court of Amsterdam eventually supported the arguments of the public prosecutor and implicitly rejected the findings of the Court of Appeal. In this second proceedings the charges are discrimination and hate speech on the ground of race (even though Moroccans is a group based on nationality, not a specific

⁴⁹ ECtHR, *Le Pen v. France* [Decision on the admissibility], no.18788/09, 20.04.2010, decision of the Court.



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race, the court might interpret the insult and hate speech under a broad interpretation of race discrimination).⁵⁰ The public prosecutor stated that the freedom of speech is ultimately limited by Article 37d of the Dutch Criminal Code. As observed, this case is still pending at the moment of writing, so it is unclear what the verdict will be.

Another case worth mentioning in the context of the freedom of expression against the right not to be discriminated and hate speech is the case of the politician Delano Felter, who was head of the ‘Republikeinse Moderne Partij’ (Republican Modern Party) at the Amsterdam municipal elections.⁵¹ On 24 February 2010 he made statements against homosexuals at the regional television (AT5) like “homosexuals are abnormal, they should be challenged by heterosexuals” and “It is normal to express that you hate homosexuals”, “They should be gone”.⁵² Even though the Court of Appeal (*Gerechtshof Amsterdam*) held that his statements were made within the context of a public debate of political parties.⁵³ It refers to the case law of the ECtHR⁵⁴ and decided eventually that the statements were meant to 'offend, shock or disturb', but did not constitute hate speech. The Court of Appeal decided in its judgment that even though these statements may offend (a group) of people, that Mr. Felter has the freedom of speech on ground of Article 10 ECHR, which would under the particular situation not be limited by the prohibition of hate speech. The Supreme Court held in December 2014, however, that the right to freedom of speech, specifically of a politician in a public debate should not light be impeded, but that a political also has a responsibility to ensure that statements do not incite hate, discrimination or intolerance. It therefor decided to destroy the

⁵⁰ Zie on this difference: De Trouw, 'Dit is een heel andere zaak-Wilders', 10 October 2014.

⁵¹ Hoge Raad, 16 December 2014, ECLI:NL:HR:2014:3583.

⁵² Free translation HvE.

⁵³ Gerechtshof Amsterdam, 11 March 2013, ECLI:NL:GHAMS:2013:BZ3787.

⁵⁴ For instance to the case EHRM 23 April 1992, NJ 1994/102, par. 42 in which the ECtHR held that “While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition Member of Parliament, like the applicant, call for the closest scrutiny on the part of the Court.”



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judgement of the Court of Appeal and refer the case back to the Appeal Court to be decided again, taking into account these considerations. It is significant that the Supreme Court seems to extend the scope of Article 137 of Criminal Code, in the sense that also incitement to intolerance may fall under its scope. That would mean that the freedom of expression of politicians may in these situations also be limited in order to protect the civil rights of groups of citizens. Both courts (the Court of Appeal and the Supreme Court) refer to the case law of the ECtHR, but eventually come to different conclusions of how this case law should be interpreted in this particular case and what the limits of freedom of speech in public debates are.

III. Vereniging Martijn (association of paedophiles)

Even though this case does not concern political freedoms in the sphere of political parties, it does concern the right to association and to submit statements in the public as association. In the broader context of the balancing of rights this case is also of particular interest. ‘Vereniging Martijn’, an association of paedophiles was prohibited by the Dutch court, since it would infringe the civil rights of other citizens in the Netherlands. These cases on the one hand concern political freedoms of citizens and on the other hand infringements of that exercise of political rights of civil rights of others (the freedom of religion, equal treatment of man and women). The Dutch public prosecutor requested the Court in Assen to prohibit the association based on Article 2:20 of the Civil Code, on the ground of public order. In its judgement the court refers to Article 8 of the Dutch Constitution (the freedom of association) and Article 11 ECHR (right to freedom of assembly and association) both as foundational principles (*‘grondbeginselen’*) of the Dutch constitutional legal order. In balancing these rights with the public order the court holds a limited interpretation of the exception on grounds of public order. The court ruled that balancing the freedom of association and freedom of speech with the public order that the association Martijn would be prohibited and



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being dissolved. It was decisive that the board members of the association expressed publicly, on their website and in media, that sexual interactions with children are, in principal, not harmful and should be possible.⁵⁵ The regional court (*Gerechtshof*) Leeuwarden, however, in the appeal case ruled that the activities of association Martijn may be very disturbing and grave, but cannot be qualified as distorting the fundamental values of the Dutch society.⁵⁶ Against this judgement the public prosecutor appealed to the Dutch Supreme Court (*de Hoge Raad*). On 18 April 2014 the Supreme Court ruled that the association ‘Martijn’ may be prohibited.⁵⁷

2.2. Selected civil right in the Dutch legal order: The right to privacy and data retention

2.2.1. Scope and limits of the right

The right to privacy and data protection is provided for in the Dutch constitution, in Article 10 of the Dutch Constitution. According to the first paragraph “Everyone shall have the right to respect for his privacy, without prejudice to restrictions laid down by or pursuant to Act of Parliament.” Limitations to the right to privacy are therefore only allowed if provided for or pursuant by an Act of Parliament.

The right to privacy has been provided for in the Dutch constitution ever since 1983. With regard to the scope of the right to privacy the Dutch legislature has not provided much guidance. However, it is clear that the scope entails also elements of the right to family life, but also communication, confidential conversations and certain customs and way of lives. The right to family life is not protected as such in the Dutch constitution. Dutch courts apply

⁵⁵ Rechtbank Assen, 27 June 2012, ECLI:NL:RBASS:2012:BW9477.

⁵⁶ Gerechtshof Leeuwarden, 2 April 2013, ECLI:NL:GHARL:2013:BZ6041.

⁵⁷ Hoge Raad, 18 April 2014, ECLI:NL:HR:2014:948.



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therefore Article 8 ECHR directly. Parts that are not covered with Article 8 ECHR, may fall under the right to privacy of Article 10 of the Dutch Constitution. The right to privacy has been codified in several more specific Acts. The main Act is the Act Personal Data Protection (*Wet Bescherming Persoonsgegevens*). The Act applies to all (either automatically or manual) collection of personal data. The data should be collected and retained carefully and the data retention may not exceed a reasonable period of time. Other important acts with regard to privacy rights are the Act police data (*Wet politiegegevens*) and the Act judicial and criminal procedural data (*Wet justitiële en strafvordelijke gegevens*).

2.2.3. Interpretation and application

As observed above, Directive 2006/24 (Data Retention Directive) is implemented in the Act data retention (*Wet bewaarplicht telecommunicatiegegevens*) and the Dutch law on telecommunication (*Telecommunicatiewet*). This Act provides for the obligation for providers of telecommunication networks to retain data for 6 or 12 months, as discussed above. The Dutch Act is very similar to the Data Retention Directive and therefore questions arose on its validity after the judgment of the CJEU in *Digital Rights Ireland*.

According to a research to the actual practice of the Dutch Act that implemented the Directive on Data Retention shows that the information that is collected plays a very important role in criminal investigations. According to interviews with professionals and experts in the field of crime investigation the historic data is very relevant for their work.⁵⁸ Most of the data is highly important in criminal investigations according to the same research. The data is also referred to in different cases before national courts, for the purpose of establishing a connection between a suspects, but also to establish that someone has been on a certain location.

⁵⁸ G. Odinet et al, *The Dutch implementation of the Data Retention Directive*, Eleven International Publishing (2014).



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Moreover in child pornography cases data is used in order to establish a link with the suspect.⁵⁹ Therefore the use of this data seems to be very important and relevant for crime investigations and sometimes provides the decisive evidence.

The CJEU decided in April 2014 that the Data Retention Directive was invalid, because it was not in conformity with the civil right to privacy and data protection as protected by the EU Charter (Article 7 and 8 of the EU Charter). According to the CJEU the Data Retention Directive violates the right to private and family life and data protection, which might, however, be justified by reasons of public security, such as the fight against serious crime and terrorism. The CJEU, moreover, acknowledges the added value of data retention for the purposes of public security. Nevertheless the CJEU ruled that the Data Retention Directive does not comply with the principle of proportionality. In the first place the CJEU ruled that the Directive does not comply with the principle of proportionality, since the scope of the data retention covers in a generalised manner, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime.”⁶⁰ The Directive does not require a relation between the data that is retained and the particular information that is needed in the light of public security. Moreover, the Directive lacks objective criteria for access to the data by the national authorities. Furthermore the CJEU held that the Directive lacks to differentiate the periods of data retention for the different categories of data. Finally the CJEU ruled therefore that the Directive lacks “clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter.”⁶¹

⁵⁹ G. Odinet et al, *The Dutch implementation of the Data Retention Directive*, Eleven International Publishing (2014), pp. 20-21.

⁶⁰ *Digital Rights Ireland*, par. 57.

⁶¹ Par. 65.



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Subsequently, after the judgment of the CJEU, in the Netherlands the question rose whether the Dutch Act that implemented the Directive was still valid.⁶² In that light the Minister of Security and Justice (*Minister van Veiligheid en Justitie*) asked the Advisory Division of the Council of State (*Raad van State*), which advises the government and Parliament on legislation and governance, for advice with regard to the validity of the Dutch Act that implemented the Data Retention Directive. The Minister asked whether the national law on data retention, including parts that are not direct implementation of the Data Retention Directive, were still valid after the judgment of the CJEU. The Council of the State refers to Article 51 of the EU Charter and emphasizes that the Dutch Act on data retention is subject to the EU Charter, since it falls within the scope of EU law, either because it falls under the free movement of services or because the legislation falls under the scope of the e-Privacy Directive. It stresses that national legislation has to comply with the EU Charter, if it falls within the scope of EU law. The Advisory Division of the Council of State reasons that the scope of EU law is broadly interpreted by the CJEU, which means that also the free movement of services or the e-Privacy Directive may constitute a sufficient link with EU law. Since the Dutch Act on Data Retention is heavily based on the Directive, it would seem likely that the Dutch Act would be incompatible with Article 7 and 8 of the EU Charter. The Council of State, moreover, points out in its advice that also other, not specific, legislation with regard to collection and storage of data may in fact be incompatible with Article 7 and 8 of the EU Charter. It also stressed that even if the EU Charter is not applicable, the Dutch legislation has to comply with the ECHR. In that perspective, the Council of State is of the opinion that national legislation that concerns data retention in criminal matters might also be in violation of the ECHR. In that sense the Council of State answers the question of the Minister of Security and Justice that the Data Retention Act is probably not compatible with

⁶² See on this matter T.A.J.A. Vandamme, *Dataretentie als fata morgana: Over nationale beleidsruimte en een richtlijn die er niet was*, Tijdschrift voor Constitutioneel Recht (2014), pp. 284-302.



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the EU Charter or with the ECHR.⁶³ Subsequently the Minister of Security and Justice informed the House of Representatives (*De Tweede Kamer*) that it took the position that the Dutch legislation that obliges providers to collect and retain data is still valid, after the judgement of the CJEU. The Minister held, in that light, that the Dutch law was adopted according to national procedures and therefore the fact that the Directive is invalid would not invalidate the national law that implements the Data Retention Directive.⁶⁴ The Minister however also announced that the telecommunication Act would be amended, in order to create more safeguards for the right to privacy for citizens.

On 11 March 2015 the court in The Hague decided in a preliminary injunction (*kort geding*). In that case the judge declared the Dutch law that obliged providers of data to collect and restore data of mobile phones and internet users in the Netherlands should not be applicable (“buiten werking verklaard”).⁶⁵ Based on Article 94 of the Dutch Constitution Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.” In that sense a Dutch can set aside Dutch statutory regulations when in violation with EU law or international civil rights norms. The status of this declaration of the Dutch Court is that the legislation is that the legislation is declared not to be binding anymore, formally between the specific parties of the conflict. However, in literature and case law erga omnes effects are sometimes accepted.⁶⁶ According to the Supreme Court in 1983 such declaration of not being binding is an order to the government not to apply the (part of)

⁶³ Advice Raad van State, 17 juli 2014, No.W03.14.0161/II/Vo.

⁶⁴ Reactie van het kabinet naar aanleiding van de ongeldigverklaring van de richtlijn dataretentie., TK 33 542, No. 16.

⁶⁵ Rechtbank Den Haag, 11 March 2015, ECLI:NL:RBDHA:2015:2498, accessibel at: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:2498>.

⁶⁶ See on this in more detail J. Uzman, *Constitutionele remedies bij schending van grondrechten – Over effectieve rechtsbescherming, rechterlijk absteren en de dialoog tussen rechter en wetgever*, Kluwer 2013.



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legislation at stake to citizens, also citizens that are not a party of the specific dispute.⁶⁷ According to the Supreme Court such declaration means that there is a general prohibition to the State to apply or act on the basis of the legislation at stake ('een in algemene termen vervat verbod (...), daartoe strekkende dat de Staat zich (...) heeft te onthouden van gedragingen die op de werking van die beschikkingen zijn gegrond, met name het uitvoeren of doen uitvoeren daarvan, bijv. door daden van opsporing en strafvervolging).⁶⁸ As a result of the judgment of the preliminary injunction judge the data retention obligation may not be The Minister of Security and Justice announced that the Dutch government would not appeal against the ruling of the court in The Hague.⁶⁹

Another development worth mentioning are three cases in which the Council of State referred questions to the CJEU. These questions rose in the cases Willems, Kooistra, Roestand Van Luijk.⁷⁰ In these cases the applicants have been refused a passport since they refused to provide digital fingerprints. The applicants argued before that such obligation to provide for digital fingerprints is in violation of their physical integrity and their right to privacy. They argue in that regard that especially the storage of these data is retained in decentralised databases, which eventually may even be combined in a central register. Moreover there are no specific persons appointed, who have access to the data, so it is unclear to the applicants who has that access. The Council of State asked the CJEU two preliminary questions on the compatibility with the EU Charter of the obligation to provide these biometric information.⁷¹ Unfortunately the CJEU does not answer this question, since it ruled that the EU Regulation on standards for security features and biometrics in passports and travel documents “does not require a Member State to guarantee in its legislation that biometric data will not be used or

⁶⁷ HR 1 juli 1983, NJ 1984/360 (Staat/LSV).

⁶⁸ HR 1 juli 1983, NJ 1984/360 (Staat/LSV), par.. 3.4.

⁶⁹ TK 33 542 Nr. 18. Accessible:

https://www.eerstekamer.nl/behandeling/20150410/brief_regering_geen_hoger_beroep.

⁷⁰ C-446/12, C-447/12, C-448/12, Willems, Kooistra, Roest and Van Luijk, ECLI:EU:C:2015:238.

⁷¹ Raad van State, 28 September 2012, ECLI:NL:RVS:2012:BX8646.



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stored by that State for purposes other than those mentioned in Article 4(3) of that regulation⁷² and therefore it rules that the EU Charter is not applicable to this situation. It is remarkable that the CJEU ruled that the matter does not fall within the scope of application of the EU Charter and that therefore the national rules that require providing this biometric data and the storage of that data is not subject to the rights of the EU Charter. Since the Council of State in its referring judgment not only referred to the EU Charter, but also to the ECHR, it might be likely that the case will be decided taking the ECHR as yardstick.

2.3. Judicial enforcement institutions and bodies

With regard to the selected rights above, the general structures of civil rights enforcement in the Netherlands apply, therefore the enforcement of these rights will be dealt with hereafter comprehensively, rather than separated.

In the Netherlands the courts are the most important actors in enforcement of civil rights. The above-mentioned examples show the important role of national courts to balance and include EU Charter and Convention rights in the context of the Dutch legal system. As submitted in report 7.1. the Netherlands has no hierarchy in civil rights, which means that balancing of these rights is performed by courts. That amounts to a case by case assessment of what civil right under which specific circumstances may prevail, when there is a clash of civil rights. That consequence is clearly visible in the SGP case, in which the courts had to balance the right to political freedom with equal treatment and came to different rulings. In general the judicial structure in the Netherlands is as follows: “The Netherlands is divided into 11 districts, each with its own court. Each district court is made up of a maximum of five sectors, which always include the administrative law, civil law, criminal law and sub-district law

⁷² Par. 46.



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sector. Appeals against judgements passed by the district court in civil and criminal law cases can be lodged at the competent Court of Appeal (there are four Courts of Appeal in total); appeals against administrative law judgements at the competent specialised administrative law tribunal - the Administrative Jurisdiction Division of the Council of State, the Central Appeals Tribunal or the Trade and Industry Appeals Tribunal, also known as Administrative High Court for Trade and Industry, depending on the type of case. Appeals in cassation in civil, criminal and tax law cases are lodged at the Supreme Court of the Netherlands.”⁷³ That means that in the Netherlands there are different courts that are the highest court: The Supreme Court, but also three specialised tribunals: the Council of State (Judicial Division), Trade and Industry Appeals Tribunal and the Central Appeals Tribunal. There is a discussion in the Netherlands whether this structure provides for coherent case law and whether it would be necessary to merge the highest courts to one Supreme court. In terms of barriers with regard to judicial protection of civil rights, legal uncertainty may be mentioned in this respect.

In order to create more coherence in case law and to speed up judicial procedures there is a possibility to ask preliminary questions to the civil chamber of the Supreme court by District Courts and Courts of Appeal since 1 July 2012.⁷⁴ So far several questions have been posed.⁷⁵

One of the issues with regard to judicial enforcement is a debate concerning the independence of the Dutch Council of State. As observed above, the Council of State is divided into two divisions, one division is the advisory division and the other division is the judicial division, which acts as one of the administrative highest tribunals in the Netherlands. The Council of State (Advisory Division) advises the government on all Bills introduced in Parliament by the

⁷³ <https://www.rechtspraak.nl/english/pages/default.aspx>.

⁷⁴ Wet van 9 februari 2012 tot wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet op de rechterlijke organisatie in verband met de invoering van de mogelijkheid tot het stellen van prejudiciële vragen aan de civiele kamer van de Hoge Raad (Wet prejudiciële vragen aan de Hoge Raad).

⁷⁵ See <https://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/Bijzondere-taken-HR-en-PG/Pages/Prejudici%C3%ABlevragenaandecivielekamervandeHogeRaad.aspx>.



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government, all orders in council, before they are promulgated by the Crown, all international agreements that the government puts before Parliament for approval, all matters on which its advice is required by law, such as the Budget Memorandum and expropriation orders and other matters on which the government seeks the Council's advice. The Judicial Division is the highest general administrative court in the Netherlands.

Some persons appointed at the Council of State have a double mandate, so that they are part of the advisory divisions, but also act in judicial procedures. As a result judges may decide on disputes concerning a piece of legislation they also advised the government on, which would cause problems with *trias politica* and independence of judges at the Council of State. In 2011 a member of the House of Representatives submitted a motion to change this situation (*Motie Taverne C.S.*).⁷⁶ This double mandates at the Council of State led to case law on national law and a complaint at the ECtHR in 2003.⁷⁷ In the case of *Kleyn* the ECtHR ruled that since the matter of advice differed from the specific dispute before the judicial division of the Council of State there was no violation of the Convention. It held “the advisory opinions given on the Transport Infrastructure Planning Bill and the subsequent proceedings on the appeals brought against the routing decision cannot be regarded as involving “the same case” or “the same decision” and “Although the planning of the *Betuweroute* railway was referred to in the advice given by the Council of State to the government on the Transport Infrastructure Planning Bill, these references cannot reasonably be interpreted as expressing any views on, or amounting to a preliminary determination of, any issues subsequently decided by the responsible ministers in the routing decision at issue. The passages containing the references to the *Betuweroute* railway in the Council of State's advice were concerned with removing perceived ambiguities in sections 24b and 24g of the Transport Infrastructure Planning Bill. These provisions were intended to apply to two major construction projects already under

⁷⁶ TK 33 000 VII, No. 54.

⁷⁷ EctHR, 6 May 2003, Case of *Kleyn* and others v. The Netherlands, (Applications nos. 39343/98, 39651/98, 43147/98 and 46664/99)



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consideration at the relevant time, of which the *Betuweroute* railway was one. The Court cannot agree with the applicants that, by suggesting to the government to indicate in the bill the names of the places where the *Betuweroute* railway was to start and end, the Council of State determined, expressed any views on or in any way prejudged the exact routing of that railway.”⁷⁸ It ruled therefore that Article 6 of the Convention, the right to fair trial was not violated. At the moment the Council of State still has double mandates. After the judgement if the ECtHR in *Procola* and *Kleyn* the government adjusted the legislation concerning the structure of the Council of State. Nowadays it is provided that a maximum of 10 persons can be appointed with a double mandate. Moreover whenever someone with such a mandate is involved in an advice may not be involved at a judicial procedure on a later moment. As long as, according the ECtHR case law, the matter of advising differs from the dispute of the judicial procedure there seems to be no problem with Article 6 ECHR. In that sense the restructuring of the Council of State may be sufficient, at least from a formal point of view. Nevertheless there are certainly voices that argue that there should be a much more clearer divisions between the two divisions of the Council of State. Even though the ECtHR held in *Kleyn* that Article 6 of the Convention in that particular case was not violated, it also sent a warning, stating “The Court is not as confident as the government was in its statement during the parliamentary budget discussions in 2000 that these arrangements are such as to ensure that in all appeals coming before it the Administrative Jurisdiction Division constitutes an “impartial tribunal” for the purposes of Article 6 § 1 of the Convention. It is not, however, the task of the Court to rule in the abstract on the compatibility of the Netherlands system in this respect with the Convention.”⁷⁹

Both issues, the problem of incoherent case law due to several highest administrative courts as well as the independence of the Council of State may be qualified as barriers to access to

⁷⁸ Paras. 199-200.

⁷⁹ Par. 198.



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justice and as a restriction of the right to fair trial. The government announced that it wants to merge the existing highest courts into two courts, so that the Council of State and the Supreme Court would be the only highest courts in the Netherlands. The special tribunals would be merged into the Council of State. Moreover the Council of State should be better divided in its advice and judicial activities. In 2014 the Dutch government proposed a bill on ‘Dividing the Council of State and the abolishment of the Central Appeals Tribunal and the Trade and Industry Appeals Tribunal’.⁸⁰ The proposal did however not make concrete steps to merge the different highest administrative courts, nor a clear division of the divisions of the Council of State.⁸¹ The Council of State reacted on the criticisms in a press release, in which it held that the interchange with advice and the judicial division support better quality of both advice and case law.⁸² Until the beginning of this year the government opened a website for consultation on this proposal.⁸³ The proposal would be submitted to the House of Representatives during the summer of 2015.⁸⁴

As observed in the Netherlands there is a possibility to class action, which led to the case of SGP. In the Netherlands class action is laid down in Article 3:305a of the Civil Code. The possibility of class action has been provided for in this provision since July 1994, as a codification of the case law of the Supreme Court. According to the law and the case law of the Supreme Court, there is legal standing for organisations that has the aim to protect the interests of other persons, which should be defined in its statutes. Furthermore, the class

⁸⁰ Wet van 20 januari 2014 houdende hervorming van de bevoegdheid, de procedureregeling en de organisatie van de Raad van State.

⁸¹ *Reforming Appeal in Administrative Law* at <https://www.rechtspraak.nl/English/Judicial-System/Special-Tribunals/Pages/Reforming-appeal-in-Administrative-Law.aspx>.

⁸² https://www.raadvanstate.nl/pers/persberichten/tekst-persbericht.html?id=721&summary_only=&category_id=8.

⁸³ <http://www.internetconsultatie.nl/wetsplitsingraadvanstate>.

⁸⁴ <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/kamerstukken/2015/06/05/kamerbrief-over-reactie-over-wetsvoorstel-splitsing-raad-van-state/kamerbrief-over-reactie-over-wetsvoorstel-splitsing-raad-van-state.pdf>.



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action should add to effective judicial protection. It should moreover perform (or has performed) activities that fall within the aim of protection of these specific interests.

2.4. Non-judicial enforcement institutions and bodies relevant for the enforcement of the selected civil right

There are several non-judicial bodies that are active in the field of civil rights. The example of the SGP case can be mentioned here, in which several organisations challenged the subsidy of the Dutch government of the political party. In that procedure against the state the following organisations were involved: Clara Wichmann test case foundation, the Netherlands section of the International Commission of Jurists (*Nederlands Juristen Comité voor de Mensenrechten*), the Humanist Committee on Human Rights (*Stichting Humanistisch Overleg Mensenrechten*), the Netherlands Association for Women's Interests, Women's Labour and Equal Citizenship (*Nederlandse Vereniging voor Vrouwenbelangen, Vrouw en arbeid en Gelijk Staatsburgerschap*), the Women's Network Association (*Vereniging Vrouwennetwerk Nederland*) and other private associations and foundations.

Another important non-judicial body of civil rights is the Dutch Ombudsman, who, in the recent years had been very active safeguarding civil rights in the Netherlands, especially under the mandate of the previous Ombudsman, Alex Brenninkmeijer. Moreover the The Dutch Institute for Human Rights is an important institute in the field of enforcement of civil rights. The Institute explains, monitors and protects human rights, promotes respect for human rights (including equal treatment) in practice, policy and legislation, and increases the awareness of human rights in the Netherlands.

2.5. Access to Justice



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With regard to access to justice criminal law charges are, as mentioned dependent on the principle of opportunity, as the public prosecutor may prioritise which suspected crimes are investigated and prosecuted. However, according to the Dutch law there is a possibility for an individual who has a direct concern to submit a complaint at the District court and request for an order to the public prosecutor to start a procedure (Article 12 of the Dutch Criminal Procedural Code).

In terms of barriers two important development in Dutch political and policy arena may be mentioned with regard to the costs of judicial access.⁸⁵ First of all a proposed increasing of registry fees to the court may create a tension with access to justice. Second, the legal aid system in the Netherlands is under evaluation, since it seems that the system is not accurate anymore and should be reformed. These two issues are very much intertwined.

An important practical barrier to access to justice and access to the court is the court registry fees in the Netherlands, or at least the discussion have registration fees that would cover the actual costs, which would result in a significant increase of these fees. In 2011 a proposal Act to change the registration fees was proposed by the Minister of Security and Justice (*Wijziging van de Algemene wet bestuursrecht en de Wet griffierechten burgerlijke zaken in verband met de invoering van kostendekkende griffierechten*) as a part of cut down measures. The proposal should save 240 Million EUR. The idea behind this proposal is, moreover, amongst others, that the person or undertaking that wants to have access to justice should be responsible for the costs of that procedure. In terms of civil rights and access to justice this seems fundamentally unfair and unjust. Especially in public law this principle causes problems with the right to have access to justice, since it would constitute a barrier to citizens to challenge decisions of the central of decentral authorities. In the political but also academic debate that followed the proposal the civil right of access to justice in the context of this extra

⁸⁵ https://e-justice.europa.eu/content_costs_of_proceedings-37-nl-en.do?member=1.



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barrier to the administrative court is discussed.⁸⁶ The Council for the Judiciary (*De Raad voor de rechtspraak*) and many other organisations and institutions were very much opposed to this proposal (de Nederlandse Orde van Advocaten, de Vereniging van Nederlandse Gemeenten, het Inter Provinciaal Overleg, VNO-NCW, MKB Nederland, FNV, CNV, de Consumentenbond en de Vereniging Eigen Huis). In April 2012 the proposal was removed from the political agenda. In 2013 a new proposal was submitted by the Minister of Justice and Security (Wetsvoorstel tot wijziging van de Algemene wet bestuursrecht, de Wet griffierechten burgerlijke zaken en de Wet op het hoger onderwijs en wetenschappelijk onderzoek in verband met aanpassing van griffierechten). On this proposal different organisations had criticism. The Dutch Bar for instance submitted and published a letter to the House of Representatives expressing its ‘concerns with regard to access to justice.’⁸⁷ The new proposal would double the fees for appeal cases and cassation, for instance.

The Council for the Judiciary has expressed its concerns regarding the guarantee of access to justice with regard to the increasing registration fees.⁸⁸ Meanwhile the Commission Wolfsen (*Commissie onderzoek oorzaken kostenstijgingen stelsel gesubsidieerde rechtsbijstand en vernieuwing van het stelsel*) has been appointed, which has as a mandate to investigate the increasing costs of legal aid and the possible reformation of the Dutch legal aid system taking access to justice into account. The Commission published its first findings in June 2015.⁸⁹ In its report of June no conclusions or recommendations have been made yet. One of the preliminary findings is that the way the fees are calculated for state aid are not sufficient or accurate anymore and should be adjusted. The final report including conclusions and recommendations is expected in September 2015.

⁸⁶ See for instance C. de Bruijn, Het wetsvoorstel kostendekkende griffierechten en de toegang tot de rechter in het bestuursrecht, *Nederlands Juristenblad*, NJB 2011/1937.

⁸⁷ <http://rechtsbijstandjuistnu.nl/wp-content/uploads/2014/06/Brief-Nova-wetsvoorstel-aanpassing-griffierechten-33757-.pdf>.

⁸⁸ <https://www.rechtspraak.nl/Organisatie/Raad-Voor-De-Rechtspraak/Nieuws/Documents/Brief%20griffierechten.pdf>.

⁸⁹ <http://njb.nl/Uploads/2015/6/tussenstand.pdf>.



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From case law it appears that the Dutch legislation is in general, at the moment of writing, in accordance with access to justice as guaranteed by the Dutch constitution, the ECHR and the EU Charter. However, in specific circumstances the payment of registration fees (even as low as 112 EUR) may constitute a unjustified barrier to access to justice.⁹⁰ In that sense the courts may compensate restrictions to access to justice. However, that is clearly only beneficial for those citizens that have eventually access to justice.

According to a recent empirical research on access to justice, only in 5 % of the cases citizens challenge the law in front of a court.⁹¹ It seems however that the costs of proceeding are not the bottleneck for citizens. However, lack of good information may be such barrier to actually start proceedings.⁹² Nevertheless it seems that the enhanced possibilities for non-judicial dispute solution, such as mediation also contribute, more positively, to this small percentage of judicial disputes.

2.6. “Support structures”

As observed above there are certainly structures to provide for legal aid and state financed legal aid, but the system could be improved.

With regard to support of NGO’s and independent bodies, the Netherlands has various institutions that support claims of citizens, in class action, but also in monitoring civil rights and investigate violations of civil rights. The cases of SGP is an example for such a class action. With regard to the data retention obligation, different organisations started a procedure

⁹⁰ See in this regard the judgement of the Dutch Supreme Court, Hoge Raad, 28 March 2014, ECLI:NL:HR:2014:699.

⁹¹ M. Ter Voert, Toegang tot recht in beweging Over burgers en hun oplossingsstrategieën, Justitiële Verkenningen (2014), p. 70.

⁹² A. Brenninkmeijer, Stresstest rechtsstaat Nederland (Stresstest Dutch ‘Rechtsstaat’), Nederlands JuristenBlad (2015), pp. 1046-1055.



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against the Dutch state to challenge the civil right of privacy (The foundation Privacy First, de Dutch Association of Criminal law lawyers, the Dutch Association of Journalists, the Dutch Committee for Human Rights and the Dutch Legal Committee for Human Rights as well as internet and telecom providers.

Moreover, as observed also other institutions support civil rights in the Netherlands. The Dutch Ombudsman and the Netherlands Institute for Human Rights are both excellent examples.

2.1 Further practical barriers to the effective enjoyment of the selected civil rights

With regard to the practical barriers to the selected rights the reformation of the legal aid system may be mentioned. Whereas the system of legal aid is old-fashioned and does not constitute fully-fledged compensation to lawyers this might impede the quality of the work in files that are state-financed by legal aid. At the moment there is a discussion in the Netherlands to reform the legal aid system. Much depends on how the system will be reformed.

A second issue, much related, are the costs of registry fees for courts which have been increased recently. Even though the courts may compensate for obstacles to justice, as a judgement of the Supreme Court declaring that 112 EUR was too much to ask from the citizen in his particular circumstances, that is only beneficial for citizens that actually go to court. In that sense the costs of registration fees may and have a deterrent effect. If the cost for access to courts increase in the future a serious barrier will be imposed to citizens to bring a case to the court. Even if, as it looks now, only the registry fees for appeal and cassation will be significantly increase, this would be a serious threat to access to justice, since citizens might be prevented to appeal to a judgement of a lower judge.

3.1 Jurisdictional issues in practice



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To the knowledge of the author there are no specific barriers in personal, material, territorial or temporary scope of judicial protection of civil rights in the Netherlands.

4.1 Systematic or notorious lack or deficient enforcement of the selected civil rights in the country under study?

Even though there are problems in the Netherlands with regard to for instance prioritizing by the Data Protection Authority, in the legal aid system and with regard to the independency of the Council of State, there are to the knowledge of the author no notorious lacks in civil rights enforcement in the Netherlands.

5.1 Good practices

As observed key cases on civil rights started with legal proceedings of several NGO's and other civil society organisation, which in terms of enforcement of civil rights may be mentioned as a good practice. The culture to enforce civil rights for Dutch courts by these organisations may be praised.

Moreover, as observed, most cases are (in general) solved in a non-judicial setting. In terms of good practices the role of mediation is therefore noteworthy.



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National provisions

Important case law: (accessible in Dutch on www.rechtspraak.nl)

On the EAW and equal treatment:

Hoge Raad, 18 March 2014, ECLI:NL:HR:2014:650.

On data protection:

District Court The Hague, 11 March 2015, ECLI:NL:RBDHA:2015:2498.

Council of State, 15 April 2015, ECLI:NL:RVS:2015:1185.

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G. Odnot et al, The Dutch implementation of the Data Retention Directive, Eleven International Publishing (2014).

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A. Brenninkmeijer, Stresstest rechtsstaat Nederland (Stresstest Dutch ‘Rechtsstaat’), Nederlands JuristenBlad (2015), pp. 1046-1055.

R.J.N. Schlössels en L.J.M. Timmermans, Baron von Münchhausen aan het werk in de polder: de hoogste bestuursrechtspraak als (never) ending story? (‘De highest administrative judiciary as a (never) ending story?’), Tijdschrift voor Constitutioneel Recht (2014).



WP 7. DELIVERABLE 7.2

Mechanisms for enforcing civil rights

Country Report: SPAIN

(UNIOVI Report 9/05/2015)

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QUESTIONS

Part I – The (legislative) transposition, (executive/administrative) implementation and (judicial) application of EU legislative instruments which provide protection for specific civil rights

1. EU legislation affording protection to civil rights in judicial proceedings⁷

1.1. Protection of rights in civil proceedings concerning divorce, parental responsibility, maintenance, etc.

1.1. 1. Mutual recognition legislation

Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters ('Brussels I Regulation') – relevant provisions only.

Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ('Brussels IIa Regulation').

Regulation No 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters.

Question 1 – Transposition of the above EU instruments protecting or affecting civil rights:

How are the above EU instruments for the protection of civil rights transposed in the country of study? Has there been any notorious failure or defect in the national transposition?

⁷ Note: there is a lot of comparative data available on national judicial mechanisms at http://ec.europa.eu/civiljustice/index_en.htm



Due to the fact that these legal acts were adopted as regulations and not directives, there is no transposition to Spanish Law in the sense of Spanish rules applying the regulations.

Question 2 – Executive/administrative implementation of EU instruments affecting civil rights

- ✓ How are the above EU instruments for the protection of civil rights implemented in the country of study? Have there been any notorious failures or deficiencies in the practice of administration/government regarding these instruments?

In Spanish Law, the main rules of these regulations are applied by the courts and not by the administration or government. The main exception is in the case of child abduction cases, due to the relevance of the cross-border cooperation between Central Authorities (in Spain, a General Direction of the Ministry of Justice).

In some cases, a lack of cooperation between the Central Authorities of the Member States has been observed, in relation with Art. 11.4 Brussels which provides that “A court cannot refuse to return a child on the basis of Article 13b of the Convention on civil aspects of child abduction, concluded in the Hague 25th October 1980⁸.”

1980 HC if it established that adequate arrangements have been made to secure the protection of the child after his or her return”. Nevertheless, this provision shows the benefits of this cooperation.

We have a good example in the Decision de la Cour d’appel de Bordeaux, of 19th January 2007 (INCADAT HC/E/FR 947): at first instance, the French courts refuse the return of the child to Spain due to the health problems of the mother related to drugs; in just a few days, Spanish central authorities offered the French courts all the necessary undertakings to allow the child to return to Spain.

Undertakings or mirror orders in Hague Convention matters, are according to Spanish procedural law, although they are not explicitly provided for in the relevant legislation and their legal nature is therefore uncertain. The duties of the Spanish Central Authorities (CAs) - and other European CAs- have not been accomplished in many cases, neither in the case if Spain is the requested State nor if it is the requesting State. In the Spanish Profile we can see in the Hague Conference website, we have to note that the Spanish Central Authority does not answer the questions about undertakings or mirror orders before Spanish courts (11.2). The undertaking is quite unknown in Spanish practice.

⁸ SOJ, nº 202, 24 August 1987; corrigenda SOJ, 30 June 1989.



Question 3 – Judicial interpretation and application of EU instruments affecting civil rights

- ✓ How are the above instruments (as transposed) interpreted and applied by courts in the country of study? Have there been notorious cases of failure or deficiency in the application?

We will focus on the analysis of Brussels II.a Regulation more than Brussels I Regulation (or Brussels I.a Regulation), because the latter concerns patrimonial and commercial matters and the protection of civil rights is less affected. These matters are governed by a principle of disposition and by the freedom of the parties (with the exception of the exclusive jurisdictions and the consumers, employees and insurance contracts).

1. Perhaps, as a preliminary question, the main interest of Brussels I Regulation concerning civil rights is linked to the right to defence of the defendant, because it is directly connected with Article 24 of the Spanish Constitution.

1.1. On the one hand, it is very interesting the definition of prorogation of jurisdiction by tacit agreement provided by the Regulation, particularly when it requires that the defendant makes an appearance and does not contest the jurisdiction (Article 24, new Article 26). Moreover the new Brussels I.a provided the right of information to contest jurisdiction in relation with the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee who is a defendant. These provisions are very important for the Spanish practice, because the Law 1/2000, 7th January, on Civil Procedure considers that a tacit agreement is observed when the defendant does not make an appearance (Article 56). Fortunately, this national provision is not applicable in cross-border cases, cause of the application of Brussels I Regulation. Moreover, the European Regulation is universally applicable by the Spanish courts, irrespective of the domicile of the parties in a Member State or in a third country.

1.2. On the other hand, Article 26 (new Article 28) is very important in order to ensure the right of the defendant's defence in accordance with section 24 of the Spanish Constitution. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him or her to arrange for his or her defence, or that all necessary steps have been taken to this end. This legal guarantees could also refer to Article 19 of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and to Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, due to the fact that Spain is a contracting State⁹.

2. With regard to disputes over divorce concerning Brussels II.a Regulation, the Spanish practice shows different problems.

⁹ SOJ, n° 203, 25 August 1987, corrigenda SOJ, 13 April 1989.



2.1. Failures related to SPATIAL AND PERSONAL SCOPE of the Brussels II bis Regulation

It is known that the nationality of the couple is not a requirement to apply the Regulation. Nevertheless, in many cases, Spanish courts misunderstand the meaning and the scope of articles 6 and 7 of the Regulation. There are many rulings that refuse to apply the Regulation when neither of the spouses are nationals of a Member State, although they are habitually residents in Spain. This outcome is clearly inconsistent with the Regulation.

CASES: Applying LOPJ instead of the Regulation: *Order PC Bizkaia 20 July 2010* (Peru); *PC Balearic Islands (section 4^a) 172/2010, 7 May 2010* (Argentine) (JUR 2010\252723); *PC Barcelona (Section 12^a) Judgment núm. 365/2011 29 June* (JUR 2011\310187) (Morocco); *Judgment PC Barcelona 26 February 2010 (Section 12^a)* (JUR 2010\145152); *Judgment PC Barcelona 28 July 2009* (Morocco); *Judgment PC Barcelona 16 May 2006* (Chile).

2.2. Failures related to MATERIAL SCOPE

Related to limited material scope, the main problem of Spanish practice is linked to domestic procedural rules. According to these rules, a court during a matrimonial proceeding has to decide about many different questions: dissolution of marriage, custody, maintenance obligation.

In Private international law, we have different grounds/rules of jurisdiction for each issue.

The Spanish courts have difficulty understanding that it is possible to have jurisdiction over divorce but not over parental responsibility or maintenance. This explains why, in many cases, the courts apply the same grounds of jurisdiction to these matters.

In other cases, the courts apply the Regulation for the recognition of a ruling given in another Member State without taking into account that not all the statements of the ruling have to follow the same procedure and have to overcome the same grounds for refusal of recognition.

CASE: Incorrect application of the automatic recognition stated by Brussels II. a to give effects to the statements about financial reliefs of a Belgium ruling: *Provincial Court Santa Cruz de Tenerife (Section 4^a), Order núm. 233/2009 de 25 November 2009* (JUR 2010\77303).

Nevertheless, the situation is improving. The courts are getting used to correctly interpreting that only the dissolution of marriage depends on the Regulation and that the settlement of financial issues depends on internal rules (and exequatur procedure). This is particularly interesting related to English rulings due to the fact that these rulings decide both questions: the dissolution of marriage and the settlement of financial aspects.

CASE.- A *Provincial Court Balearic Islands* (Section 4^a) Judgement n° 193/2011
31 May 2011 (JUR 2011\257305) (UK)

General Direction on registries and Notaries, n° 12446, 27 July 2012 (RJ
2012\10378) (UK)

Provincial Court Málaga (Section 6^a) Judgment núm. 284/2012 de 25 May
(JUR 2012\331625).

3. In relation with child abduction and parental responsibility of Brussels II.a Regulation:

3.1. First failure: conflicting characterization of the removal of the child.

There is a possibility of two European courts issuing contradictory decisions about the characterization of the removal of the child. This possibility is not consistent with the Regulation.

The question is: which court has jurisdiction to decide about the character of the removal? And how should this court decide? These questions are not solved by the Regulation. In its Judgement of 22 December 2010 in the *Mercredi* case, the ECJ (C-497/10 PPU) was asked about that, but nothing has been answered in relation to it.

Risks:

1) Opposite approaches of the removal from two different European courts would be possible. The Spanish Central Authority recognizes it has problems in the interpretation of art. 5 about custody rights (Report CH 1980, 2010). Reasons:

Misinterpretation of the law of the country of origin or not applying this law:

PC Málaga, Section 6^a, 9 July 2007: Refuse the return to Ireland based on the custody of the mother without checking the Irish law.

Different interpretations about consent to the removal in regard to art. 3 of the 1980 Hague Convention:

AP Tenerife, Sección 1^a, 18 September 2006: the Spanish court interpreted that the removal was lawful although there is an English order to the contrary.



PC Barcelona, Section 12, 20 December 2010: the Spanish court reviews the characterization of the removal carried out by German courts; nevertheless they arrived at the same conclusion in the case.

And, overall, characterization of the removal as lawful without taking into account the certificate of art. 15 of the Hague Convention:

PC Tenerife, Section 1^a, 18 September 2006.

2) The aforementioned problem would lead to positive and negative conflicts of jurisdiction on the merits of the custody:

- Positive: the existence of parallel proceedings before different courts. This happens especially when the courts of the State of refuge have characterized the removal as lawful and the courts of the country of origin decided that it is wrongful.

-Negative: there is no competent court to solve custody dispute. For example, in cases of unmarried parents, if the mother removed the child without the consent of the father, the Spanish court would decide the removal was wrongful (in consequence, applying art. 10 the English courts will have jurisdiction); however, for an English court, the removal would be lawful (consequently, applying art. 8, the Spanish courts will have jurisdiction).

3.2. Second Failure: no strict interpretation of art. 13.1.b) 1980 Hague Convention.

The grounds for refusal of the child's return based on art. 13.1.b) of the Hague Convention have not always been interpreted in a restrictive way.

In different cases, the Spanish courts decided not to return the child due to the fact:

-The separation of the mother could cause a grave risk of harm to the child. The child's return could only take place if he or she was accompanied by the mother in order not to expose the child to a grave risk of psychological harm.

PC Málaga (Section 6^a) 11 September 2007 (AC\2007\2085): Refuse the return of the child to UK. English CA did not offer undertakings to guarantee the return.

Order PC Valencia, 26 March 2009 (JUR\2010\73240): In the same way, also related to UK.

-There are irreconcilable medical reports about the child's health in Spain and in the country of origin.

PC Granada (Section 3^a) 100/2006, 16 June (AC 2006\2076): Refuse the return to Belgium. Art. 11.4 is not taken into account.

-The allegation of violence of the father in the country of origin.



Res. Tribunal de Grande Instance de Toulouse of 21 January 2011 refuses the return of the child to Spain, although the violence of the father was not proved before Spanish courts.

These cases illustrate two problems:

- The first caused by a wrongful interpretation of art. 13.1.b) by Spanish courts. For example, it is not possible to use the separation of the mother as grounds for refusal of the return because this question depends on the merits of the custody, not on return procedure. (The second problem?)

3.3. Third failure: the problem of time.

The procedural rules are not followed, especially the six-week deadline.

Spanish procedural law (art. 1901 y ss. Law on Criminal Procedure of 1881) complies with the six-week term established in the Regulation. It is also important to note that lodging an appeal does not prevent the enforcement of the return order. There is not a stay on enforcement of the return order if an appeal is pending to try to ensure a quick return of the child. But in practice, Spanish Central Authorities recognize that there is a stay on enforcement if a party applies for it and the judge decides in that way (10.7.e) of the Spanish Profile).

In practice it is impossible to comply with this term. Reasons:

-The abductor's behaviour to delay the procedure by, for example, hiding the child and his/her domicile.

-The abductor's behaviour could also prevent the enforcement of the return order, even in cases where the return order has been issued within a 6 week period.

-Procedural reasons.

In the Spanish Profile, Central Authorities states that the proceedings usually last more than 12 weeks (excluding appeals) (10.3.e))/ in cases of appeal, the proceedings could last more than 6 months (10.7f)).

Risks:

- on the one hand, if it takes a long period of time to finish the procedure there is a risk of not returning the child. The longer the child stays in the requested State the more likely there are to be enforcement difficulties.
- but, on the other hand, if the procedure is carried out too quickly there is a risk of fewer guarantees to the child.

3.4. Fourth failure: no minimum procedural standards to allow the fast track enforcement of art. 42.

The best and most important example: the compulsory hearings of the child.

As far as Spanish law is concerned, this duty of hearing of the minor is also established.

We have to take into account that art. 12 of the United Nations Convention of the Rights of the Child provides: "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. / 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".

Art. 9 of Organic Law 1/1996, on Childhood Protection imposes the duty of this hearing¹⁰, and coherently Art. 156 Civil Code forces the court to hear the views of the child in accordance with his/her maturity and providing he/she is over the age of 12.

The hearing of the child is required by art. 11.3 in the return procedure; but it is also required to issue the certificate established by art. 42. It is well known that the behavior of the Spanish courts was criticized in the *Aguirre* case (C-491/10 PPU); but related to this case I want to offer a different approach:

- Obviously, the Spanish procedure was not correct.
- But, the behaviour of the German courts was not correct either. It is clear that the German courts did not trust the Spanish courts. But the question is also why does nobody complain about the behavior of the German courts? 1) The delay of the return procedure (2 years!) and 2) the stay of the enforcement order issued in the first stage due to the appeal (in first instance, the return order was given).
- Moreover, the *Aguirre* case shows that there is a loophole in Brussels II bis Regulation concerning the minimum standards applicable to the hearings of the child:
 - o Nothing is said about the hearing procedure (unlike in Regulation 804/2004, creating a European Enforcement Order for uncontested claims).

a) The ECJ said in *Aguirre* "it must first be observed that it is clear from Article 24 of that charter and from Article 42(2)(a) of Regulation No 2201/2003 that those provisions refer not to the hearing of the child per se, but to the child's having the opportunity to be heard" (para. 62). That means that the actual hearing of the child is not required; the duty is to give

¹⁰ Organic Law 1/1996, 15th January, on the Protection of Childhood (SOJ, n° 15, 17 January 1996)



the child the possibility to express his/her views. In the same way, art. 23.b) of the Regulation at the recognition stage.

b) Are courts obliged to apply all the means established in the Regulation 1206/2001, on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters? Para. 20 of the Preamble of Brussels II bis Regulation only states a recommendation, not an obligation (“The hearing of the child in another Member State may take place under the arrangements laid down in Council Regulation...”).

c) Spanish law forces the court to hear every case where the child is over the age of 12. Who establishes and where is it established that children younger than this age must be heard? (In *Aguirre* the child is only 10 years old, after 2 two years in Germany).

- Another question is raised: We have to take into account that the mother and child were correctly served with the claim brought by the father before Spanish court (document which instituted the proceeding by the Spanish court).

But the mother did not want to come to Spain with the child without a guarantee that she would be able to leave Spain again with the child.

Are Spanish courts still obliged to hear the child even in the case that the wrongful behaviour of the mother prevents the child from attending the hearing?

- Finally, if there is a breach of the right to a fair trial, couldn't Spanish courts guarantee the same protection of fundamental rights as German courts?

Is it possible that conclusions/outcomes about the breach of these Fundamental Rights could be different/conflicting in different European countries? If the answer is yes, that shows us that art. 42 does not work correctly.

There are no procedural standards and in these circumstances there has to be mutual trust with respect to national rules and the possible domestic challenges to the decision.

3.5. Fifth failure: The inadmissible existence of parallel proceedings before different European courts.

How can we explain the existence of parallel proceedings before different European courts?

As far as Spanish practice is concerned, we realize that there are too many cases that show parallel proceedings which last for years before different European courts. The existence of these parallel proceedings is evidence that the cooperation does not work.

In the *Purrucker* case (C-256/09; C-296/10), there were simultaneous proceedings before Spanish and German Courts and the German Courts were unable to know the situation of the proceedings pending in Spain. It is an anomalous situation:

two siblings were separated in two countries for years and the courts and the Central Authorities of the States involved were not capable of using art. 15¹¹.

A Judgment of PC A Coruña (Section 5ª) 80/2011, 25 February: with parallel proceedings before Spanish and Belgian courts.

In the *Mercredi* case, there were parallel proceedings before English and French courts, and the French did not apply the *lis pendens*.

These cases should not happen in the Regulation context.

That shows us the following:

-*Lis pendens* (art. 19) does not work. The reasons are: 1) the amount of provisional measures issued in the disputes over custody; 2) and the constant revision of rulings on this subject due to the changes of circumstances (the passage of time, the settlement in another country or the willingness of the child).

Taking these reasons into account, the outcome is that the traditional way of application of *lis pendens* does not avoid the parallel proceedings.

-Art. 55, cooperation between Central Authorities on cases of parental responsibility does not work either.

-Spanish courts are also reluctant to apply the *forum non conveniens* (art. 15). In Spanish practice this is considered an exceptional measure and courts have not applied the *forum non conveniens*, despite the fact that there are cases in which the court of another Member State would be better placed to hear the case. Spanish courts need time to get used to art. 15.

-There is a lack of direct judicial communications.

None of them work correctly.

As a result:

- The existence of irreconcilable/conflicting decisions over custody in different Member States.
- In the end, in cases of abduction, the child will still remain in the State of refuge due to the passage of time.

¹¹ See CJ Judgment of the Court (Second Chamber) of 15 July 2010. *Bianca Purrucker v Guillermo Vallés Pérez* (C-256/09) and CJ Judgment of the Court (Second Chamber) of 9 November 2010. *Bianca Purrucker v Guillermo Vallés Pérez* (C-296/10)

3.6. Sixth failure: The problem of the actual enforcement of the return orders.

Main problems:

On the one hand, it is not possible at the enforcement stage to review the merits of the proceedings for return. On the other hand, there are many cases in which the length of the enforcement is long and the passage of time could lead to a change of circumstances (for example, a settlement of the child in the State of the new residence, a new decision over custody).

- What happens when there is a strong opposition by the child to return to the country of origin?

Is it still possible to enforce, even with coercive measures, the return order in these cases?

Is the refusal to actual enforcement consistent with Brussels II bis?

General rule: Article 47(1) of the Brussels II bis Regulation states that the enforcement procedure is governed by the law of the Member State of enforcement. According to Article 47(2)

“Any judgment delivered by a court of another Member State and declared to be enforceable in accordance with Section 2 or certified in accordance with Article 41(1) or Article 42(1) shall be enforced in the Member State of enforcement in the same conditions as if it had been delivered in that Member State.”

The interpretation:

ECJ: *Alpago v. Povse* (C-211/10 PPU): the ECJ has held that the reference to national law is limited to procedural arrangements for the enforcement of the judgment¹².

The discussion:

The interpretation of ECJ in *Alpago v. Povse* is not supported by the art. 47 Brussels II bis Regulation.

In Spanish practice:

There are different positions about how the passage of time and the change of circumstances affect the actual enforcement of the return. In different rulings, the courts decided that the time factor was irrelevant and they decided to return the child in any case.

CASE: *PC Pontevedra* (Section 1^a) 5 July 2006 (AC\2010\715): Return to France. The court took into account the undertakings offered by the French authorities. The

¹² Cfr. CJ Judgment of the Court (Third Chamber) of 1 July 2010. *Doris Povse v Mauro Alpago* (C-211/10).



time the child has spent in Spain (4 years) was not relevant because it was due to the mother's behavior.

However, we also have an example in which the Spanish court refused the enforcement of a return order taking into account that the child remained in Spain for more than 8 years from the time that the return order was given.

CASE: Court of First Instance (n° 6) Zaragoza, 20 April 2004 (AC 2004\420): it took 8 years to locate the child from the time the return order was given.

It should be possible in these cases to refuse the actual enforcement of a return order in the same condition as if it had been issued in the requested State. According to Spanish law, it would be possible to refuse the actual enforcement in exceptional cases when there is an important change of circumstances: one of these cases is when there is a strong opposition of the child at the stage of enforcement and it is impossible to use coercive measures against him/her. We can find the same outcome in the practice of other States (Switzerland) and Member States (England). And what will happen in the *Aguirre* case? In fact, it is impossible to force the child to return to Spain 2 or 3 years after the removal.

For example, we do not think it would be in accordance with the welfare of the child to be put on a plane by the police.

In this matter, we have to balance the different approaches supported by the ECHR in the *Neulinger* case and the ECJ in *Aguirre* case:

Of course there is a possibility that the courts of the Member State of refuge may refuse the actual enforcement of the return decision (according to Article 47);

A different issue is the whole assessment of the welfare of the child which has to be made by the court with jurisdiction on the merits of the custody.

3.1. Protection of rights in criminal proceedings (due process, right to a fair trial, etc.)

The EU has adopted numerous legislative instruments enhancing judicial cooperation and imposing mutual recognition in criminal matters. These have led to concerns regarding the protection of individuals in criminal proceedings across the member states of the EU, which led to the adoption of approximation/minimum harmonization of aspects of national criminal law and procedures.

Background instrument on judicial cooperation



Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.

1.2.1. Mutual recognition instruments

Framework Decision 2002/584/JHA of 13 June 2002 on the *European arrest warrant* and the surrender procedure between member States

Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition for judgements imposing custodial sentences or measures involving deprivation of liberty.

Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in criminal proceedings

Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence

Framework Decision 2006/783/JHA on the application of the principle of mutual recognition for confiscation orders

Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements and probation decisions with a view to the supervision of probation measures and alternative sanctions

Focus on 'safeguard' provisions in these MR instruments.

Question 1 – Transposition of the above EU instruments protecting or affecting civil rights:

How are the above EU instruments for the protection of civil rights transposed in the country of study? Has there been any notorious failure or defect in the national transposition?

These are the Spanish Laws, which implement the European Legislation in those matters:



- Law 23/2014, 20th November, on mutual recognition of criminal judgements in the European Union¹³.
- Organic Law 7/2014, 12nd November, on exchange of information on criminal records and taking into account of criminal judicial resolution in the European Union¹⁴
- Organic Law 6/2014, 29 October, supplementary to the Law on mutual recognition of criminal judgements in the European Union, modifying Organic Law 6/1985, 1 July, on Judiciary¹⁵
- Law 31/2010, 27 July, on simplification on Exchange of information and intelligence in the European Union¹⁶
- Law 11/2003, 21 May, regulating Joint investigation teams on criminal matters in the European Union¹⁷

And these are Spanish general Laws in which the Spanish Legislator has implemented this European Legislation:

- Organic Law 15/2003 25 November, modifying organic Law 10/1995, 23 November, Penal Code (in matters concerning money laundering).¹⁸
- Organic Law 5/2010, 22 June, modifying Organic Law 10/1995, 23 November, Penal Code (in terms of fraud, crimes against consumers and the market, revealing secrets and spreading false information on commercial, private corruption)¹⁹

There have been no outstanding problems in the application of this European Legislation.

¹³ SOJ, nº 282, 21 November 2014

¹⁴ SOJ nº 275, 13 November 2014

¹⁵ SOJ nº 263, 30 October 2014

¹⁶ SOJ nº 182, 28 July 2010

¹⁷ SOJ nº 122, 22 May 2003

¹⁸ SOJ nº 283, 26 November 2003

¹⁹ SOJ nº 152, 23 June 2010



Question 2 – Executive/administrative implementation of EU instruments affecting civil rights

- ✓ How are the above EU instruments for the protection of civil rights implemented in the country of study? Have there been any notorious failures or deficiencies in the practice of administration/government regarding these instruments?

The above measures have been implemented through administrative decisions, and our criminal jurisdiction applies normally.

There have been no outstanding problems in the application of these rules.

Question 3 – Judicial interpretation and application of EU instruments affecting civil rights

- ✓ How are the above instruments (as transposed) interpreted and applied by courts in the country of study? Have there been notorious cases of failures or deficiencies in the application?²⁰

At this point, Framework Decision 2008/675/JHA of 24 July 2008 has created difficulties in its jurisprudential application, about the possibility of recognizing effects by convictions from other Member States of the European Union and their accumulation with the convictions dictated in Spain. The Supreme Court (TS) had already ruled in its Judgement 186/2014, of 13 March, Case *Urrusolo Sistiaga*, about the possibility of those accumulating convictions from European Courts with the Spanish in implementing the Framework Decision 2008/675/JHA (and in advance, since 2002 under international agreements of mutual recognition of judgments). On that occasion, despite having not yet implemented the framework decision on the Spanish domestic legislation, the TS felt obliged to care what ECJ missed (Grand Chamber) in its judgment of 16 June 2005 (Case *Pupino*, C-105 / 03) interpretation consistent with the framework of the Spanish criminal law decision authorizing the alleged accumulation of sentences. Subsequently the Organic Law 7/2014, of 12 November, on the exchange of criminal history information and consideration of criminal judgments in the European Union was adopted, implementing the aforementioned framework decision and applying the equivalence principle whereby sentences by other European member state courts have the same status as the Spanish to the effects of the corresponding settlement of convictions.

²⁰ Note: there is a lot of comparative data available on national judicial mechanisms at http://ec.europa.eu/civiljustice/index_en.htm



The origin of these implementation difficulties is the TS Case *Picabea*. This case was decided by the TS Judgment 874/2014 of 27 January 2015. *Picabea*, convicted of terrorist offenses, appealed before Supreme Court, the Spain's National High Court (*Audiencia Nacional*) Order of September 4, 2014, which rejected to accumulate with the Spanish sentence decided by the sentence of 13 September 2007, the conviction decided by Paris High Court in Judgment of 26 May 1997. At this time, the TS dismissed the appeal, and upheld the decision of the National High Court.

Nevertheless, the National High Court, First Section, later decided to accumulate convictions, also for those convicted of terrorist activities, in direct application of the framework decision and the doctrine of Supreme Court sitting in Judgment 186/2014, although the Organic Law 7/2014, of 12 November, was not yet in force at the time of the decision (but it was published in the *State Official Journal (SOJ/BOE)*). The National High Court did not take into account the Spanish law restrictions to the full recognition of member State criminal jurisdiction decisions. The Public Prosecution has appealed to Supreme Court and it has overruled the National High Court decision in its Judgment of 10 March 2015 in application of its doctrine of Judgment 874/2014.

1.2.2. 'Approximation' instruments

1.2.2.1. Victims' rights

Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.

Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims

Directive 2011/99/EU on 13 December 2011 on the European Protection Order

Question 1 – Transposition of the above EU instruments protecting or affecting civil rights:

How are the above EU instruments for the protection of civil rights transposed in the country of study? Has there been any notorious failure or defect in the national transposition?



In Spain, Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, has not been implemented yet. Repair to crime victims and injured civilians is effected by exercising civil actions in terms of Article 109 of Spain's Penal Code and Law 35/95 of 11 December aid and assistance to crime victims violent and sexual offenses and Regulations²¹, Royal Decree 738/1997 of 23 May Aid and Assistance to Victims of violent Crime and sexual Freedom²².

Directive 2004/80/EC of 29 April 2004, was implemented by Royal Decree 199/2006 of 17 February²³, which amended the Royal Decree 738/1997 of 23 May to fit the aforementioned Directive. The Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims and the Framework Decision 2001/220/JAI, of 15 March 2001 on the standing of victims in criminal proceedings has not been implemented by internal regulations either.

The Ministry of Justice elevated to the Cabinet a Draft Bill on March 14, 2014 which aims to transpose these directives into national law.

The objections raised by the Spanish Doctrine to this Draft Bill are:

- Attribution to the public prosecution of powers of a judicial nature that may violate reserve judges and courts jurisdiction under Article 117 EC, it is anticipated that the public prosecution is to recognize and enforce orders from other EU states.
- Necessary clarification from the courts in attention, processing and execution of the European protection order.
- Existence of gaps in the draft: that European order can be promoted *ex officio* or at the request of the public prosecution, that the relatives of the main protected person resulting authorized to request and be covered by a European order, or mandatory is established that the person causing danger to be assisted by counsel during the pre-decide on the issuance of a European order audience (esta frase no tiene sentido).
- Applies to the European order the principle of *non bis in idem*, distorting the principle of mutual recognition.

Question 2 – Executive/administrative implementation of EU instruments affecting civil rights

- ✓ How are the above EU instruments for the protection of civil rights implemented in the country of study? Have there been any notorious failures or deficiencies in the practice of administration/government regarding these instruments?

²¹ SOJ, nº 296, 12 December 1995.

²² SOJ, nº 126, 27 May 1997

²³ SOJ, nº 43, 20 February 2006



Royal Decree 738/1997, 23 May, on Aid and Assistance to Victims of violent Crime and sexual Freedom

Royal Decree 199/2006, 17 February, modifying Royal Decree 738/1997.

Question 3 – Judicial interpretation and application of EU instruments affecting civil rights

- ✓ How are the above instruments (as transposed) interpreted and applied by courts in the country of study? Have there been notorious cases of failure or deficiency in the application?²⁴

The Judgment of the Supreme Court 282/2014, 24 January 2014, rejected a claim for damages against the State for not having implemented the directive leaving unattended without compensation the parents of a minor killed by another child, and establishes the following doctrine in its Legal Argument nº 3:

"Well, the liability of the State for damages arising from breach of European Union law requires, in general, the concurrence of the following conditions. First, that there has been a violation or breach of EU law. Second, that the violation of Community law deserves the rating "sufficiently serious", ie, that violation is of such degree or entity that deserves the indicated rating. And finally, would result from implementation, where appropriate, the specific requirements of the liability ex Article 139 and following of Law 30/1992"

The Supreme Court has considered that the 1995 Law and its administrative regulation after its reform in 2006 to implement the Directive 2004/80 have accomplished the European Legislation.

1.2.2.2. Rights of suspects and accused persons

Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings

Directive 2012/13/EU of 22 May 2012 on the Right to Information in Criminal Proceedings

²⁴ Note: there is a lot of comparative data available on national judicial mechanisms at http://ec.europa.eu/civiljustice/index_en.htm



Question 1 – Transposition of the above EU instruments protecting or affecting civil rights:

How are the above EU instruments for the protection of civil rights transposed in the country of study? Has there been any notorious failure or defect in the national transposition?

Neither has been implemented by national Legislation.

In the case of assistance of the right to interpretation and translation in criminal procedures, the provisions of Articles 231.5 Organic Law 6/1985 on Judiciary continue to apply, in general for all oral proceedings, Articles 398, 440 et seq, and 520.2 e) of Law on Criminal Procedures (1881) for witnesses and detainees respectively. Specifically for the accused and defendants in criminal oral proceedings, articles 762.8 and 771 Law 1/2000 on Civil Procedure. The problem is that this regulation does not guarantee the election of the interpreter by the applicant or his or her professional character or accredited knowledge of the foreign language in question.

On a different note, in matters concerning the Directive 2012/13/EU, the Spanish legislation already regulates carefully and sufficiently information rights in the context of criminal proceedings, although the Directive has not been transposed. These rights are fundamental rights and are established in Sections 17.3 and 24.2 of Spanish Constitution (and interpreted by abundant case-law). The main rule has been established in Article 520.2 Law 1/2000 on Civil Procedure, to which Article 302 (access to the docket) must be added. At this point the Spanish law is more of a guarantee than the Directive, and the standard is peaceful in doctrine and jurisprudence. The same can be said about Directive 2013/48/EU, on the right to legal counsel in criminal proceedings. The Spanish Constitution recognizes this right as a fundamental right in sections 17.3 and 24.2, and is amply covered in the Law 1/2000 on Civil Procedure, Article 520 in connection with articles 118, 771, 775 and 768 thereof.

Question 2 – Executive/administrative implementation of EU instruments affecting civil rights

- ✓ How are the above EU instruments for the protection of civil rights implemented in the country of study? Have there been any notorious failures or deficiencies in the practice of administration/government regarding these instruments?

None.



Question 3 – Judicial interpretation and application of EU instruments affecting civil rights

- ✓ How are the above instruments (as transposed) interpreted and applied by courts in the country of study? Have there been notorious cases of failure or deficiency in the application?²⁵

None.

2. EU legislation protecting personal data

Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive) [1995] OJ L281/31.

Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector (ePrivacy Directive) [2002] OJ L201/37.

Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive (Data Retention Directive) [2006] OJ L105/54. [annulled]

Question 1 – Transposition of the above EU instruments protecting or affecting civil rights:

How are the above EU instruments for the protection of civil rights transposed in the country of study? Has there been any notorious failure or defect in the national transposition?

The European Legislation has been transposed by:

- Organic Law 15/1999, 13 December, on Personal Data Protection²⁶
- Law 32/2010, 1 October, on Catalan Authority for Data Protection (Consolidated Text. Latest modification: 23 March 2012)²⁷

²⁵ Note: there is a lot of comparative data available on national judicial mechanisms at http://ec.europa.eu/civiljustice/index_en.htm

²⁶ SOJ, n° 298, 14 December 1999.

²⁷ GCOJ, n° 5731, 8 October 2010.



- Law 2/2004, 25 February, on Personal Data files of public ownership and creation of Basque Agency on Data Protection²⁸.
- Law 1/2014, 24 June, Public Transparency of Andalusia²⁹
- Law 11/2007, 22 June, regulating citizenship electronic access to public services (Consolidated Text. Latest modification: 17 September 2014)³⁰
- Law 25/2007, 18 October, on preservation of data linked to electronic communications and public networks (Latest reform: 10 de mayo de 2014).³¹
- Law 34/2002, 11 July, on services for information society and e-commerce. (Latest reform: 10 May 2014).³²

Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, has been transposed by Law 25/2007, 18 October - and in its reforms- and in 2002 by Law 34/2002, 11 July, and its respective regulations for implementation.

Question 2 – Executive/administrative implementation of EU instruments affecting civil rights

- ✓ How are the above EU instruments for the protection of civil rights implemented in the country of study? Have there been any notorious failures or deficiencies in the practice of administration/government regarding these instruments?

-Royal Decree 1720/2007, 21 December, purporting approval of regulation of implementation of Organic Law 15/1999, de 13 December, on Personal data Protection (Latest reform: 8 March 2012)³³.

²⁸ BCOJ, n° 44, 4 March 2004.

²⁹ JAOJ, n° 124, 30 June 2014

³⁰ SOJ n°. 150, 23 June 2007

³¹ SOJ n° 251, 19 October 2007

³² SOJ n° 166, 12 July 2002

³³ SOJ n° 17, 19 January 2008



-Royal Decree 428/1993, 26 March, purporting approval of the statute of Spanish Agency on Data Protection (Consolidated Text. Latest reform: 5 November 2008)³⁴.

-Royal Decree 899/2009, 22 May, approving the Charter rights of user of electronic communication services³⁵.

-Royal Decree 424/2005, 15 April, approving Regulation on conditions to offer services on electronic communications, universal service and users protection.³⁶

-Order CTE/771/2002, 26 March, fixing conditions to give services on telephonic consultation for subscribers numbers.³⁷

-Order PRE/361/2002, 14 February, implementing users' rights and additional pricing services of Title IV of Royal Decree 1736/1998, 31 July, approving the Regulation implementing Title III of the General Law on Telecommunications³⁸.

The implementation and enforcement of the rules on data protection is entrusted to independent administrative agencies.

- Spanish Agency for Data Protection (*Agencia Española de Protección de Datos*) is an Agency with jurisdiction throughout the state. It has powers of inspection and sanction.
- With regional jurisdiction:
 - o Catalan Agency on Data Protection
 - o Basque Agency on Data Protection

More recently, the Law 1/2014, 24 June, on Public Transparency in Andalusia, has set up the Council on Transparency and Data Protection of Andalusia.

Question 3 – Judicial interpretation and application of EU instruments affecting civil rights

³⁴ SOJn° 106, 4 May 1993

³⁵ SOJn° 131, 30 May 2009

³⁶ SOJn° 102, 29 April 2005

³⁷ SOJn° 81, 4 April 2002

³⁸ SOJn° 46, 22 February 2002



- ✓ How are the above instruments (as transposed) interpreted and applied by courts in the country of study? Have there been notorious cases of failure or deficiency in the application?³⁹

The implementation of the Data Protection regulation has been peaceful. However, problems have been generated by the application of Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and the European Passengers Data Record. The Spanish Data Protection Agency has repeatedly expressed doubts about certain items and purposes of this Directive, and also on the European passenger data recording, adding to the opinion (6 May 2014) issued by the Working Group of the European Data Protection Agencies. The group believes that such measures may undermine the protection of the fundamental right to data protection, but its necessity and proportionality are not credited. On November 8 2006 the Agency had already issued a critical opinion on the restraint data communications in its report on the draft bill of the Law 25/2007, of October 18, the retention of data relating to electronic communications and public communications networks.

³⁹ Note: there is a lot of comparative data available on national judicial mechanisms at http://ec.europa.eu/civiljustice/index_en.htm

Part II - Enforcement of select civil rights

Question 1 – Source of protection

- ✓ What is the source of protection of each of these rights? Do you see any problems in this regard? (eg the right is recognized only in a lower level norm)

A) *Freedom of association*: The right to associate is ruled by Constitution. Its section 22 states:

"1. The right of association is recognised. 2. Associations which pursue ends or use means legally defined as criminal offences are illegal. 3. Associations set up on the basis of this section must be entered in a register for the sole purpose of public knowledge. 4. Associations may only be dissolved or have their activities suspended by virtue of a court order stating the reasons for it. 5. Secret and paramilitary associations are prohibited."

According to the Constitutional Court this regulation in Spain's Constitution has superseded "prejudges from Liberal State against association phenomenon"⁴⁰. And its essential role in a democratic society has been constantly asserted because from its constitutional basis, the right of association is set "as one of essential public freedoms of the person" and as a precondition to ensure a level of personal autonomy and the "exercise with full power of self-determination of faculties inherent to this specific manifestation of freedom"⁴¹.

⁴⁰ Ruling 67/1985 of CC, 24th May. Evidently, Spain's Constitution firmly rejects the severe restrictions imposed during the Franco Dictatorship on Association by Law 191/1964, 24th December (SOJ, n° 311, 28 December 1964), now abrogated, but in force for 38 years! In fact, the promulgation of the Constitution in 1978 has made void many of its provisions, according to the doctrine of supervening unconstitutionality (*inconstitucionalidad sobrevinida*) issued by the Constitutional Court in one of their first rulings. However, the current Constitution also repudiates the restrictions in force under the old liberal regime of the Monarchical Restoration (*Restauración*) (1876-1931). On this subject see VELLOSO JIMÉNEZ, L., "Los orígenes constitucionales del Derecho de asociación en España (1868-1923)", *Anuario de la Facultad de Derecho (Universidad de Extremadura)*, núm. 1, 1982, pp. 307-355 (in Spanish).

⁴¹ FERNANDEZ ALLES, J.J., "Las funciones del derecho de asociación en el régimen constitucional español", *Derechos y libertades*, n° 30, 2014, p. 119, quoting Constitutional Court Ruling 244/1991, 16th December. In fact, the relevance of this fundamental right has been highlighted since its very beginning by the Constitutional Court: Its fifth judgement in history concerns this right (See the Constitutional Court Ruling 5/1981, 13th February).



In fact, the right to associate is developed generally by Organic Law 1/2002, 22nd March⁴², stating that there is a right to associate or not to associate recognized to every person⁴³. This right could be enjoyed without the interference of public authorities; the access to public registry imposed on associations is only conceived as a means of publicity⁴⁴. Nevertheless, its (Associations) functioning must be democratic, respecting pluralism, and the right of individuals to leave associations and to dissolve them is also recognized. Moreover, associations with criminal goals or means are unlawful and according to the Constitution the law forbids secret and paramilitary associations⁴⁵. Members of associations cannot be subject

⁴² *SOJ*, n° 73, 26 March 2002. Some specific associations are regulated by Special laws: e.g. Political Parties (Organic Law 6/2002, 27th June; *OJ*, n° 154, 28 June 2002); Trade unions (Organic Law 11/1985, 2nd August; *SOJ*, n° 189, 8 August 1985); Religious confessions (Organic Law 7/1980, 5th July; *SOJ*, n° 177, 24 July 1980); Sports Federations and Clubs (Law 10/1990, 15th October; *SOJ*, n° 249, 17 October 1990); Consumer Associations (Royal Legislative Decree 1/2007, 16th November; *SOJ*, n° 287, 30 November 2007). Also Professional Corporations –e.g. Bar Associations and their compulsory affiliation- are excluded from the regulation provided by OL 1/2002, in conformity with constitutional doctrine (see the Constitutional Court (1st Chamber) Ruling 125/1987 of 15th July 1987; the Constitutional Court (Plenary) Ruling 89/1989 of 11th May 1989; the Constitutional Court (2nd Chamber) Ruling 131/1989 of 17th July 1989; the Constitutional Court (Plenary) Ruling 132/1989 of 18th July 1989, etc.).

⁴³ On the right to not associate see the Constitutional Court (Plenary) Ruling 178/1994 of 16th June 1994; the Constitutional Court (2nd Chamber) Rulings 223 to 226/1994 of 18th July 1994; the Constitutional Court (1st Chamber) Ruling 152/1995 of 24th October 1995, etc. Also, according to Spanish Law, even legal persons can associate and this right is constitutionally protected (Constitutional Court (1st Chamber) Ruling 64/1988 of 12th April 1988). And this right can also be exerted by Public entities – under certain conditions-, inasmuch as they cannot abuse their particular position. Notwithstanding, the right to associate is restricted –but not forbidden- for Judges, Prosecutors and members of the Army and Guardia Civil (see below).

⁴⁴ Art. 25, Organic Law 1/2002. See Royal Decree 1497/2003, 28th November, on Regulations concerning the National Registry of Associations and its relations with other Registries on associations (*SOJ*, n° 306, 23 December 2003). When Associations deploy their activities mainly in one Autonomous Community (AC) they should be registered there (art. 26, Organic Law 1/2002). There are 17 AC Registries and 2 Registries in the Autonomous Cities of Ceuta and Melilla. See e.g. Decree 13/1995 (Aragon), 7th February, regulating the Registry of Associations in the Autonomous Community of Aragon (*AOJ*, n° 22, 22 February 1995).

⁴⁵ Art. 517 of the Spanish Penal Code provides for punishment of founders of such associations, albeit Courts seem reluctant to apply it as revealed by the Supreme Court (2nd Chamber) Ruling 259/2011: In fact, this self-restraint is linked with jurisprudential weakness of “hate speech” repression by Spanish Courts notwithstanding the Constitutional Court Rulings 214/1991, 11th November 1991, 176/1995, 11th December 1995 and 235/2007, 7th November. (On these questions, see CUEVA FERNÁNDEZ, R., “About the judgment 259/2011 of the Spanish Supreme Court: hate speech, incitement and right to collective honor. A new twist against the prohibition of extreme speech?”, *Eunomia*, n° 2, March-August 2012, pp. 99-108; accessible on <<http://hosting01.uc3m.es/Erevistas/index.php/EUNOM/article/view/2066/1000>>. In Spanish). Further, since the introduction of a reform in the Spanish Penal Code (Organic Law 5/2010, 23rd June; *OJ*, n° 152,



to any advantage or discrimination by public authorities⁴⁶. However, the State can fund associations pursuing goals of general interest. Also, some associations are considered of public benefit, enjoying exemption on taxes; instead, in such cases, they are obliged to submit periodical reports on their activities to public authorities⁴⁷. Anyway, the fundamental right proclaimed by the Constitution benefits the association itself –not only its partners-; then it could ask for judicial and constitutional protection introducing by itself an *amparo* appeal⁴⁸.

23 June 2010), those Associations could be considered responsible for criminal offences: at present, the Penal Code envisages 22 possible crimes. See BOLDOVA PASAMAR, M.A., “La introducción de la responsabilidad penal de las personas jurídicas en la legislación española”, *Estudios Penales y Criminológicos*, vol. XXIII, 2013, pp. 219-263 (in Spanish)(accessible in <file:///C:/Users/Administrador/Downloads/1395-5384-1-PB.pdf>); GÓMEZ-JARA DÍEZ, C., “La responsabilidad penal de las personas jurídicas en la reforma del Código Penal”, *La Ley*, nº 14962, 2010 (in Spanish) (accessible in <[⁴⁶ But the Catholic Church and its associations are in fact preferred, according to section 16 of the Spanish Constitution, notwithstanding its change of position since their privileged *de jure* status under the Franco regime \(On the failure of the Second Republic to provide a solution on these issues see MARTÍNEZ TORRÓN, J., “Derecho de asociación y confesiones religiosas en la Constitución de 1931”, *Cuestiones constitucionales. Revista Mexicana de Derecho Constitucional*, nº 3, 2000, pp. 91-120 \(in Spanish\); accessible on <<http://www.juridicas.unam.mx/publica/librev/rev/cconst/cont/3/art/art5.pdf>>\). Their status is regulated by international treaties \(agreements?\) \(*Acuerdos*\) concluded with the Holy See on 3rd January 1979 \(*OJ*, nº 300, 15 December 1979\), including exemption on taxes and public funding support \(On these issues see LLAMAZARES, M.C., “In Pursuit of Secularism: the Gymkhana of the Agreements with the Holy See”, *Eunomia*. No. 6, marzo-agosto 2014, pp.72-97; accesible in <<http://hosting01.uc3m.es/Erevistas/index.php/EUNOM/article/view/2198/1134>>. In Spanish\). Other religious confessions are not treated in the same manner, although the Constitutional Court saw no discrimination in successive rulings concerning this question. However, ECHR find in its Judgement on 3 April 2012, *Manzanas Martin v. Spain*, that differences between retirement pensions of Catholic priests and Evangelical ministers amounted to discrimination.](http://www.laley.es/Content/Documento.aspx?params=H4sIAAAAAAAEAO29B2AcSZYIji9tynt/SvVK1+B0oQiAYBMk2JBAE0zBIM3mkuwdaUcjKasqgcplVmVdZhZAzO2dvPfee++999577733ujudTif33/8/XGZkAWz2zkrayZ4hgKrlHz9+fB8/lorZ7L0nb3bo2b2/c7C/8wsv87opquVnezu7O7t7O3v4oDi/flpN31yv8s/Os7LJf2E+q aq3wXu/v2n//wCUipik7UQAAAA=WKE>).</p></div><div data-bbox=)

⁴⁷ Arts. 32-34, Organic Law 1/2002. The specific regulation concerning those associations is contained in Royal Decree 1740/2003, 19 December (*SOJ*, nº 11, 13 January 2004). As for the fiscal benefits there are also differences –founded on historical reasons- between Autonomous Communities and Autonomous Cities invested of finance power (Basque Country, Navarre, Canary Islands, Ceuta and Melilla) and the rest of the State.

⁴⁸ See the Constitutional Court Rulings 218/1988 of 22th November 1998; 5/1996 of 16th January 1996; 104/1999 of 14th June 1999.



As a “fundamental right” –according to Spanish Law⁴⁹- its regulation is an exclusive power of the State⁵⁰. However, some Autonomous Communities passed specific Legislation on Associations not impinging on the essential content of this right, but rather regulating administrative issues (registry, promotion and funding, tax benefits, etc.) concerning its implementation⁵¹ or its specific Civil Law (*Droit Civil*) dimension –i.e. association contracts– when the Autonomous Community has such a competence⁵².

B) Right to Diplomatic protection. As far as this right is concerned the regime is to be found in two different sets of norms. On the one hand, according to article 96 of the Spanish Constitution, International Law is incorporated to national law by the mere Official Publication of treaties and automatically when it comes to international customary rules, therefore, general rules of international law are fully enforceable in Spain. In other words, customary rules covering diplomatic protection, consular protection and consular assistance, are an integral part of Spanish law, in addition to this the Vienna Convention on Diplomatic Relations, which came into force in Spain on 21 January 1968, and the Vienna Convention on Consular Relations, which came into force in Spain on 19 March 1967.

On the other hand, the recent Law 2/2014, 23 March 2014, on the External Action of State and the External Service of the State⁵³, tackles the question of diplomatic protection, affecting both diplomatic and consular protection and consular assistance, although this Law does not delve into either of them, simply pointing out the obligation of the Spanish authorities to protect and assist Spanish nationals abroad. Other Spanish norms deal with very

⁴⁹ On this category see our previous Report D.7.1 (30th April 2014).

⁵⁰ See Constitutional Court (Plenary) Ruling 173/1998 of 23rd July 1998. This decision annuls some articles of the Basque Country Law 3/1998, of 12th February, on Associations (*BCOJ*, n° 42, 1 March 1988), because they encroach State power to legislate on the essential content of the fundamental right to association.

⁵¹ E.g. Law 4/2006 (Andalusia), 23th June (*SOJ*, n° 185, 4 August 2006); Law 7/2007 (Basque Country), 22nd June (*BCOJ*, n° 2007134, 12 July 2007); Law 14/2008 (Comunidad Valenciana), 18th November (*SOJ*, n° 294, 6 December 2008)

⁵² Such dichotomy was outlined by Opinion of the State’s Council when examining the draft of the future Organic Law 1/2002 (See the SC Opinion 145/2001, 9th May, para. 23). Concerning Civil Law developments, it must be taken into account that notwithstanding the existence of a Civil Code since 1889, the maintenance of *Ancien Régime* Regional Civil Law was preserved in Catalonia, Balearic Islands, Aragon, Navarre, some areas of the Basque Country and even –through customary law- in Galicia. Then e.g. Catalonia enacted a Law 4/2008, 24th April, on the Third Book of the Civil Code of Catalonia, regulating Associations and other Legal Persons (*SOJ*, n° 131, 30 May 2008). On this civil –and even commercial- feature of the right to association distinct from the right protected by Section 22 of the Spanish Constitution, see the Constitutional Court (2nd Chamber) Ruling 23/1987 of 23rd February 1987; the Constitutional Court (1st Chamber) Ruling 6/1996 of 16th January 1996.

⁵³ *SOJ*, n° 74, 26 March 2014.



specific aspects of this right, such as the possibility of claiming for a compensation where Spain does not pursue the protection of its nationals abroad or does it in a way that is not up to the standard of due diligence or else decides not to set in motion such process, in which cases the Council of State must be consulted on the matter (article 21.6, Organic Law 3/1980, 22 April 1980, on the Council of State). For instance, the emergency travel document is foreseen in the Royal Decree 116/2013, 15 February 2013, on the issue of provisional passport and safe-conducts. In the same vein, the Royal Decree 557/2011, 20 April 2011, on the rights and liberties of aliens in Spain and their social integration, expressly mentions the competence of Spanish consular authorities to issue emergency travel documents or safe-conducts for foreign citizens. Finally, the Royal Decree 342/2012, 10 February 2012, on the structure of Foreign Affairs and Cooperation Ministry determines the organs of the Ministry in charge of providing consular assistance, consular protection and diplomatic protection for Spanish citizens.

C) *Right to environment*⁵⁴. The Spanish Constitution sets out that everyone has the right to enjoy an environment suitable for the development of the person, as well as the duty to

⁵⁴ The idea of a human right to environment was not openly defended until 1972, in Stockholm, and since then, has been repeatedly linked to the right to development. After the Rio Declaration the right to the environment can be identified with the right to a sustainable development. The Charter of Fundamental Rights for the European Union assumes in Article 37 relating to the Environmental protection that a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development. Whereas the text of the European Convention for the Protection of Human Rights and Fundamental Freedoms does not recognize a right to environmental protection, the European Court of Human Rights in the case of *López Ostra v. Spain* (judgment of 9 December 1994) accepted that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in a way as to affect their private and family lives adversely. After this first case a following judgment confirmed the environmental dimension of the European Convention on human rights. In the cases of *Guerra and others v. Italy* (judgment of 19 February 1998), the Court holds, therefore, that the respondent State did not fulfill its obligation to secure the applicants' right to respect for their private and family life because the applicants waited for essential information that would have enabled them to assess the risks they and their families might run if they continued to live in Manfredonia. Since then the European Court of Human Rights has been called upon to develop its case law in environmental matters on account of the fact that the exercise of certain Convention rights may be undermined by the existence of harm to the environment and exposure to environmental risks. Regarding neighbour's noise in the case of *Moreno Gómez v. Spain*, judgment of 16 November 2004, the applicant complained of noise and of being disturbed at night by nightclubs near her home. She alleged that the Spanish authorities were responsible and that the resulting noise pollution constituted a violation of her right to respect for her home. In view of the volume of the noise, at night and beyond permitted levels, and the fact that it had continued over a number of years, the Court found that there had been a breach of the rights protected by Article 8 of the Convention. Although the City Council had used its powers in this sphere to adopt measures (such as a bylaw concerning noise and vibrations) which should in principle have been adequate to secure respect for the guaranteed rights, it had tolerated, and thus contributed to, the repeated flouting of the rules which it itself had established during the period concerned. In these circumstances, it was found that the applicant had suffered a serious infringement of her right to respect for her home as a result of the authorities' failure to take

preserve it (Article 45). The public authorities shall safeguard rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment, by relying on essential collective solidarity.

Question 2 – Scope and limits of the right (including balancing with other rights)

- ✓ What is the scope and what are the limits of each of these rights? Are there any deficiencies in this regard (eg non-compliance with EU or ECHR standards)? How are they balanced against other rights, values or interests?

A) *Freedom to associate*. Spain has adopted a wide formulation on the right to associate⁵⁵. In general, associations must be democratic in their functioning. Denominations accorded to them cannot be contrary to the law nor constitute a breach of fundamental rights. Spanish Associations must have their headquarters in Spain. Associations created abroad and usually acting in Spain need at least one delegation and a domicile therein.

In principle, there is no right of association for persons aged under 14 nor for persons deprived of their civil capacity to associate⁵⁶. Moreover, the right constitutionally guaranteed

action to deal with the night time disturbances, the Court held that Spain had failed to discharge its positive obligation to guarantee her right to respect for her home and her private life, in breach of Article 8 of the Convention.

⁵⁵ In conformity with this wide conception –in a different way to some countries deeply concerned with specificities surrounding associations (particularly regarding trade unions)- Spain made no reservation concerning this right when acceding to international human rights treaties. In a very different way see e.g. New Zealand who made a reservation upon its ratification on ICCPR on 28th December 1978 that states: “*The Government of New Zealand reserves the right not to apply article 22 as it relates to trade unions to the extent that existing legislative measures, enacted to ensure effective trade union representation and encourage orderly industrial relations, may not be fully compatible with that article.*” (<http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/international-human-rights-instruments/international-human-rights-instruments-1/international-covenant-on-civil-and-political-rights>).

⁵⁶ But according to Organic Law 1/1996, 15th January (SOJ, nº 15, 17 January 1996), Childhood is not excluded of the right to associate to entities concerning the enjoyment of its rights. Persons with disabilities are not excluded unless they have been submitted to a judiciary process lifting their capacity and even in such cases there must be a specific restriction of the right to associate. In other cases, their capacity could be supplemented by their guardian (*tutor/curador*). In fact, recent Legislation takes into account the existence of Associations of people with disabilities and provides for their development with public support (e.g. art. 74.4 Law (Castille-La Mancha) 7/2014, 13th November, CMOJ, 2 December 2014).



does not cover private associations created by the State to develop public functions of administrative character⁵⁷.

The right to association is somewhat restricted in the case of members of the Judiciary⁵⁸ – including Prosecutor Office⁵⁹-, in the case of members of the Army –including *Guardia Civil* (a police force under military discipline)- and on Police Corps⁶⁰. With a view to conciliate those restrictions with the right to association recognized by art. 11 ECHR, Spain submitted a reservation when acceding to the European Convention on Human Rights stating that:

“Spain makes reservations in respect of the application of the following provisions: Article 11, insofar as it may be incompatible with Articles 28 and 127 of the Spanish Constitution. Brief statement of the relevant provisions:

Article 28 of the Constitution recognises the right to organise (inside labour), but provides that legislation may restrict the exercise of this right or make it subject to exception in the case of the armed forces or other corps subject to military discipline and shall regulate the manner of its exercise in the case of civil servants.

Article 127, paragraph 1, specifies that serving judges, law officers and prosecutors may not belong to either political parties or trade unions and provides that legislation shall lay down the system and modalities as to the professional association of these groups.⁶¹

Such constraints concerning freedom to association in some Police corps were questioned before the European Court of Human Rights in a case against Spain, recently dismissed⁶².

⁵⁷ The Constitutional Court (plenary) Ruling 67/1985 of 24th May 1985.

⁵⁸ Art. 401, Organic Law 6/1985, 1st July (*SOJ*, n° 157, 2 July 1985). Resolution of 28 February 2011 of General Council of Judiciary (CGPJ) enacts Regulation 1/2011 concerning Judicial Professional Associations.

⁵⁹ Art. 54, Law 50/1981, 30th December; *SOJ*, n° 11, 13 January 1982.

⁶⁰ As for members of the Army, their participation is forbidden in trade unions, but they can create or join specific professional associations (see arts. 7 and 33-45, Organic Law 9/2011, 27th July; *SOJ*, 180, 28 July 2011). In the case of the *Guardia Civil* there are similar provisions (see arts. 9 and 11, Organic Law 11/2007, 22th October; *SOJ*, n° 254, 23 October 2007).

⁶¹ *OJ*, n° 243, 10 October 1979. English text accessible in < <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CM=8&DF=09/04/2015&CL=ENG&VL=1>>. Section (article) 28 refers to Workers rights. Although it provides for eventual restrictions concerning public servants further Legislation passed did not introduce any (See arts. 14.p) and 15.a), Law 7/2007, 12th April; *SOJ*, n° 89, 13 April 2007) Police corps excepted, see below.

⁶² At State level arts. 18-24 Law forbid them to join general trade unions, albeit they can create their own trade unions (Organic Law 2/1986, 13th March; *SOJ*, n° 63, 14 March 1986), but Autonomous



Anyway, the regulation of this freedom is decidedly liberal: Organic Law 1/2002 does not forbid the maintenance of associations acting on a discriminatory basis, nor the existence of associations whose activities promote hate or violence or justify terrorist acts, through the participation or even command of people previously condemned for such acts. In those cases, the Law only looks at a restriction on public funding⁶³.

According to section 22.4 of the Spanish Constitution, control over associations is attributed only to Judicial Courts. Developing this provision Organic Law 1/2002 states that:

"1. Except in cases where dissolution is a result of will of their partners, associations can only be suspended in their activities, or dissolved by resolution motivated by the competent judicial authority.

2. The dissolution of associations may only be declared in the following cases:

a) When having the status of conspiracy, according to the criminal laws.

b) For the reasons provided in special laws or in this Act, or when dissolved or declared null by the application of civil law.

3. In the processes concerning the preceding paragraph a), the competent court of its own motion or on application in part, may agree to provisional suspension of association until sentencing."

Therefore, there is no possibility of administrative control over associations⁶⁴ -even if they are created by foreigners⁶⁵- nor any power in the hands of the Administration to suspend

Communities with their own Police Corps (Basque Country, Catalonia and Navarre) have their specific Legislation (e.g. Foral Law 8/2007 (Navarre), 23th March, *SOJ*, nº 100, 26 April 2007). Concerning a recent controversy over those restrictions: see ECHR Judgement 21 April 2015, *Junta Rectora del Ertzainen nazional elkartasuna v. Spain* (no. 45892/09). The applicant is the executive committee of the independent trade union for the autonomous police force of the Basque Country, Ertzainen Nazional Elkartasuna (E.r.N.E.). This trade union was established in 1984 and is the largest union of ertzainas, the members of the Basque Country's police force, who operate in the territory of that Autonomous Community. Relying in particular on Article 11 (freedom of assembly and association), the applicant committee complains of the statutory prohibition on strike action by ertzainas and, in particular, of the refusal of its request for authorisation to call a strike in 2004 (http://www.echr.coe.int/Documents/CP_Spain_ENG.pdf). But its plea was dismissed by ECHR.

⁶³ Art. 4, paras. 5 and 6, Organic Law 1/2002. Although, art. 61 Law 29/2011, 22nd September (*SOJ*, nº 229, 23 September 2011) concerning the protection of terrorism victims confers to the Government power to ask the judicial authorities to prosecute activities offending them.

⁶⁴ Otherwise the enjoyment of the right would be conditioned by the will of Public Authorities. Consequently, access to public registries cannot be denied unless there is a clear constitutional restriction. See the Constitutional Court (Plenary) Ruling 219/2001 of 31th October 2001; citing ECHR Judgement of 20th May 1999, *Rekvenyi v. Hungary*, Application nº 25390/94.



or to dissolve associations presumed to be unconstitutional or unlawful. This solution –a clear reaction against repressive measures on associations during the Dictatorship- is clearly wider than those retained in international human rights treaties⁶⁶.

Undoubtedly, the most controversial issue concerning freedom to associate is linked with political parties and associations presumed to have connections with ETA terrorism. In this line, some judicial decisions dissolved youth “patriotic” (*abertzale*) and convicted-relief associations created in Basque Country⁶⁷; even in this case, restrictive measures were adopted by the European Union⁶⁸. Further, the adoption of Organic Law 6/2002, 27th June, on Political

⁶⁵ In this sense, former Organic Law 7/1985, 1st July on Aliens (*SOJ*, n° 158, 3 July 1985) –now abrogated- tried to reduce the right to association for aliens providing an administrative control in those cases (art. 8.2). This provision was declared unconstitutional by Ruling 115/1987 of the Constitutional Court (Plenary) of 7th June 1987 as incompatible with the guarantee of right to association recognized to all people by section 22.4 of the Spanish Constitution and not restricted in such a case by additional conditions -authorized in other situations by the Legislator- as provided by art. 13.1 of Spanish Constitution (on aliens). Furthermore, the Constitutional Court even declared unconstitutional provisions concerning the power to regulate specific issues on Associations by Public Authorities, referred in Organic Law 1/2002. See the Constitutional Court Ruling 133/2006, 27th April.

⁶⁶ On the one hand, Article 22.2 of the International Covenant on Civil and Political Rights provides that “No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.”; certainly there is an obligation of result asking State Parties to provide for an implementation of this right that has to be effective (*Cfr.* SEIBERT-FORT, A., “Domestic Implementation of the International Covenant on Civil and Political Rights according to its article 2, para 2”, *The Max Planck Yearbook of United Nations Law*, vol. 5, 2001, pp. 399-472, on p. 402). On the other hand, Article 12 of the European Convention on Human Rights –which clearly influenced ICCPR provision- states that “No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.” Finally, art. 12 of the European Charter of Fundamental Rights simply provides for the freedom of association “at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests”. In the case of EU it must be remembered that proposals - dating from 1992- concerning a regulation on European Associations were abandoned in 2006.

⁶⁷ This was the case for *Jarrai-Haika* and *Segi*, which were involved in public disturbances (*kale borroka* i.e. street fighting) in the Basque Country and Navarre. A first Ruling 27/05 on dissolution was adopted by the National High Court on 20th June 2005 and confirmed later by the Supreme Court (2nd Chamber-Criminal) on its Ruling of 19 January 2007. A similar ruling was made for *Gestoras Pro-amnistia* in the Ruling 39/08 of the National High Court of 19th September 2008. The words in italics are Basque (*euskera*).

⁶⁸ *Segi* and *Gestoras Pro-Aministia* were subject to restrictive measures adopted by the Council of the European Union in 2001 (see Common Position 2001/931/PESC of the Council, 27th December 2001;



Parties, was highly debated because of its provisions on this matter. Further judicial actions by forbidden political parties were dismissed by judicial courts and the Constitutional Court. Twice ECHR also dismissed complaints on presumed violation by Spain of article 11 of the European Convention⁶⁹.

Freedom of association for aliens is widely recognized. First of all, Constitutional provision concerning this right is formulated in generic terms and it does not distinguish between Spaniards and foreigners⁷⁰. In this way, according to constitutional jurisprudence there is no possibility to forbid or to annihilate the “essential content” of this right in the case of aliens, even if they are residing in Spain irregularly⁷¹. In this sense, the Constitutional Court affirms in its Ruling 236/2007 that:

OJ(EU) n° L 344, p. 93). Further judicial actions were dismissed by the European Courts. See ECHR Decision 23rd May 2002, n.º 6422/02 and 9916/02, *Segi y otros y Gestoras pro Amnistía v. (15) Member States of the European Union*, according to which those measures were “embarrassing but the link is much too tenuous to justify the application of the Convention” (*Recueil des arrêts et décisions*, 2002-V); CFI Orders 7th June 2004, *Segi y otros c. Consejo* (T-338/02, *Rec.* p. II-1647), and *Gestoras ProAmnistía*, T-333/02, (not published in *Rec.*) and Rulings 27th February 2007, *Segi y otros c. Consejo*, C-355/04 P (*Rec.* 2007, p. I-1647) and *Gestoras Pro-Amnistía*, C-354/04 P (*Rec.* 2007, p. I- 1579). On these issues see SANTOS VARAS, J., “El control judicial de la ejecución de las sanciones antiterroristas del Consejo de Seguridad en la Unión Europea”, *Revista Electrónica de Estudios Internacionales*, n° 15, 2008 (in Spanish); accessible on < <http://www.reei.org/index.php/revista/num15/articulos/control-judicial-ejecucion-sanciones-antiterroristas-consejo-seguridad-union-europea>>.

⁶⁹ See *Herri Batasuna and Batasuna v. Spain, Etxebarria and Others v. Spain and Herritarren Zerrenda v. Spain Herri Batasuna and Batasuna v. Spain*, Judgements of 30 June 2009 (They concern the suspension of the activities of the parties in question declared illegal and dissolved under Law no. 6/2002, electoral groupings having pursued the activities of political parties that had been declared illegal and dissolved debarred from standing in municipal, regional or autonomous community elections and the same organizations barred from standing in the European parliamentary elections of June 2004 on grounds that their aim was to pursue the activities of three parties that had been declared illegal and dissolved); *Eusko Abertzale Ekintza – Acción Nacionalista Vasca (EAE-ANV) v. Spain*, Judgement of 7 December 2010 (After *Batasuna* and *Herri Batasuna* -among others- were declared illegal in 2003, certain candidatures in municipal elections and elections to the provincial councils in the Basque country and to the Navarre parliament were revoked). See http://www.echr.coe.int/Documents/CP_Spain_ENG.pdf.

⁷⁰ There are other sections in Title I (On Fundamental Rights and Liberties) of the Spanish Constitution where there is such a distinction: e.g. 14 (equality under the law); 19 (freedom to residence and movement); 23 (political participation), 29 (right to petition), etc.

⁷¹ The former Organic Law of 1985 was derogated by Organic Law 4/2000, 11th January (*SOJ*, n° 10, 12 January 2000; *corrigenda SOJ*, n° 20, 24 January 2000). At this time, Parliament was controlled by opposition parties. General Elections held in March 2000 were won by the right wing People’s Party. The new Government decided to introduce a drastic reform on Organic Law 4/2000. Then, a severe restriction on rights of aliens not residing legally in Spain –freedom to association, to affiliate to trade unions, to assembly, to education (non compulsory) and Legal Aid, among others- was introduced by



“The right of association is therefore linked to human dignity and the free development of personality as it protects the value of sociability as an essential dimension of the person and as an element necessary for public communication in a democratic society. Since this is a right whose content is linked to this essential dimension, the Constitution and international treaties “projected it universally” and hence is not constitutionally permissible the denial of its exercise to foreigners who lack proper authorization from or residence in Spain. This does not mean, as we have said concerning the right of assembly, that it is an absolute right, and therefore the legislature may establish limits on the exercise by any person provided that it respects their constitutionally declared content”⁷²

Then, although Organic Law 1/2002 makes no distinction regarding beneficiaries of the right to association on a nationality-linked basis, following overruling by the Constitutional Court, now the Organic Law 2/2009 expressly states that “Aliens enjoy freedom to association in the same conditions as Spaniards”⁷³.

Notwithstanding, the higher risk of Spain’s liberal regulation concerns the protection of other rights that could be threatened by the exercise of the freedom to associate. It is well known that the State’s room to regulate private relationships between members of an Association in the interest of effective enjoyment of this freedom is probably one of “the most pressing contexts” where the State has a positive obligation” –under the terms of ECHR- “to control private action that infringes other individuals’ rights”⁷⁴. Nevertheless, It should be noted that, until now, there has been no significant conflict on these issues (terrorism-linked associations excluded)⁷⁵.

Organic Law 8/2000, 22nd December (*SOJ*, nº 307, 23 December 2000; *corrigenda SOJ*, nº 47, 23 February 2001), but the Constitutional Court has rejected those restrictions declaring them unconstitutional: see below.

⁷² Ruling 236/2007, 7th November of the Constitutional Court, at 7. This interpretation was reiterated by CC Rulings 259/2007, 19th December, and 260 to 265/2007, 20th December.

⁷³ Organic Law 2/2009, 11th December (*SOJ*, nº 299, 12 December 2009), Single Article, 10, amending art. 8 of Organic Law 8/2000.

⁷⁴ HARRIS, D., BOYLE, M., BATES, E., BUCKLEY, C., *Law of the European Convention on Human Rights*, 3rd ed., Oxford UP, 2014, p. 738.

⁷⁵ See above. In fact, according to the Constitutional Court freedom to association includes the right of partners to establish by themselves their organization. It extends to regulation in the Statutes of the causes and procedures of expulsion of partners whilst judicial control can only check whether there was a reasonable basis in the organs of associations to take the relevant decision (CC (2nd Chamber) Ruling 218/1988 of 22th November 1988. In the same way, the Supreme Court (1st Chamber-Civil) Judgment of 24th March 1992; the Supreme Court (1st Chamber-Civil) Judgment of 19th January 1999. Concerning the test of reasonableness on these issues see the Constitutional Court (2nd Chamber) Ruling 104/1999 of 14th June 1999; Supreme Court (1st Chamber-Civil) Judgment of 2nd March 1999.



B) Right to Diplomatic protection. The limits of this right are those set up by international law. Basically and in as much as this right certainly encompasses three different façades (diplomatic protection, consular protection and consular assistance), there are specific limits for the right of diplomatic protection, given that, in spite of the fact that the internal law of Spain proclaims it and conceives it as a right, international law does not foresee a right to diplomatic protection, which is considered an exclusive right of the State, which can renounce it even to the jeopardy of the victim.

In international law availability of these three institutions is subjected to nationality. States can only protect their nationals abroad; therefore nationality has been erected as a condition to exert the right. This rule can only be avoided when the receiving State and the sending State have so agreed by means of a treaty, and, in spite of the suggestion of the Green Paper on Diplomatic Protection and Consular Protection of Union Citizen in third Countries that consular clauses on these issues be part of the treaty policies of EU members, Spain does not enforce it.

No express references are made in Spanish Laws to nationals of the European Union when it comes to diplomatic protection, consular protection and consular assistance. This could well cast doubts on the applicability of the right to EU nationals before courts, for the time being there are no precedents.

C) Right to environment. In Spain, the national Parliament has enacted specific legislation on natural heritage and biodiversity, assessment of the effects of certain plans and programmes, coastal areas, continental water, the national parks network, environmental liability, integrated pollution prevention and control, the quality and protection of the air, waste and waste packaging, environmental noise, geological sequestration of CO₂, access to information and public participation in environmental matters.

The regions (*Comunidades Autónomas*) may establish a higher level of protection to the basic legislation, but not a lower one.

Question 3 – Interpretation and application

- ✓ How are each of these rights interpreted and applied by courts? Are there any deficiencies in this regard?

A) Concerning Freedom to association, only activities related to associations with presumed links with terrorism and political parties were discussed. However, legal restrictions were considered in conformity with the Spanish Constitution and ECHR.

B) Right to Diplomatic protection. The interpretation of the different set of rules previously mentioned by courts and other competent organs, in the view of Spanish law and



Constitutional principles, fills in some of the gaps. The Spanish Supreme Court has declared that it is an obligation of the Spanish Administration to protect Spaniards abroad. Should it fail to perform this duty, the victim could claim compensation (Supreme Court, 3rd Chamber, Judgment 29th December 1986). In cases in which Spanish authorities have refused to exert diplomatic protection (Supreme Court, 3rd Chamber, Judgement 16th November 1974) or where Spain has acted in a non-satisfactory way (Supreme Court, 3rd Chamber, Judgements 29th September 1986 and 28th April 1987) a right to compensation arose (¿surgió?), the amount of the compensation depends on which of the above mentioned cases is involved and the other factors surrounding the case.

C) Right to environment. Certain natural resources in Spain are considered public domain (territorial sea, beaches, rivers or certain forests). Their public use and the temporary exclusive use by concession are controlled in order to ensure their integrity and preservation. In general, the establishment of environmental permits are used which allow the public administration to supervise that the private activity is developed in accordance with the requirements of the relevant environmental legislation (wastes, waste and chemicals, emissions of pollutants, etc.). In other cases, a prior communication or a responsible declaration must be presented to the public administration before the beginning of the activity, subjected to ex post supervision by the public authorities.

Other preventive techniques are the certification or the regulation of the market of pollutions fees (CO₂). The Spanish law also establishes a system of sanctions, including criminal and administrative, and civil liability for causing environmental damage. For the enforcement of this legislation specialised units exist in the law enforcement agencies and in the Public Prosecutor's Office.

Question 4 – Case law protecting civil rights

When rights are recognised through case law, how are they enforced? Is there a relevant doctrine of precedent? Can violation of judge-made principle be invoked in courts? Must judges bring up of their own motion civil rights violations? Etc

A) As it concerns *Freedom to association*, there are no relevant developments concerning this question.

Anyway, as a matter of principle in Spanish Law rights are created by the Constitution or Law (Organic and Ordinary). No case law can fund civil rights and liberties. Notwithstanding, the precise extent of civil rights could be clarified by a judicial decision; in such a case lower jurisdictions are subject *de facto* to *stare decisis* principle in relation to jurisdictions in the



apex⁷⁶: the Higher Courts in the Autonomous Communities, the Supreme Court at State level, and even the Constitutional Court –but only when it relates to “essential content” of rights proclaimed by the Constitution. Judges cannot bring up on their own motion presumed civil rights violations; these can be introduced only by the affected parties and the Public Prosecutor’s Office.

B) Right to environment. Spain's Constitutional Court in its Ruling 150/2011, of 29th September 2011 has addressed the problem of acoustic pollution. What does not follow from that statement, and therefore requires individualized proof, is the impact of the background noise within each individual housing, which oscillates on its own merits among various scales ranging from a simple excess, which is unlawful because contrary to the ordinance and may even be contrary to the right to an adequate environment ex art. 45 EC but does not injure any fundamental right and a surplus of such magnitude that prevents even more intense peaceful enjoyment of the home or that is in violation of the right to physical and moral integrity. The actual impact will depend on the identifying conditions of each house, such as its height (in this case it was the fourth floor where necessarily outside noise has to reach with more attenuated intensity than on the lower floors) and, above all, the insulation of the façade, a variable which the report of a Professor of Applied Physics recognized as principal. Also, if relevant the impact on people's sleep, as in this case, it is necessary to consider the distribution of the housing. It is not the same a room contiguous with the outer wall as one that is interior. Finally, housing located in an acoustically saturated zone can, depending on a number of particular conditions, stand a sound level that is within the limit of the ordinance, or which exceeds, or exceeds it in such a way that qualified as preventing the peaceful enjoyment of the home and injuring the right to home privacy, or which exceeds even more intense terms involving a violation of the right to physical and moral integrity.

Mention should be made of the dissenting opinion issued by Judge Jiménez de Parga in Ruling of the Constitutional Court 119/2001, of 24th May, in which he said “the convenience of talking about a triple step of constitutional protection, downstream, running from the right to physical and moral integrity (section 15 SC) to the right to an adequate environment for the development of the person (section 45.1 SC), to the right to home privacy (section 18 SC) “and that “the free development of personality (section 10.1 SC) is affected by the acoustic saturation, which violates the personal and family privacy (section 18.1 SC), both inside and outside the home”.

⁷⁶ Although Civil Rights Systems -like Spain's- do not recognize a precedent, of course “there is a functioning *de facto stare decisis*: lawyers know that cases ‘in point’ are a good argument and judges often support their decisions with reference to previous decisions” (AHUMADA RUIZ, M.A., “*Stare decisis* y Creación judicial de Derecho (constitucional). (A propósito de El precedente constitucional en el sistema judicial norteamericano, de Ana Laura Magaloni Kerpel)”, *Revista Española de Derecho Constitucional*, nº 67, Enero-Abril 2003, pp. 351-365, in pp. 363-364).



However, it cannot be ignored that section 45 of the Spanish Constitution contains a guiding principle, not a fundamental right. Courts should ensure respect for the environment, no doubt, but "in accordance with provisions of the laws" to develop the constitutional provision (section 53.3 SC).

The Spanish law, by its own momentum and coming under the provisions of Community law, has developed a significant body of standards for environmental protection. But it is noteworthy that such rules provide preventive and corrective measures primarily administrative in nature, given the complexity of the problems and their collective reach, as is common in other European countries.

The Supreme Court (3rd Chamber) in its judgement of 23rd March 2010 estimated the administrative appeal filed by the legal representation of the Ecologists in Action-CODA Association against the Council of Ministers Agreement of 15th June 2007, by which the power station Combined Cycle Morata de Tajuña in the province of Madrid was declared of public utility.

Note that Spain has ratified the UNECE United Nations, on access to information, public participation in decision-making and Access to Justice in Environmental Matters, carried out at Aarhus (Denmark), on 25th June 1998⁷⁷, which, in Article 9 makes provision in respect of the possibility of instituting legal proceedings or otherwise to challenge the legality, in substance or in terms of procedure, of any decision, act or omission which falls within the scope of the provisions relating to public participation in the decisions about activities that may have a significant effect on the environment, and promotes the recognition of the legitimacy of those associations and NGOs which work in defence of environmental protection, and therefore binding on the court to resolve contentious administrative resources in the environment, because of the nature and specificity of environmental interests, to conduct a non-restrictive interpretation of Article 19.1 b) of the Contentious Administrative Jurisdiction Act, based on the principles laid down in the international environmental report, to ensure effective judicial protection of environmental interests postulates Treaty .

The Law 27/2006 of 28 July, by which the rights of access to information, public participation and access to justice in environmental matters recognizes regulated as a guarantor instrument of environmental democracy, the right of access to justice of the public and, therefore, of legal persons established in order to protect the environment, to bring administrative proceedings brought against decisions attributable to a public authority that violate environmental legislation, as the environment is, according to Article 45 of the Constitution, a legal right to the enjoyment of which all citizens are entitled and whose conservation is an obligation incumbent on public authorities and society as a whole, which encourages everyone the right to demand that public authorities take the necessary measures to ensure adequate protection of the environment.

⁷⁷ Instrument of ratification published in *SOJ*, 16th February 2005 and that came into force on 29th March 2005

Question 5 – Judicial enforcement institutions and bodies

- ✓ Which institutions are responsible for the enforcement of these rights in your country? Please expose here the structure of the judicial system of the country under study. Indicate, in particular, whether the country under study has a constitutional court or equivalent body. If not, how is compliance with international, European (including EU) and national civil rights guaranteed. Explain the role of other relevant bodies (eg ordinary courts, specialised courts, etc.)

According to Spanish Law the protection of fundamental rights -including civil rights- is a task for the judiciary. When a breach of these rights is presumed, individuals can introduce an action (*amparo judicial*) according to the special procedure of protection of fundamental rights accorded by the Spanish Constitution (section 53), in a preferential way⁷⁸. A dismissal of this request can be contested before the Constitutional Court through an appeal (*amparo constitucional*) in conformity with sections 53.2 and 161.1.b) of the Spanish Constitution and arts. 41 to 58 of Organic Law 2/1979⁷⁹. Also, it must be remembered⁸⁰, that when considering the protection of human rights (i.e. fundamental rights and civil rights) the Judiciary and the Constitutional Court shall take into account the interpretation of these rights provided by the Universal Declaration on Human Rights and treaties and conventions –e.g. ECHR- on such issues ratified by Spain (Spanish Constitution, section 10.2). According to the Constitutional Court:

"That decision of the Constituent expresses the recognition of our agreement with the range of values and interests that these instruments want to protect... (and) our will as a nation to join an international legal order conceived for the defence and protection of human rights as foundation of the State organization"⁸¹

Therefore, such interpretation also includes –since its very beginning- the jurisprudence of the European Court of Human Rights concerning those rights. Furthermore, since its adoption in 2000, the European Charter of Fundamental Rights forms part of this *acquis*, and later,

⁷⁸ Specific regulation for this procedure is provided by Law 62/1978, 26th December (*SOJ*, nº 3, 3 January 1979) on criminal issues, by arts. 249-250 of Law 1/2000, 7th January (*SOJ*, nº 7, 8 January 2000) on civil matters (including labour affairs), and arts. 114 to 122 of Law 29/1998, 13 July (*SOJ*, nº 167, 14 July 1998) on administrative questions.

⁷⁹ *SOJ*, nº 239, 5th October 1979.

⁸⁰ See Country Report: Spain, D-7.1.

⁸¹ Constitutional Court Ruling 91/2000, 30th March, para. 7.

Rulings of EUCJ on fundamental rights have also been included. Then, when considering a possible breach of *freedom to association* this general doctrine should be applied.

More specifically, concerning *Diplomatic Protection* this right is to be enforced fundamentally before Foreign Affairs Administrations: any claim must be raised before the Administrative Jurisdiction, which is an ordinary jurisdiction, according to patterns previously described. Access to the Constitutional Court is only likely in the event that the claim before ordinary courts does not remedy the violation of the right to diplomatic protection, consular protection or consular assistance, resulting in a subsequent violation of the right to a fair trial, otherwise no constitutional protection is foreseen.

As for the *right to environment*, a specific protection is not foreseen, but if there is a link between this right and other rights proclaimed in the Spanish Constitution (e.g. law to privacy or family life), as it was considered *par ricochet* in ECHR Judgement on 9th December 1994, *López Ostra v. Spain*⁸² -disavowing the previous Spanish Constitutional Court's rejection of such claim- there must be a possibility to make a judicial or a constitutional *amparo* appeal, following the lines previously described.

- ✓ How are these institutions regulated at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other)?

As previously explained, as a Civil Law system, Spanish regulation on these issues is built on a Legal basis. The Spanish Constitution provides for a general framework concerning the protection of fundamental rights. More precise developments are contained in Laws (organic or ordinary) on Constitutional jurisdiction and judiciary procedures, passed by the (Central) State.

- ✓ Is the independence of these institutions and organs guaranteed? If so, how? Have there been concerns related to the independency of the judiciary in the country of study, which could undermine the effective enforcement of the selected civil rights? Please indicate the different modes and modalities of enforcement of civil rights carried out by the different judicial institutions involved.

According to the Constitution and Organic Laws developing it, the Judiciary and the Constitutional Court are independent. As for the Constitutional Court, Organic Law 2/1979 says:

⁸² Application n° 16798/90.



“The Constitutional Court as a supreme interpreter of the Constitution is independent from all other constitutional organs and it is only subject to the Constitution and this Organic Law”⁸³

Regarding the Judiciary, the Spanish Constitution states:

“1. Justice emanates from the people and is administered on behalf of the King by judges and magistrates members of the Judicial Power who shall be independent, shall have fixity of tenure, shall be accountable for their acts and subject only to the rule of law.

2. Judges and magistrates may only be dismissed, suspended, transferred or retired on the grounds and subject to the safeguards provided for by the law.

3. The exercise of judicial authority in any kind of action, both in ruling and having judgements executed, is vested exclusively in the courts and tribunals laid down by the law, in accordance with the rules of jurisdiction and procedure which may be established therein.”⁸⁴

In line with those provisions, all Judges are irremovable. Organic Law 2/1979 –on Constitutional Court- and Organic Law 6/1985 –on Judiciary- strictly regulates the procedures for the impeachment of Judges. Also, further guarantees on the independence of the judiciary are provided through its own (autonomous) governing body, the General Council on Judiciary (CGPJ), regulated by Organic Law 6/1985⁸⁵.

Notwithstanding, there is a serious concern on effective independence of Constitutional and Ordinary Judges and Tribunals, in view of the fact that nomination of Constitutional Judges emanates from the Government and Parliament –with a serious risk of politicization⁸⁶. As for the Judiciary, not the access, but the promotion of judges to higher Courts and the Supreme Court is in the hands of the CGPJ, whose members are also partially elected by the Government and Parliament, with the same danger of politicization.

As for the *Diplomatic Protection*, this right is constitutionally protected. There is no concern in this area. However, the special characteristics of this right empower the Government to reject the claim when the interest of the State is at stake, that is subsequently followed by compensation, as previously stated.

⁸³ Art. 1, Organic Law 2/1979, *cit*.

⁸⁴ Section 117.

⁸⁵ It must not be forgotten that previously examined restrictions on Judges' freedom to association (see above, II, 2) are closely linked with the need to preserve their Independence and impartiality. See SERRA CRISTÓBAL, R., “El derecho de asociación de los Jueces: asociacionismo profesional y asociación del Juez a asociaciones no profesionales”, *Revista Española de Derecho Constitucional*, nº 83, 2008, pp. 115-145 (in Spanish); accessible on <file:///C:/Users/Administrador/Downloads/Dialnet-EIDerechoDeAsociacionDeLosJuecesAsociacionismoProf-2702881.pdf>.

⁸⁶ Nowadays, the President of the Constitutional Court -who was appointed as a Judge by the Government- is a former affiliate of the People's Party, the governing Party today.

- ✓ What are currently the main judicial procedures available to remedy or compensate for violations of the selected civil rights (eg judicial review, damages, emergency measures, etc.)? Indicate for each of them important information related in particular to time limits, costs, legal aid availability, length of proceedings, type of actions (eg collective action, class action), admissibility criteria (including standing conditions, delays, etc) as well as merit conditions (acceptable grounds, substantive conditions, degree of control, evidential aspects, burden of proof, etc.). What are the consequences of successful or unsuccessful legal actions under each of the procedures (annulment, compensation, sanctions, etc.)?

There is a wide possibility of judicial review in every case where there is a breach of fundamental (civil) rights. Judicial and Constitutional protection could assign a reparation for damages –if there is proof of economic losses. Sometimes even moral damages are compensated. Provisional measures could be granted in exceptional cases, when there is evidence that the length of the judicial process could endanger the enjoyment of the right discussed⁸⁷.

Diplomatic Protection: The recourse to be used in this case is the judicial administrative (*contencioso-administrativo*) process, disciplined in article 25 Law 29/1998, 13 July 1998, on the Contentious-Administrative Jurisdiction. Every judicial process must pay Court fees, according to Law 10/2012, 20 November 2012⁸⁸, the fee is calculated on the basis of the amount claimed by the suit. The success of the action conveys the payment of due compensation calculated on the basis of the prejudices impaired, the diligence of the State and the actual conduct of the victim; the cleaner the hands, the higher the amount.

- ✓ Is the judiciary effective and/or trusted to protect fundamental rights, or do people turn to alternative modes of action in order to protect these rights (ie demonstrations, media involvement, social network activities, etc)?

Generally, until now people have confidence in the judicial process, although in specific cases related to the *right to environment*, alternative methods to protect it were registered. Concerning the *right to Diplomatic protection*, albeit this right is not fundamental according to the Spanish Constitution, however, the judiciary has up to now protected it very efficiently.

⁸⁷ As for Legal Aid, see below.

⁸⁸ *SOJ*, nº 280, 21 November 2012



Question 6 – Non-judicial enforcement institutions and bodies relevant for the enforcement of the selected civil rights

- ✓ Are there non-judicial/ administrative procedures to enforce the selected rights against public authorities or private actors involved in public policy activities (eg delivery of public services, quasi-regulatory bodies, etc)?

Freedom to Association. When associations are participating in public calls to benefit of public funding, administrative remedies are available before public institutions. When public policy activities are deserved by private actors, claims can be submitted by affected Associations to Public Administration for redress.

Diplomatic Protection. According to Spanish Law, it is previously necessary to initiate a claim before the Spanish Foreign Affairs Ministry. When it comes to consular protection and consular assistance, it begins by a request before the Directorate-General of Spaniards Abroad and Consular and Migratory Affairs (as is stated in article 15 Royal Decree 342/2012, 10 February 2012, on the Structure of the Foreign Affairs and Cooperation Ministry⁸⁹, as amended by Royal Decree 1/2015, 9 January 2015⁹⁰). The Consul can protect and assist according to international law, the Vienna Convention on Consular Relations. If the request is turned down there is a voluntary administrative review before the Minister of Foreign Affairs. When diplomatic protection *strictu sensu* is concerned, the request is directly addressed to the Minister.

After the administrative procedure, the claimant is free to set up a judicial procedure before the National High Court (*Audiencia Nacional*), in the administrative (*contencioso-administrativo*) jurisdiction, following the pattern previously described.

- ✓ Are there non-judicial procedures available to uphold these rights against private actors (eg employers, landlords, etc)?

There are no significant examples on the rights concerned⁹¹.

⁸⁹ SOJ, nº 36, 11 February 2012

⁹⁰ SOJ, nº 9, 10 January 2015

⁹¹ But it must be taken into account that alternative means to conflict resolution before public and private structures are open in the case of Consumer associations and other customer organizations (e.g. Transport Boards). Even recently (April 2015), a process of reforms in Consumer Law –concerning those specific issues and aimed to transpose EU Directives- was sent to the State Parliament by the Government. Notwithstanding, those procedures do not concern freedom to association itself, nor any other right here studied.



- ✓ Which organs, institutions, or bodies contribute to promoting and enforcing the selected civil rights? (eg equality body, ombudsperson, governmental supervisory authorities, etc.)

The most significant role is incumbent to the State's Ombudsman (*Defensor del Pueblo*) -but also the Autonomous Communities' Ombudsmen, even at a local level (*Defensor del Ciudadano*), where they exist. Information concerning those organs has been submitted in our previous Report⁹².

As for the *Diplomatic Protection*, the *Defensor del Pueblo* (ombudsman) could run a claim for maladministration, should the Ministry fail to exert diplomatic protection.

C) *Right to environment*. The Ombudsman is assigned, under the provisions of section 54 of the Spanish Constitution as high commissioner of Parliament for the defence of the rights under Title I of the Constitution, fitting Section 45 of the Spanish Constitution within said Title I. Section 45 of the Spanish Constitution is integrated within Chapter III ("of the guiding principles of social and economic policy") of Title I of the Constitution, providing for Section 53.3 of the Constitution that the recognition, respect and protection of the principles recognized in that chapter guide legislation, judicial practice and actions of public authorities. However, these principles may be invoked only before the ordinary courts in accordance with the provisions of the laws that implement them.

- ✓ How are procedures before these bodies regulated at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?

Regulation about Ombudsmen and procedure related to them has been provided in our previous Report⁹³.

Diplomatic Protection. The administrative bodies: The Ministries are regulated by Government Law 50/97, 27 November 1997⁹⁴, and Law 30/92, 26 November 1992, on the Regime of Public Administration and Common Administrative Procedure⁹⁵. The distribution of competences amongst the Directorate-Generals is covered by Royal Decree, being currently in force the Royal Decree 342/2012, 10 February 2012, on the Structure of the Foreign Affairs

⁹² See Country Report (Spain) D.7.1, 30th April 2014.

⁹³ See D.7.1.

⁹⁴ *SOJ*, n° 285, 28 November 1997

⁹⁵ *SOJ*, n° 285, 27 November 1992



and Cooperation Ministry, as amended by Royal Decree 1/2015, 9 January 2015, on the reforms of Public Administration (both cited above).

- ✓ What is their respective mandate? Were/are there discussions as to expanding, or reducing their mandate?

Their significant role is not disputed. Albeit budgetary restrictions have affected their functioning and in some cases –e.g. Principality of Asturias- the institution has been suppressed for these reasons⁹⁶.

Diplomatic Protection. The Minister is entrusted overall with the mission of protecting Spaniards abroad (be read, and EU citizens where it is pertinent), according to article 1 of Royal Decree 342/2012, 10 February 2012, previously cited; the Directorate-General of Spaniards Abroad and Consular and Migratory Affairs is endowed with the competences set forth in article 15: consular action, consular protection of Spaniards (be read, including EU citizens if pertinent), consular assistance.

- ✓ What are their powers? (eg consultation, information-gathering, reporting, adjudication/decision-making, regulatory powers, etc)? Were there/are there discussions as to expanding, reducing their powers?

Their main tasks are linked with consultation, information-gathering and reporting. They do not have power to adjudicate or to regulate. Notwithstanding, hearings before Parliaments (both State and Autonomous Communities) and proposals issued by Ombudsmen have sometimes been taken into account in Legislative reforms.

Diplomatic Protection. These administrative bodies are competent to order diplomatic protection, consular protection or consular assistance.

- ✓ How independent are they from government, parliament, stakeholders? Please pay particular attention to powers of appointment, and termination of the mandate of actors, as well as the bodies' decision-making procedures.

The appointment of Ombudsmen corresponds to Legislatures. Their politicization is a serious risk –e.g. in the Principality of Asturias there was a “bad practice” according to which the Ombudsman (*Procuradora General*) was an affiliate to the Socialist Party (then in power) and his assistant was an affiliate to the People’s Party (then the main opposition party). Notwithstanding, in this case there was no evidence of *détournement* of their roles.

⁹⁶ See our previous Report D.7.1.



A) *Diplomatic Protection*. Concerning this right, the relevant actors are:

Consuls and civil-servants of the Ministry of Foreign Affairs are professionals and elected by public and concurrent procedure, immovable in their positions unless according to Civil-Servant Laws, either through promotion or by administrative procedure in case of sanction.

Ministers are freely elected by the President of the Cabinet.

Director-Generals are elected and can be removed by the Minister, the conditions being that he/she be a civil-servant and a graduate, engineer, doctor or architect.

C) *Right to environment*. In Spain, Law 27/2006, of 18th July, guarantees access to environmental information and the diffusion and availability of environmental information to the public⁹⁷. This right is guaranteed without any obligation to declare a certain interest. The right to public participation on environmental matters can be exercised through certain administrative organs (the Advisory Council on Environment, the National Council for Climate Change, the Council for the Natural Heritage and Biodiversity, the National Council of Water, etc.). In addition, direct participation (in person or by representative associations) is possible in most administrative procedures and in the elaboration of procedure, plans or programs on environmental matters.

Question 7 – Access to Justice

- ✓ Are civil rights related to access to justice (fair trial, due process, right to an effective remedy protected in the country of study, etc) effectively protected when it comes to the enforcement of the selected rights, and if so, how?

Of course. As it concerns *freedom of association* restrictions concerning aliens introduced by Legislature through successive Organic Laws (7/1985 and 8/2000) regulating this right were repeatedly annulled by the Constitutional Court, confirming the possibilities of judicial control⁹⁸.

In the case of *diplomatic protection*, it is perfectly protected, by means of the previously explained administrative (*contencioso-administrativo*) appeal and in the development of the judicial procedure every right thereto related is enforceable as it impinges on the action of the court.

⁹⁷ SOJ, nº 171, 19 July 2006.

⁹⁸ Cited above. Previously, some appeals before the Supreme Court against Regulations implementing those Organic Laws were also submitted and granted.



- ✓ Does the principle have a broad scope of applications, or are there exceptions?

In general terms, if there is an annulment of Law provisions made by the Constitutional Court there is no exception. Nevertheless, the Constitutional Court sometimes tries “to save” the content of the provisions questioned through its “constructive” (or positive) interpretation (*interpretación conforme*) according to the Constitution.

Concerning more specifically the *right to environment*, in Spain citizens, NGOs or any other entity who exercise the right of access to information may challenge before the administrative authorities any decision refusing the information requested and, if the denial decision is ratified, before the judicial authorities. Law 27/2006 allows a request of the access to information from natural or legal persons acting on behalf or by delegation of any public authority.

The decision adopted by the Public Administration is mandatory to the private person and is enforceable by coercive fines. In addition, in environmental matters, NGOs and other non-profit entities (under certain conditions) may exercise before the courts an *actio popularis* against any administrative decision, or the failure to adopt it, violating the environmental rules.

Question 8 – “Support structures”

- ✓ What is the role of NGOs or other civil society actors (eg legal entrepreneurs, etc.) in bringing awareness about modes of enforcement of the selected civil rights and in supporting actions to uphold the selected rights using judicial or non-judicial means? Please give as many details as possible and identify the most relevant actors.

A) Concerning *freedom of association* the role of civil society is essential, because this right is the basis for its existence as a means to create NGOs⁹⁹. Moreover, as has been rightly pointed out:

“individuals want to associate not just to comply classical associative purposes, but also to ask for educational, judicial, health and political rights that could be violated in situations of need and injustice. In recent Spanish history, there have been eloquent examples of this phenomenon e.g. associations of victims of terrorism or of consumers harmed by scammers. Thus, the right of association has been conceived progressively as an ancillary and supplementary collective guarantee to make requests and to claim justice, becoming one of the backbones of the Spanish

⁹⁹ On these issues see ABAD CASTELOS, M., “La defensa de los derechos humanos por las ONG desde el prisma del Derecho Internacional”, *Derechos y Libertades*, núm. 27, 2012, pp. 57-102.



constitutional rights regime and, together with the right to equality and the right to effective judicial protection, a "star right" of the universe of fundamental rights"¹⁰⁰

In fact, as stated by the State's Council in its aforementioned Opinion 1045/2001, of May 9, 2001, the core of the right to association also includes the requirement to provide for an effective "remedy" under the terms of Article 13 of the Rome Convention of 1950, being a mechanism of legitimation for the defence of collective interests, whose denial in a process could also imply an injury of the fundamental right to effective judicial protection guaranteed by Section 24 of the Spanish Constitution¹⁰¹.

More specifically, the role of *Amnesty International* and other NGOs related to the protection of immigrants (*SOS Racismo*) was very relevant in order to question the constitutionality of restrictions introduced by Legislature. In this sense, concerning the controversy on limits introduced by Organic Law 8/2000 in the freedom of association of aliens without legal residence in Spain, its role was crucial: in this case, lobbying exerted before Autonomous Community Governments and Legislatures was successful. As the institution of *Amicus Curiae* is unknown in the Spanish Judicial System, some Autonomic Governments (Andalusia, Castille-La Mancha, Balearic Islands, Aragon, Extremadura and Asturias) and Parliaments (Basque Country and Navarre) introduced unconstitutionality appeals against this Law¹⁰², subsequently declared by the Constitutional Court in its Rulings 236/2007 and 259/2001 to 265/2001, previously referred to¹⁰³. There is also a significant contribution of the *Asociación para la Libertad Religiosa* –an evangelically based association, but representing minority religious confessions as a whole- on issues concerning religious freedom.

Campaigns organised by those NGOs and complaints addressed to the Ombudsman (*Defensor del Pueblo*) and to political parties have a deep influence on the suits successively and successfully introduced by the Ombudsman and Autonomous Communities before the Constitutional Court against Organic Laws 1985 and 4/2000.

Also among the associations there are a lot of entities (volunteering, cooperation to development, etc.) deploying activities in deep contact with Administration. In that way they

¹⁰⁰ FERNANDEZ ALLES, "Las funciones del derecho de asociación...", *cit.*, p. 123.

¹⁰¹ SS'sC Opinion 1045/2001, of May 9, 2001, on the Draft Act on the right of association, para. 53.

¹⁰² See unconstitutionality appeals 1640/2001, 1644/2001, 1669/2001, 1670/2001, 1671/2001, 1677/2001, 1679/2001 and 1707/2001; however, the change of Government in the Balearic Islands led to the withdrawal of its appeal (Order CC 1 February 2006). Apart from them, 50 parliamentarians of the Socialist Party in the Congress of deputies also submitted an unconstitutionality appeal nº 1668/2001 before CC.

¹⁰³ See above. As for non-judicial means of solution and implications of NGOs and other associations see above.



have the possibility to exert pressure over it¹⁰⁴. And more specifically –in the area of socio-economic and labour rights- trade unions, employers organizations and other associations have an institutional platform, the Economic and Social Council to advise Government on such issues¹⁰⁵.

Unfortunately, the possibilities for Associations to introduce appeals against Laws is not possible. Even in the case of Regulations this possibility is strictly linked with the protection of their own rights supposedly affected by the regulation questioned¹⁰⁶.

B) Diplomatic Protection. No precedent known.

C) Right to environment. In 2007, Spain adopted a Sustainable Development Strategy which includes “ a long-term perspective to aim towards a more coherent society in terms of the rational use of its resources, and a more equitable and cohesive approach and more balanced in terms of land use” . The state legislation usually includes co-ordination mechanisms and planning directives. At the institutional level, an inter-territorial conference on environment regularly gathers the state and regional authorities competent for the environment and the Advisory Committee on Environment in which NGOs and other civil society organizations participate, to provide advice to the Ministry of Environment.

- ✓ Does the organization and structure of the legal professions support the selected civil rights claims? In particular, are there developed legal aid systems or pro bono schemes, or any other relevant support system which purports to enable public interest litigation aimed at promoting/supporting the development and effective enjoyment of the selected civil rights?

The common legal aid regime is enforceable in this field.

According to it, until 2013 there was in Spain a wide recognition of the right to pursue civil rights claims because Court fees were lower than in other countries. Anyway, at anytime a legal aid system has been sustained by Public Authorities: an attempt to restrict those benefits for aliens not regularly resident pursued by Organic Laws 4/2000 and 8/2000 was judged unconstitutional by the Constitutional Court in its Ruling 236/2007¹⁰⁷. Bar Associations and other Associations deemed of public benefit are working with *pro bono* schemes, thus

¹⁰⁴ As for the case of Asturias –there is a similar situation in other Autonomous Communities- e.g. Law 10/2001 (Principality of Asturias), 12th November, on Volunteering (*SOJ*, n° 10, 11 January 2002); Law 4/2006 (Principality of Asturias), 5th May, on Cooperation to Development (*PoAOJ*, n° 114, 19 May 2006).

¹⁰⁵ See Law 21/1991, 27th June (*SOJ*, n° 145, 28 June 1991).

¹⁰⁶ See the Constitutional Court (1st Chamber) Ruling 24/1987 of 25 February 1987.

¹⁰⁷ See CC Ruling 236/2007, at 13.



supporting the development and effective enjoyment of civil rights, lobbying and appealing before public authorities and if necessary through judicial means.

- ✓ Does legal training contribute or undermine the effective protection of the selected civil rights? Please give evidence based on standard law-school and/or bar-exams curricula.

The need for good training concerning civil rights is widely recognized. Although there is a flexible planning on Law studies, everywhere in Spain the Law Schools pay attention to training on Civil Rights and Public Liberties: e.g. in the Law Degree of the University of Oviedo (UNIOVI) in addition to fundamentals on civil rights and public liberties and international human rights Law developed in Constitutional Law and Public International Law annual courses, the European Union Law semester course devotes one Lecture to the European Charter of Fundamental Rights, and there is a specific semester course on Fundamental Rights and Democratic Citizenship in Multicultural Societies (*Derechos Fundamentales y Libertades Públicas*), taught both in English and Spanish¹⁰⁸. Also at State level, a recent reform on Bar-Exams (2011) has introduced a syllabus concerning those issues¹⁰⁹. The recently published Order regulating 2015 exam provides as “General issues of legal aid and process” to be assessed:

“13. Effective judicial protection. The right to an ordinary judge predetermined by law. The right to defence and to legal assistance....

16. The judicial system of the European Union. Powers of the Courts. European and international and issues.

17. Protection of fundamental rights.”¹¹⁰

Concerning *Diplomatic Protection*, article 11 of the Royal Decree on the access to the bar and other juristic professions 775/2011, 3 June 2011, does not contain any reference to diplomatic protection, consular protection or consular assistance but merely to EU and international tribunals and Courts, therefore neglecting the administrative procedure before the Foreign Affairs and Cooperation Ministry.

¹⁰⁸ See data sheet of this Course at <https://directo.uniovi.es/catalogo/FichaAsignatura.asp?asignatura=13796>

¹⁰⁹ Although Law 34/2006, 30th October, on access to the professions of Barrister and Solicitor of the Courts (*SOJ*, n° 260, 31 October 2006), provided for a Bar-Exam, until 2011 there were no Regulations concerning this issue, finally approved by Royal Decree 775/2011, 3 June, article 18 (*SOJ*, n° 143, 16 June 2011).

¹¹⁰ See Annex II, Order PRE / 202/2015, of February 9, regulating assessment test to appraisal fitness to practice the profession of Lawyer 2015 (in Spanish); *OJ*, n° 38, 13 February 2015.



- ✓ What is the relationship between legal elites, political/governmental elites and civil society organizations? Do they contribute or undermine civil rights litigation and enforcement?

NGOs are deeply introduced among political parties and public authorities. Notwithstanding the fact that according to political orientation, Governments are more able (Left wing) or not (Right wing) to consider petitions coming from civil society, contacts are frequent –many Laws recently approved have taken into account the participation of civil society and NGOs through consultative organs where they are present- and their demands are regularly attended. Regrettably, legal elites are not easily involved in strategies developed by NGOs, nor is there a significant participation of them therein. However, the expanding concept of corporate social responsibility – not well developed yet in Spain- could have a future impact to reverse this trend.

Concerning *Diplomatic Protection*, Informal contacts are usually held between major companies and the Government when their interest is placed under any danger in a foreign country. In fact, the Minister often acts on his or her own volition without previous claim from the victim.

- ✓ What is the role played by academic scholars in promoting and supporting the effective enforcement of the selected civil rights?

Their role is essential. Public campaigns through political manifestos led by academic scholars usually attract media attention. Moreover, although not provided on Standing Orders, Public hearings with their participation are now regularly held by State and Autonomous Communities Legislatures when considering drafting Laws related to or affecting civil rights.

In the case of *Diplomatic Protection*, it is widely explained and taught as part of the schedule of Public International Law in Law Degrees and it is an integral part to Public International Law books.

Question 9: Further practical barriers to the effective enjoyment of the selected civil rights

- ✓ Can you identify further barriers to an effective enjoyment of the selected civil rights in practice?

In the case of *Diplomatic Protection*, there is usually a problem of lack of expertise of barristers, given that their professional training focuses on Courts and not on administrative procedures by Exterior Spanish Administration.



- ✓ Can you identify linguistic barriers, and/or barriers related to difference between legal and judicial culture and practices which could undermine the effective enforcement of the selected civil rights, in particular for mobile EU citizens/Third Country Nationals?

No. Anyway, to prevent any discrimination on linguistic issues, additional measures have been adopted recently through Organic Law 5/2015, 27th April, modifying Law (1881) on Criminal Proceedings and Organic Law 6/1985, 1st July, on Judiciary, implementing Directive 2010/64/EU, 20th October, concerning rights to interpretation and translation in criminal proceedings, and Directive 2012/13/EU, 22nd May, on information in criminal proceedings¹¹¹.

More specifically, recently the EU has taken a new step as far as consular protection is concerned, by means of Council Directive 2015/637, 20 April 2015¹¹². This norm aims consolidating and improving the obligation of consular authorities of EU Member States to help out nationals of other EU countries that lack consular representation in a third country. It clearly puts forward a rationale: no represented States must have their nationals helped by any other EU State. In addition to this provision, there are specific clauses setting up the obligation to cooperate and join efforts when a crisis takes place, with a view to improving the release offered to EU citizens. In spite of those new developments, what this sector of EU still wants is mechanism that eases the enforcement of consular and diplomatic protection before third countries, given that International Law still foresees the nationality rule concerning the determination of the competent authorities to exercise both consular and diplomatic protection.

Question 10: Jurisdictional issues in practice

- ✓ Personal
 - Is there any de jure or de facto difference in the effective enjoyment of the selected civil rights in your country depending on the status of the person? (differences between natural and legal persons; citizens of that state; EU citizens; third country nationals; refugees; long term residents; family members; tourists; etc.)

A) Concerning *Freedom of Association* –as previously explained¹¹³- there is no distinction in the effective enjoyment of this right among their beneficiaries.

¹¹¹ SOJ, n° 101, 28 April 2015.

¹¹² EU-OJ, n° L 106, 24 April 2015/Spain OJ, n° 106, 24 April 2015.

¹¹³ See above, II, 2.

B) In the case of *Diplomatic Protection*, de facto, important companies and firms are more likely to get the support of the Government and promptly resort to diplomatic protection than human beings affected, in so far that the Cabinet tends to identify the interest of such enterprises with the national interest.

✓ Territorial

- Are there any de jure or de facto differences in the effective enjoyment of the selected civil rights in different parts, provinces or territories in your member states?

Generally not, but concerning *freedom to association* until recent years there was a substantial difference of treatment for associations with presumed connections with ETA in the Basque Country than in other areas of the State. In fact, there, public funds were sometimes allocated to those associations, especially by local authorities in municipalities led by political parties presumed to be connected with ETA. At the same time, associations constituted by relatives of victims of ETA terrorism suffered public hostility in certain areas of the Basque Country¹¹⁴.

✓ Material

- Are rights enforced differently in different *policy areas* (e.g. security exceptions, foreign policy exclusion, etc.)? Please, make an assessment on the basis of practice, too (eg more deference accorded in the balancing to the executive when it comes to these policy areas, though the legal framework – what you described in the response to the D7.1. questionnaire — is itself not different from other areas).

As for the *freedom to association*, restrictions imposed on Army members and Police Forces for discipline and, finally, security reasons, have been previously explained¹¹⁵.

In the case of *Diplomatic Protection*, this right can only be enforced in the frame of external action.

✓ Temporal

- What is the temporal scope of protection in the enforcement of the selected civil rights? Are there any notorious or systematic deficiencies in how deadlines are determined or related to the length of proceedings in practice? Please, answer this question from the

¹¹⁴ Some of those events were revealed by the Council of Europe's Commissioner for Human Rights in his Report on his visit to Spain during winter 2005. See CommDH(2005)8, Strasbourg, 9 November 2005, pp. 58-63. This situation was explained in detail by FERNANDEZ DE CASADEVANTE, C., *La nación sin ciudadanos: el dilema del País Vasco*, Dilex S.L., Madrid, 2006.

¹¹⁵ See above, II.2.



viewpoint of the practical application of the rules on deadlines for both initiating proceedings, reviews, etc., and for the court's duty, if there is any (next to Art 6 ECHR), to complete proceedings.

Although judicial proceedings in Spain have a relative length, there are no grave breaches concerning the right of effective judicial protection, as ECHR jurisprudence concerning our country clearly shows.

Question 11: Systematic or notorious lack or deficient enforcement of the selected civil rights in the country under study?

Please, discuss here in detail any 'revealing' cases of weaknesses in the effective exercise of selected civil rights in your country. Try to identify the reasons (eg political influence, financial hurdles, lack of expertise, etc.). Feel free to either repeat here, or refer back to points elaborated upon in previous replies.

A) As for the *freedom to association* there were some deficiencies at the initial stage of the restoration of democracy. E.g. Religious Associations other than catholic had no real support from Authorities and were subject to discrimination; even other associations, supposedly "sects" –although not forbidden - were treated in an exceptional manner, as the facts surrounding the *Riera Blume* case in 1983 blatantly revealed¹¹⁶. Moreover, at that time, apart from Constitutional provisions, the right to association linked with retired military personnel was sometimes restricted and limitations on associations related to police corps were higher. However, gradually, since the 90s there has been a "normalization" of those situations. Now there are no significant remarks to point out.

B) In the case of *Diplomatic Protection*, as previously referred.

B) *Right to environment*. None.

Question 12: Good practices

- ✓ Please highlight legal frameworks, policies, instruments or practical tools which facilitate the enforcement of the selected civil rights in the country under study.

¹¹⁶ ECHR found a violation of right to freedom of some individuals belonging to CEIS association in its Judgment of 14th October 1999, *Riera Blume and others v. Spain*, application n° 37680/97. Those persons –in spite of having full age- were arrested and subsequently interned in a psychiatric centre upon request of their families and an association (*Projuventut*) -supposedly fighting against sects- with the support of the authorities of Catalonia.



A) Concerning *Freedom to Association* and *Diplomatic Protection*. None.

B) *Right to environment*. Under the Spanish Environmental Projects Assessments Law, EIA is a prerequisite before issuing a permit in the case of potentially harmful activities and infrastructure works. Besides, other legislation also provides EIAs of a preventive character for certain activities that could produce an important alteration of the public maritime and terrestrial domain (Coastal Area Law) or in continental waters (Water Law).



Annexes

✓ Table of Treaties

European Convention for the Protection of Human Rights and Fundamental Freedoms, 4th November 1950, *OJ*, n° 243, 10 October 1979

Vienna Convention on Diplomatic Relations, 18 April 1961

Vienna Convention on Consular Relations, 24 April 1963

Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

International Covenant on Civil and Political Rights, 16th December 1966

Agreements concluded between Spain and the Holy See, 3rd January 1979

Convention on civil aspects of child abduction, concluded in the Hague 25th October 1980

United Nations Convention of the Rights of the Child, 20th November 1989

UNECE Convention on access to information, public participation in decision-making and Access to Justice in Environmental Matters, done at Aarhus (Denmark), June 25, 1998

Charter of Fundamental Rights of the European Union, 7th December 2007

✓ European Union

Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union

Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings

Regulation (EC) N° 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters

Common Position 2001/931/PESC of the Council, 27th December 2001

Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector



Framework Decision 2002/584/JHA of 13 June 2002 on the *European arrest warrant* and the surrender procedure between member States

Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence

Regulation (EC) N° 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims

Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive

Framework Decision 2006/783/JHA on the application of the principle of mutual recognition for confiscation orders

Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)

Framework Decision 2008/675 / JHA of 24 July 2008

Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition for judgements imposing custodial sentences or measures involving deprivation of liberty

Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements and probation decisions with a view to the supervision of probation measures and alternative sanctions

Framework Decision 2008/978/JHA of 18 December 2008 on the *European evidence warrant* for the purpose of obtaining objects, documents and data for use in criminal proceedings

Directive 2010/64/EU of 20 October 2010 on the right to *interpretation and translation* in criminal proceedings

Directive 2011/99/EU on 13 December 2011 on the European Protection Order

Directive 2012/13/EU of 22 May 2012 on the Right to Information in Criminal Proceedings

Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

Regulation N° 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters



Council Directive 2015/637, 20th April 2015, on cooperation and coordination measures to provide Consular Protection to EU citizens not represented in Third-Countries and derogating Decision 95/553/CE

✓ National provisions

1. Spain's State Law

1.1. Constitution

Constitution of the Spanish Republic, 1931

Spanish Constitution, 6th December 1978

1.2. State's Laws

Civil Code, 1889

Law 191/1964, 24th December, on Associations

Law 62/1978, 26th December, on jurisdictional protection of fundamental rights

Organic Law 2/1979, 1st October, on Constitutional Court

Organic Law 3/1980, 22 April 1980, on the Council of State

Organic Law 7/1980, 5th July, on Religious freedom

Law 50/1981, 30th December, regulating the statute of Public Prosecutor

Organic Law 6/1985, 1st July, on Judiciary

Organic Law 7/1985, 1st July, on Aliens

Organic Law 11/1985, 2nd August, on Trade Unions freedom

Organic Law 2/1986, 13th March, on State's Police Forces and Security Corps

Law 10/1990, 15th October, on Sports

Law 21/1991, 27th June, regulating the Economic and Social Council

Law 30/92, 26 November 1992, on the Regime of Public Administration and Common Administrative Procedure

Law 35/95 of 11 December aid and assistance to crime victims violent and sexual offenses and Regulations

Organic Law 1/1996, 15th January, on the Protection of Childhood

Law 50/97, 27 November 1997, On Government



Law 29/1998, 13 July, on Contentious-Administrative Jurisdiction

Organic Law 15/1999, 13 December, on Personal Data Protection

Law 1/2000, 7th January, on Civil Procedure

Organic Law 4/2000, 11th January, on Aliens

Organic Law 8/2000, 22th December, modifying Organic Law 4/2000, on Aliens

Organic Law 1/2002, 22th March, on freedom to Association

Organic Law 6/2002, 27th June, on Political Parties

Law 34/2002, 11 July, on services for information society and e-commerce

Law 11/2003, 21 May, regulating Joint investigation teams on criminal matters in the European Union

Law 43/2003, 21 November, on Forestry, amended by Law 10/2006

Organic Law 15/2003 25 November, modifying organic Law 10/1995, 23 November, Penal Code (in matters concerning money laundering)

Law 9/2006, 28 April on the assessment of the effects of certain plans and programs on the environment (Consolidated text).

Law 10/2006, 28 April, amending Law 43/2003 of 21 November, Forestry modified

Law 27/2006 of 28 July, on rights of access to information, public participation and access to justice in environmental matters,

Law 34/2006, 30th October, on access to the professions of Barrister and Solicitor of the Courts

Law 7/2007, 12th April, on Public servants

Law 11/2007, 22 June, regulating citizenship electronic access to public services

Organic Law 11/2007, 22th October, on the rights of members of Guardia Civil Corp

Law 25/2007, 18 October, on preservation of data linked to electronic communications and public networks

Royal Legislative Decree 1/2007, 16th November, on Consumers Protection

Law 42/2007, 13 December, on Natural Heritage and Biodiversity.

Law 45/2007, 13 December, for the sustainable development of rural areas

Royal Legislative Decree 1/2008, 11 January, approving the revised text of the Act on Environmental Impact Assessment Project (Consolidated text).

Organic Law 2/2009, 11th December, amending Organic Law 8/2000, on Aliens



Law 6/2010, 24 March, amending the consolidated text of the Act on Environmental Impact Assessment Project, approved by Royal Legislative Decree 1/2008 of 11 January

Law 41/2010 29 December, on the Protection of the Marine Environment.

Organic Law 5/2010, 23th June, reforming Penal Code

Law 31/2010, 27 July, on simplification on Exchange of information and intelligence in the European Union

Law 2/2011, 4 March, on Sustainable Economy

Organic Law 9/2011, 27th July, on the rights of Army's members

Law 29/2011, 22th September, concerning the protection of terrorism victims

Law 10/2012, 20 November 2012, on Court fees

Law 21/2013, 9 December, on environmental assessment

Law 2/2014, 23 March 2014, on the External Action of State and the External Service of the State

Organic Law 6/2014, 29 October, supplementary to the Law on mutual recognition of criminal judgements in the European Union, modifying Organic Law 6/1985, 1 July, on Judiciary

Organic Law 7/2014, 12 November, on exchange of information on criminal records and taking into account of criminal judicial resolution in the European Union

Law 23/2014, 20 November, on mutual recognition of criminal judgments in the European Union

Organic Law 5/2015, 27th April, modifying Law (1881) on Criminal Proceedings and Organic Law 6/1985, 1st July, on Judiciary, implementing Directive 2010/64/EU, 20th October, concerning rights to interpretation and translation in criminal proceedings, and Directive 2012/13/EU, 22nd May, on information in criminal proceedings

1.3. Decrees

Royal Decree 1131/1988, 30 September, approving the Regulations for the Implementation of Royal Legislative Decree 1302/1986, of 28 June, regarding the EIA.

Royal Decree 428/1993, 26 March, purporting approval of the statute of Spanish Agency on Data Protection

Royal Decree 738/1997 of 23 May Aid and Assistance to Victims of violent Crime and sexual Freedom

Royal Decree 1497/2003, 28th November, on Regulations concerning the National Registry of Associations and its relations with other Registries on associations



Royal Decree 1740/2003, 19 December, on Associations of public benefit

Royal Decree 424/2005, 15 April, approving Regulation on conditions to offer services on electronic communications, universal service and users protection

Royal Decree 199/2006, 17 February, modifying Royal Decree 738/1997

Royal Decree 1720/2007, 21 December, purporting approval of regulation of implementation of Organic Law 15/1999, de 13 December, on Personal data Protection

Royal Decree 1424/2008, 18 September, which determines the composition and functions of the State Committee for Natural Heritage and Biodiversity, dictates the rules governing its operation and sets assigned to the same specialized committees

Royal Decree 1432/2008, 13 September, laying down measures for the protection of birds against collision and electrocution in electric power lines

Royal Decree 899/2009, 22 May, approving the Charter rights of user of electronic communication services

Royal Decree 556/2011, 20 April, for the development of the Spanish Inventory of Natural Heritage and Biodiversity

Royal Decree 557/2011, 20 April 2011, on the rights and liberties of aliens in Spain and their social integration

Royal Decree 775/2011, 3 June, on Assessment Tests to access to the profession of Barrister and Solicitor

Royal Decree 1274/2011, 30 September, approving the Strategic Plan of the Natural Heritage and Biodiversity 2011-2017

Royal Decree 342/2012, 10 February 2012, on the structure of Foreign Affairs and Cooperation (FAC) Ministry

Royal Decree 116/2013, 15 February 2013, on the issue of provisional passport and safe-conducts

Royal Decree 630/2013, 2 August, whereby the Spanish catalog of invasive alien species is regulated

Royal Decree 1015/2013, 20 December, amending Annexes I, II and V of Law 42/2007 of 13 December on Natural Heritage and Biodiversity change

Royal Decree 416/2014, 6 June, whereby the sector plan nature tourism and biodiversity 2014-2020 is approved

Royal Decree 1/2015, 9 January 2015, amending the structure of FAC Ministry

1.4. Other provisions



Council of Ministers Agreement, 15th June 2007

Resolution of 28 February 2011 of General Council of Judiciary (CGPJ) enacting Regulation 1/2011 concerning Judicial Professional Associations

Order PRE/361/2002, 14 February, implementing users' rights and additional pricing services of Title IV of Royal Decree 1736/1998, 31 July, approving the Regulation implementing Title III of the General Law on Telecommunications

Order CTE/771/2002, 26 March, fixing conditions to give services on telephonic consultation for subscribers numbers

Order PRE/202/2015, of February 9, regulating assessment test to appraisal fitness to practice the profession of Lawyer 2015; *OJ*, n° 38, 13 February 2015

1.2. Spain's Autonomous Communities Law

1.2.1. Laws

Law 3/1998 (Basque Country), of 12th February, on Associations

Law 10/2001 (Principality of Asturias), 12th November, on Volunteering

Law 2/2004 (Basque Country), 25 February, on Personal Data files of public ownership and creation of Basque Agency on Data Protection

Law 4/2006 (Principality of Asturias), 5th May, on Cooperation to Development

Law 4/2006 (Andalusia), 23th June, on Associations

Foral Law 8/2007 (Navarre), 23th March, on Foral police

Law 7/2007 (Basque Country), 22th June, on Associations

Law 4/2008 (Catalonia), 24th April, on the Third Book of the Civil Code of Catalonia, regulating Associations and other Legal Persons

Law 14/2008 (Comunidad Valenciana), 18th November, on Associations

Law 32/2010 (Catalonia), 1 October, on Catalan Authority for Data Protection

Law 1/2014 (Andalusia), 24 June, Public Transparency of Andalusia

Law 7/2014 (Castille-La Mancha), 13th November, on protection of people with disabilities

1.2.2. Decrees

Decree 13/1995 (Aragon), 7th February, regulating the Registry of Associations in the Autonomous Community of Aragon



✓ Table of cases

1. EUCJ

CFI Order 7th June 2004, *Segi y otros v. Council* (T-338/02)

CFI Order 7th June 2004, *Gestoras ProAmnistía*, (T-333/02)

CJ Judgment of 16 June 2005, *Pupino* (C-105 / 03)

CFI Judgment 27th February 2007, *Segi y otros v. Council*, C-355/04 P

CFI Judgment 27th February 2007, *Gestoras Pro-Amnistía*, C-354/04 P

CJ Judgment of the Court (Third Chamber) of 1 July 2010. *Doris Povse v Mauro Alpage* (C-211/10)

CJ Judgment of the Court (Second Chamber) of 15 July 2010. *Bianca Purrucker v Guillermo Vallés Pérez* (C-256/09)

CJ Judgment of the Court (Second Chamber) of 9 November 2010. *Bianca Purrucker v Guillermo Vallés Pérez* (C-296/10)

CJ Judgment (First Chamber) 22 December 2010, *Joseba Andoni Aguirre Zarraga v. Simone Pelz* (C-491/10 PPU)

CJ Judgment (First Chamber), 22 December 2010, *Barbara Mercredi v Richard Chaffe*. (C-497/10 PPU)

2. ECHR

Judgment of 9 December 1994, *López Ostra v. Spain*, n° 16798/90

Judgment of 19 February 1998, *Guerra y others v. Italy*

Judgment of 20th May 1999, *Rekvenyi v. Hungary*, n° 25390/94.

Judgment of 14th October 1999, *Riera Blume and others v. Spain*, n° 37680/97

Decision 23th May 2002, *Segi y otros y Gestoras pro Amnistía v. (15) Member States of the European Union*, ns. 6422/02 and 9916/02

Judgment of 16 November 2004, *Moreno Gómez v. Spain*,

Judgment of 30 June 2009, *Herri Batasuna and Batasuna v. Spain*,

Judgment of 30 June 2009, *Etxebarria and Others v. Spain*

Judgment of 30 June 2009, *Herritarren Zerrenda v. Spain*



Judgment of 7 December 2010, *Eusko Abertzale Ekintza – Acción Nacionalista Vasca (EAE-ANV) v. Spain*

Judgment of 3 April 2012, *Manzanas Martin v. Spain*

Judgment of 21 April 2015, *Junta Rectora del Ertzainen nazional elkartasuna v. Spain* (no. 45892/09).

3. Spain's Constitutional Court (CC)

Ruling 5/1981, 13th February 1981

Ruling 23/1987, 23th February 1987

Ruling 67/1985, 24th May 1985

Ruling 24/1987, 25 February 1987

Ruling 115/1987, 7th June 1987

Ruling 125/1987, 15th July 1987;

Ruling 64/1988 of 12th April 1988

Ruling 218/1988, 22th November 1988

Ruling 89/1989, 11th May 1989;

Ruling 131/1989, 17th July 1989;

Ruling 132/1989, 18th July 1989,

Ruling 214/1991, 11th November 1991

Ruling 244/1991, 16th December 1991

Ruling 178/1994, 16th June 1994;

Rulings 223 to 226/1994, 18th July 1994;

Ruling 152/1995, 24th October 1995

Ruling 176/1995, 11th December 1995

Ruling 5/1996 of 16th January 1996

Ruling 6/1996, 16th January 1996

Ruling 173/1998, 23th July 1998

Ruling 104/1999, 14th June 1999



Ruling 104/1999, 14th June 1999

Ruling 91/2000, 30th March 2000

Ruling 119/2001, 24th May 2001

Ruling 219/2001, 31st October 2001

Ruling 133/2006, 27th April 2006

Ruling 235/2007, 7th November 2007

Ruling 236/2007, 7th November 2007

Ruling 259/2007, 19th December 2007

Rulings 260 to 265/2007, 20th December 2007

Ruling 150/2011, 29th September 2011

4. Spain's Supreme Court

Supreme Court (3rd Chamber), Judgment 16th November 1974

Supreme Court (3rd Chamber), Judgment 29th September 1986 and 28-4-1987

Supreme Court (3rd Chamber), Judgment 29th December 1986

Supreme Court (3rd Chamber), Judgment 28th April 1987

Supreme Court (1st Chamber-Civil) Judgment 24th March 1992;

Supreme Court (1st Chamber-Civil) Judgment 19th January 1999.

Supreme Court (1st Chamber-Civil) Judgment 2nd March 1999

Supreme Court (2nd Chamber) Judgment 19 January 2007

Supreme Court (3rd Chamber) Judgment 23rd March 2010

Supreme Court (2nd Chamber) Judgment 259/2011

Supreme Court Judgment 282/2014, 24 January 2014

Supreme Court (2nd Chamber), Judgment 186/2014, 13 March 2014

Supreme Court (2nd Chamber) Judgment 874/2014, 27 January 2015

5. Spain's National High Court



Judgment 27/05, 20th June 2005

Judgment 13 September 2007

Judgment 39/08, 19th September 2008

Judgment 4 September 2014

Judgment 10 March 2015

6. Other Spain's Courts and Tribunals

Order Court First Instance (n° 6) Zaragoza 20 April 2004

Judgment Provincial Court Barcelona 16 May 2006

Judgment Provincial Court Granada n° 100/2006, 16 June 2006

Judgment Provincial Court Pontevedra 5 July 2006

Judgment Provincial Court Tenerife 18 September 2006

Judgment Provincial Court Malaga 9 July 2007

Judgment Provincial Court Malaga 11 September 2007

Order Provincial Court Valencia 26 March 2009

Judgment Provincial Court Barcelona 28 July 2009

Order Provincial Court Tenerife n° 233/2009, 25 November 2009

Judgment Provincial Court Barcelona 26 February 2010

Judgment Provincial Court Balearic Islands, n° 172/2010, 7 May 2010

Order Provincial Court Bizkaia 20 July de 2010

Judgment Provincial Court Barcelona 20 December 2010

Judgment Provincial Court A Coruña n° 80/2011, 25 February 2011

Judgment Provincial Court Balearic Islands n° 193/2011, 31 May 2011

Judgment Provincial Court Barcelona, n° 365/2011, 29 June 2011

Judgment Provincial Court Malaga n° 284/2012, 25 May 2012

7. Foreign Judicial Decisions



High Court of Paris Judgment, 26 May 1997

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8. Other decisions

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✓ List of abbreviations

AC/AACC: Autonomous Communit(y)(ies)

AOJ: Aragon Official Journal

BCOJ: Basque Country Official Journal

CC: Constitutional Court

CMOJ: Castille-La Mancha Official Journal



GCOJ: Generality of Catalonia Official Journal

HC: Hague Convention

OL: Organic Law

PC: Provincial Court

PoAOJ: Principality of Asturias Official Journal

RDCE: Revista de Derecho Comunitario Europeo

SC: Spanish Constitution (1978)

SOJ: State's Official Journal (Boletín Oficial del Estado, BOE)

VV.AA: Various Authors



Deliverable 7.2 Mechanisms for enforcing civil rights- Questionnaire for Country report

Extract from the Description of Work

Task 7.2: An identification of modes of transposition and mechanisms available at European and national levels for granting and enforcing civil rights, with a view to identifying institutional, legal, procedural and practical barriers that EU citizens and third-country nationals face in gaining (cross-border) access to justice.

D7.2 Report exploring the mechanisms for enforcing civil rights with a view to identifying the barriers

Report exploring the mechanisms to transpose and enforce civil rights with a view to identifying the barriers that EU citizens and third-country nationals face in gaining (cross-border) access to justice in selected Member States of the EU. Report containing identification of enforcement mechanisms for civil rights in the following Member States: United Kingdom, Denmark, Belgium, Hungary, Italy, Spain, the Netherlands, Germany, France, the Czech Republic and/or Croatia.

Introduction

In the EU legal context, fundamental rights, including civil rights, have gained not only visibility but also, arguably, significance, now that the Lisbon Treaty has made the Charter of Fundamental Rights legally binding. However, already before the Treaty of Lisbon, certain civil rights of EU citizens, in particular that of free movement and non-discrimination, had gained strong legal recognition in EU law through EU provisions, EU legislation and the case law of the Court of Justice of the European Union (CJEU). Moreover, general principles for the protection of fundamental rights, developed by the Court, conferred protection to a range of civil rights, including due process, rights, freedom of religion, right to property etc. These had to be respected by EU institutions and Member States acting within the scope of application of EU law.

The objective of WP7 is to study, from the perspective of EU citizenship, specific problems EU citizens and third country nationals (TCN) face in exercising civil rights and liberties in areas which fall within as well as beyond the scope of EU law, as the border-line between these two areas of jurisdiction is contested and constantly evolving due to EU legislative activities as well as other legal developments.

Direct or indirect EU level remedies exist before the courts composing the Court of Justice of the European Union (Court of Justice, General Court, EU Civil Service Tribunal) against violations of civil rights conferred upon individuals by EU law, by EU institutions and member states, when they act under the scope of EU law. They are, however, limited, and the day-to-day application and enforcement of EU law relies on domestic systems of judicial and non-judicial remedies, provided these comply with the principles of effectiveness and

equivalence, and respect the general principle of effective judicial protection.¹ For that reason, it is important to study the mechanisms available in the member states for implementing and enforcing civil rights, whether these are derived from international instruments, EU law and member states' legal systems, and identify possible institutional, legal, procedural and practical impediments to their full operation.

Practical information and guidelines

Please structure the country report based on the questionnaire below (including headings). Make sure to include precise references to constitutional, legislative and regulatory provisions, cases and other relevant policy and legal documents. Try, as far as possible, to use the European Case Law Identifier (ECLI), which aims at providing a uniform citation format for national and European case law. https://e-justice.europa.eu/content_european_case_law_identifier_ecli-175-en.do?init=true. While it is still a work in progress, some countries have already introduced this citation format, and some are planning to introduce it in the (near or not so near) future.

We would like to encourage you, to the extent possible, to look for and identify relevant empirical evidence of specific obstacles to civil rights implementation and enforcement in the EU (NGO reports, statistics, press extracts, testimonies, interviews, surveys, etc.).

Please note that there may be a degree of overlap between the answers given in the context of the first task (country reports for Deliverable 7.1), and those sought in this second questionnaire focused on implementation, application and enforcement (in particular in countries where the recognition of civil rights is largely case law based). In such case, we suggest that you to copy/edit the relevant sections of the first country report and to fit them into this second country report focused on implementation and enforcement, with a reference to the original source.

The country as well as final reports should be written in English. The text of country reports should give a general overview, and should be clear, easily accessible and easy to read. If certain concepts or notions do not translate well in English, try to use both the original language as well as the most appropriate English translation the first time a concept is referred to. Later mention may be in either language. Language editing is the responsibility of each author.

Please use the Kluwer author guidelines for references and citations: <http://www.kluwerlawonline.com/files/COLA/COLAHOUSERUL2013.pdf>.

Deadline for the report: 30 April, 2015

¹ Cases C-33/76 Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland [1976] ECR 01989; Case C-45/76 Comet BV v Produktschap voor Siergewassen [1976] ECR I-02043; Case C-432/05 Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern [2007] ECR I-2271. EU law (case law, legislation) sometimes imposes particular types of remedies (eg State liability for violation of EU law; public procurement...).

The deadline is a very strict one. In case of delay, we will not be able to submit the deliverable to the Commission on time.

1. The (legislative) transposition, (executive/administrative) implementation and (judicial) application of EU legislative instruments which provide protection for specific civil rights

In this part, which adopts a *top-down* approach, the idea is to study the impact of different sets of EU legislative measures on the civil rights of EU citizens and third country nationals. EU legislation has sometimes been adopted to specifically confer protection to civil rights on EU citizens (Victims Rights Directive, e-Privacy Directive, etc), whilst other EU legislative measures have, on the contrary, the potential to undermine them (the most notorious probably being the European Arrest Warrant and the – now defunct - Data Retention Directive)

For each of the instruments identified below, answer the following set of questions.

Question 1 – Transposition of the above EU instruments protecting or potential affecting civil rights

- ✓ How are the EU instruments listed below transposed in the country of study? Have there been notorious failure or defect in the national transposition? Is the national legislative transposition of these EU instruments reinforcing or on the contrary threatening civil rights norms?

Question 2 – Executive/administrative implementation of EU instruments affecting civil rights

- ✓ How are the EU instruments below and their national transposition measures implemented through regulatory/executive or administrative measures? Have these EU instruments been implemented in ways which affords further protection or potentially undermine civil rights norms?

Question 3 – Judicial interpretation and application of EU instruments affecting civil rights

- ✓ How are the EU instruments listed below and their transposition and implementation measures, interpreted and applied by courts? Is the judicial interpretation and application of these instruments and their domestic transposition and implementation measures furthering civil rights protection or, on the contrary, raising concerns in that respect?

Note: comparative data available on national judicial mechanisms at http://ec.europa.eu/civiljustice/index_en.htm

1.1 EU legislation affording protection or potentially undermining civil rights in judicial proceedings

1.1.1. Protection of rights in civil proceedings (mutual recognition instruments)

The EU has adopted a number of instruments enabling the mutual recognition of judgments in civil rights matters. Whilst these should respect EU fundamental rights norms and often include safeguard provisions, they may also undermine the civil rights of EU citizens, their families and affected third country nationals.

Regulations considered in this section:

- Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I Regulation') – in particular articles 1, 2, 3, 4, 5, 6, 7, 31, 32-56 ; 57-58, 61.
- Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ('Brussels IIa Regulation'). All provisions.
- Regulation No 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters. All provisions.

Brussels I Regulation

Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters– in particular articles 1, 2, 3, 4, 5, 6, 7, 31, 32-56 ; 57-58, 61

Question 1: *Transposition*

[1] The UK elected to opt-in to the Brussels I Regulation; and the Civil Jurisdiction and Judgments Order 2001 has implemented Regulation (EC) No 44/2001 into UK law,² amending the Civil Jurisdiction and Judgments Act 1982 which was passed to implement the 1968 Brussels Convention and the Lugano Convention. The decision to opt-in to the Brussels I Regulation was made by the UK, which has the possibility under the Protocol annexed to the treaty not to participate in measures related to judicial cooperation in civil and commercial matters. The UK notified the Commission of its intention to participate in Brussels I Regulation, and it became directly applicable in the UK on 1st March 2001.

² As this is an Act of the United Kingdom, it also has effect in Scotland.

[2] The complication of the English Court system is that it is based on the common law (along with it, the Welsh and Northern Irish, while Scotland maintains Scots Law). Historically, the recognition of foreign judgments is based on common law rules developed since the 17th century, directed by the principles of comity (or intending to guarantee mutual recognition) and obligation.³ The common law still directs the enforcement of foreign judgments to which no legislative scheme applies.⁴

Question 2: *Executive/Administrative Implementation*

[3] Selected areas for the improvement of the regime include⁵ the removal of *exequatur* as an extra step (and expense) in the enforcement of judgments abroad. It was argued that, although safeguards for defendants would be needed, it was right that in the internal market should remove the obstacle of an application to a foreign Court for enforcement.

Question 3: *Judicial Interpretation*

Brussels Ila Regulation

Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. All provisions

Question 1: *Transposition*

[4] The primary transposition of the Brussels Ila Regulation in England, Wales, Northern Ireland and Scotland are the European Communities (Matrimonial and Parental Responsibility Jurisdiction and Judgments) (Scotland) Regulations 2005; and the European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005; in addition the Regulation has directed the Parental Responsibility and Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) Regulations 2010.

Question 2: *Executive/Administrative Implementation*

³ Lords Select Committee on European Union, *Green Paper on Brussels I Regulation* (House of Lords, July 2009).

⁴ These countries include, for example, the US and China.

⁵ Lords Select Committee on European Union, *Green Paper on Brussels I Regulation* (House of Lords, July 2009).

[5] There are questions which still remain in terms of the implementation of the Brussels IIa Regulation in the UK. These include the applicability of the Regulation to same-sex couples, as the legislative regime pre-dates the earliest adoption of the recognition of same-sex marriages in the Netherlands. This is a concern for the UK, which has given legal recognition to same sex marriage in 2013.⁶ The principle of equal treatment, and the rights of free movement which are guaranteed under the Charter of Fundamental Rights, and the Treaties would indicate that there is an essential disjuncture between the application of this regulation, if same-sex couples were excluded from the scope of the Regulation. However, it is possible that interpretation of the regulation would be left to the interpreting Member State which could possibly invoke a public policy exception, leaving same-sex couples beyond the scope of legal protection afforded by this regulation.⁷

Question 3: *Judicial Interpretation*

[6] There appears to be a consistent application of the Brussels IIa Regulation evident in case law of the UK Family Division Court system. There are no outstanding or waiting applications in the higher courts on points of law with relation to the Regulation.

Mutual Recognition of Protection Measures in Civil Matters
Regulation No 606/2013 of 12 June 2013 on mutual recognition of protection measures
in civil matters. All provisions

Question 1: *Transposition*

[7] The Mutual Recognition of Protection Measures in Civil Matters was transposed into England, Wales and Northern Ireland by virtue of the Civil Jurisdiction and Judgments (Protection Measures) Regulations 2014. In Scotland, the Regulation was transposed by the Civil Jurisdiction and Judgments (Protection Measures) (Scotland) Regulations 2014.

Question 2: *Executive/Administrative Implementation*

[8] There is no easily accessible information on the implementation of Mutual Recognition of Protection Measures in Civil Matters Regulation.

⁶ Marriage (Same-Sex Couples) (England and Wales) Act 2013; and the Marriage and Civil Partnership (Scotland) Act 2014. Northern Ireland recognises civil partnerships between same-sex couples, but does not recognise marriage.

⁷ See PE McEavey, "The Communitarization of Divorce Rules: What Impact for English and Scottish Law?" (2004) ICLQ 605.

Question 3: *Judicial Interpretation*

[9] There has been no judicial treatment of the Civil Jurisdiction and Judgments (Protection Measures) Regulations 2014.

1.1.2 Protection of rights in criminal proceedings (due process, right to a fair trial, etc.)

The EU has adopted numerous legislative instruments enhancing judicial cooperation and imposing mutual recognition in criminal matters. These have led to concerns regarding the protection of individuals in criminal proceedings across the member states of the EU, which led to the adoption of approximation/minimum harmonization of aspects of national criminal law and procedures. To what extent do these measures affect the civil rights of EU citizens, and their ability to exercise them?

Background instrument on judicial cooperation

- Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.

1.1.2.1. Mutual recognition instruments in criminal matters

- Framework Decision 2002/584/JHA of 13 June 2002 on the *European arrest warrant* and the surrender procedure between Member States: all provisions potentially relevant.
- Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition for judgments imposing custodial sentences or measures involving deprivation of liberty, in particular Arts 1, 2, 3, 6, 7, 8, 9, 10, 11, 14, 18, 19, 29
- Framework Decision 2008/947/JHA of 27 November 2008 on probation decisions and alternative sanctions, in particular Arts 1, 2, 3, 4, 10, 11, 19
- Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in criminal proceedings, in particular Arts 1-19.
- Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence, in particular Arts 1-2-3, 7, 8, 10, 11.
- Framework Decision 2006/783/JHA on the application of the principle of mutual recognition for confiscation orders, in particular Arts 1, 2, 6, 7, 8, 9, 11, 14, 18.

European Arrest Warrant Framework Decision

Framework Decision 2002/584/JHA of 13 June 2002 on the *European arrest warrant* and the surrender procedure between Member States: all provisions potentially relevant.

Question 1: *Transposition*

[10] The progression of the adoption of the European Arrest Warrant in the UK was given wide media coverage, and gained significant notoriety among the public and in the press. Part 1 of the Extradition Act 2003 implements the European Arrest Warrant Framework Decision (Part 2 is concerned with extradition to other countries with which the UK has extradition treaties).

Question 2: *Executive/Administrative Implementation*

[11] In late 2014, Parliament voted to opt-in to the European Arrest Warrant, in addition to 34 other policing and justice measures. However, despite the acceptance of the need for co-ordinated efforts to fight crime in European, this vote was highly controversial. National debates have surrounded the acceptability of wide-ranging justice and policing powers transferred away from the national legal system, notably, accepting the jurisdiction of the Court of Justice of the European Union above the Supreme Court of the United Kingdom as the ultimate authority for the agreed policing measures.

[12] Additionally, the implementation of the European Arrest Warrant from an executive and administrative stand-point was met with considerable debate as concerns were raised over proportionality in the use of EAWs. There has been argument that EAWs ought only be used in the instance of serious offences, rather than minor offences, without consideration of the proportionality of extradition. A campaign group for the right to fair trial, Fair Trials International, has highlighted that this is often the case, and stated that often suspects were 'not being provided with legal representation in the issuing state as well as the executing state'.⁸

[13] In terms of the implementation of the EAW system in the UK, the National Crime Agency has made statistics readily available to the public of the number of requests, the requesting countries, and the principal offence alleged. From 2009-2014, a total of 6,844 EAWs were made to the UK, of

⁸ Fair Trials International, *The European Arrest Warrant: Time for Reform?* (May 2011).

these 5,072 were surrendered to the requesting country.⁹ It is notable that the NCA indicates that these surrenders were after the point of a failed judicial review application, or the decision not to appeal.

Question 3: *Judicial Interpretation*

[14] Interpretation of Part 1 of the Extradition Act 2003 has been marked by some uncertainty in the courts in the UK, concerned that there is apparent inconsistency between the provisions of Part 1 and the Framework Decision. In *Office of the King's Prosecutor, Brussels v Cando Armas*,¹⁰ Lord Hope directed that the correct (although, apparently conflicting) approach in the interpretation of the Act was to give effect to the Framework Decision, but where there were differences, to assume these were regarded by Parliament as necessary for the protection of an unlawful infringement on the right to liberty.¹¹

[15] There was considerable examination of the European Arrest Warrant by the Supreme Court of the United Kingdom in *Assange v Swedish Prosecution Authority*.¹² The central questions of the appeal by Mr Assange highlight some of the central concerns regarding civil rights and the European Arrest warrant, these included whether the public prosecutor of a requesting state constituted a 'judicial authority' within the meaning of the act and, fundamentally from a rights perspective, whether judgment ought to be reopened in the event that the foreign judgment was given on the basis that defending counsel was given inadequate or unfair opportunity to address the charges.

[16] The appeal on the basis of the argument that the interpretation of a public prosecutor as a 'judicial authority' within the meaning of the Framework Decision is an incorrect one, was dismissed by the Supreme Court, noting that this is a common practice among some Member States, and was not previously objected to by contracting states.

[17] The Court noted that, while removal of executive interference by virtue of mutual recognition of judicial decisions was a virtue of the act, it also abolished 'significant safeguards' though this, it was

⁹ National Crime Agency, *Wanted from the UK: European Arrest Warrant Statistics 2009-2014* (October 2014).

¹⁰ *Office of the King's Prosecutor, Brussels v Cando Armas* [2006] 2 AC 1.

¹¹ The validity of this assumption was questioned in *Assange v Swedish Prosecution Authority (Nos 1 and 2)* [2012] UKSC 22, [2012] 2 AC 471, [7].

¹² *Assange v Swedish Prosecution Authority (Nos 1 and 2)* [2012] UKSC 22, [2012] 2 AC 471.

recognised, was counterbalanced by the entire process being now 'intra-judicial'.¹³ The judgment emphasises that the contracting states to the EAW system are also, necessarily, contracting parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is also noted that the EAW system was intended to be compliant with the ECHR (citing Recital 12, and Article 1(3) Framework Decision). It is notable that the Court stated the expectation that the EAW system was rights-compliant, even if no extensive scrutiny of the system is evident in the judgment.

Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition for judgments imposing custodial sentences or measures involving deprivation of liberty for the purposes of their enforcement in the European Union, in particular Arts 1, 2, 3, 6, 7, 8, 9, 10, 11, 14, 18, 19, 29

Question 1: *Transposition*

[18] Framework Decision 2008/909/JHA was implemented in the UK by the Repatriation of Prisoners Act 1984 (as amended). Concerns raised over the Framework decision in terms of civil rights involves the fact that the Framework decision provides for the non-voluntary transfer of prisoners, though it "should be implemented and applied in a manner which allows general principles of equality, fairness and reasonableness to be respected" (Recital 6), and provides for the possibility of a representation against transfer by the prisoner to be made (Article 6(3)).

Question 2: *Executive/Administrative Implementation*

[19] The measure was seen by the UK Government as an important step to reduce the numbers of Foreign National Offenders (FNOs) held in UK prisons. In 2013, 4.8% of the total prison population were FNO from other EU member states.¹⁴ However, in outlining concerns for the implementation, the European Scrutiny Committee, in its 2013 report, expressed the need to maintain a clear declaration (Article 7(4), Framework Decision 2008/909/JHA) that the requirement of dual criminality for the offence committed before any transfer was accepted.¹⁵ Additionally, there were questions raised by the committee as to whether or not Article 3 (transfer premised on "facilitating the social rehabilitation of the sentenced person") could act as a ground for an application against transfer

¹³ *Assange v Swedish Prosecution Authority (Nos 1 and 2)* [2012] UKSC 22, [2012] 2 AC 471, [479].

¹⁴ European Scrutiny Committee, Twenty-First Report: The UK's block opt-out of pre-Lisbon criminal law and policing measures (2013).

¹⁵ European Scrutiny Committee, Twenty-First Report: The UK's block opt-out of pre-Lisbon criminal law and policing measures (2013), 179.

where the prisoner could argue that transfer to their country of nationality would not facilitate rehabilitation.¹⁶

Question 3: *Judicial Interpretation*

[20] There has been no significant judicial interpretation of the terms of Framework Directive 2008/909/JHA. Mentions of the Framework Directive in case law of the UK has been ancillary, or referential in consideration of the Extradition Act 2003 and the European Arrest Warrant Framework Decision.¹⁷

Framework Decision 2008/947/JHA of 27 November 2008 on probation decisions and alternative sanctions, in particular Arts 1, 2, 3, 4, 10, 11, 19

Question 1: *Transposition*

[21] Framework Decision 2008/947/JHA has not been implemented in England, Wales or Northern Ireland. Section 3, Criminal Justice (European Protection Order) (England and Wales) 2014 and section 3, Criminal Justice (European Protection Order) (Northern Ireland) 2014 contain explicit reference to the exclusion of the Framework Decision in the interpretation of the Act. However, in Scotland, section 27 (incoming) of the Criminal Justice and Licensing (Scotland) Act 2010, contains reference to the Framework Decision.

Question 2: *Executive/Administrative Implementation*

[22] This Framework Decision has not been implemented.

Question 3: *Judicial Interpretation*

[23] This Framework Decision has not been implemented.

¹⁶ European Scrutiny Committee, Twenty-First Report: The UK's block opt-out of pre-Lisbon criminal law and policing measures (2013), 181.

¹⁷ See *Laskiewicz v Poland* [2014] EWHC 3701 (Admin); *B (P) v HM Advocate* [2013] HCJAC 126, [2013] GWD 34-677; *Assange v Sweden* [2012] UKSC 22, [2012] 2 AC 471.

Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in criminal proceedings, in particular Arts 1-19.

Question 1: *Transposition*

[24] There is no evidence in official databases of the implementation of this Framework Decision has in England, Wales or Northern Ireland, the deadline for transposition was 19 January 2011. However, Scotland has implemented the Decision under section 92, Criminal Justice and Licensing (Scotland) Act 2010.

Question 2: *Executive/Administrative Implementation*

[25] There is no evidence that there has been Executive or Administrative implementation of this Framework Decision.

Question 3: *Judicial Interpretation*

[26] This Framework Decision has not been implemented. There is no evidence of judicial interpretation of this Decision.

Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence, in particular Arts 1-2-3, 7,8, 10, 11.

Question 1: *Transposition*

[27] The UK has transposed the Framework Decision 2003/577/JHA in relation to evidence, but not property. Sections 20-25 of the (amended) Crime (International Cooperation) Act 2003 came into effect from 19 October 2009.

Question 2: *Executive/Administrative Implementation*

[28] Between implementation in 2009 and 2013, the UK made no requests under the measure, and received only four requests from other Member States, of which one was executed. The others were

not executed for reasons of deficiency in the request.¹⁸ Despite these statistics, the European Scrutiny Committee looked favourably on the Framework Decision, seeing it as having a positive impact on the vindication of the fundamental rights of a victim in terms of ‘facilitating the effective investigation and prosecution of cross-border crime’.¹⁹

[29] In the execution of a freezing order, there ought to be consideration of the suspect’s fundamental rights, including the right to a private and family life, the right to protection of personal data, and the right to property. In their 2013 Report, it was stated that the UK engages numerous safeguards against a violation of right.²⁰ These include, for example, section 21(7) CICA which allows for a Court to disregard a non-UK freezing order where it would otherwise be incompatible with ECHR rights under the Human Rights Act 1998. Additionally, the Article 11 guarantee of access to legal remedies requires that all relevant parties have access to the Courts, fair trial and an effective remedy where the freezing order would violate ECHR rights. As noted in the previous paragraph, as there has been limited use of freezing orders between Member States, the extent to which this has been tested is limited.

Question 3: *Judicial Interpretation*

[30] There has been no judicial interpretation of this Framework Directive. It is likely that this is due to the use of alternative processes in place of the Decision.

Framework Decision 2006/783/JHA on the application of the principle of mutual recognition for confiscation orders, in particular Arts 1,2,6,7,8,9, 11, 14, 18.
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Question 1: *Transposition*

[31] The UK has transposed this decision as part of the Criminal Justice and Data Protection (Protocol No. 36) Regulations 2014. It includes directions as to the application of the decision in all parts of the UK (England, Wales, Scotland and Northern Ireland).

¹⁸ European Scrutiny Committee, Twenty-First Report: The UK’s block opt-out of pre-Lisbon criminal law and policing measures (2013), [138].

¹⁹ European Scrutiny Committee, Twenty-First Report: The UK’s block opt-out of pre-Lisbon criminal law and policing measures (2013), [139].

²⁰ European Scrutiny Committee, Twenty-First Report: The UK’s block opt-out of pre-Lisbon criminal law and policing measures (2013), [140-41].

Question 2: *Executive/Administrative Implementation*

[32] There is no accessible information of executive or administrative treatment of any of the listed articles of Framework Decision 2006/783/JHA.

Question 3: *Judicial Interpretation*

[33] There is no evidence of judicial treatment of any of the listed articles of Framework Decision 2006/783/JHA.

1.1.2.2 'Approximation' measures

1.1.2.2.1. *Victims' rights*

- (Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings).
- Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA
- Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims
- Directive 2011/99/EU on 13 December 2011 on the European Protection Order

Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, supporting and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA
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Question 1: *Transposition*

[34] The Scottish Parliament has transposed this Directive into law by virtue of the Victims and Witnesses (Scotland) Act 2014. By virtue of devolution, this law does not affect the rest of the United Kingdom.

[35] England, Wales and Northern Ireland have not yet transposed this directive into Law. According to Article 27, the UK has until 16 November 2015 to implement the directive, by bringing into force all necessary laws, regulations and administrative provisions, but it is not clear if plans have taken place. It is notable that the UK opted-in, and participated in the adoption of Directive 2012/29/EU,

and did not exercise an opt-out under the Title V Protocol. There is some media coverage of government plans to implement and improve victims' rights, however these date from, at the most recent, September 2014, but no further developments have taken place.

Question 2: *Executive/Administrative Implementation*

[36] There has been no implementation of this directive in England, Wales, or Northern Ireland.

[37] There are, however, schemes which exist within the UK which have favourably improved victim's access to justice. For example,²¹ the Crown Prosecution Service introduced in 2013 a Victims' Right to Review Scheme which offers free-of-charge administrative procedures for victims to request reconsideration of their cases, except in the event that a case has been discontinued by police services before prosecution.

Question 3: *Judicial Interpretation*

[38] There has been no judicial interpretation of measures adopted by virtue of this directive in England, Wales or Northern Ireland.

Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims

Question 1: *Transposition*

[39] This directive was implemented in the UK by virtue of the Victims of Violent Intentional Crime (Arrangements for Compensation) (European Communities) Regulations 2005.

Question 2: *Executive/Administrative Implementation*

The Criminal Injuries Compensation Authority [CICA] was created by the Criminal Injuries Compensation Act 1995 in Great Britain (England, Scotland, and Wales). The CICA was appointed as the 'assisting authority' within the meaning of the 2004/80/EC Directive. In Northern Ireland, the

²¹ CPS, Victims Rights to Review Scheme: http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/. REDRESS submitted comments to a public consultation on this scheme in September 2013.

responsibility for criminal injuries compensation lies with the Department of Justice's Compensation Agency.

Question 3: *Judicial Interpretation*

[40] There has been no judicial treatment of this Directive.

Directive 2011/99/EU on 13 December 2011 on the European Protection Order

Question 1: *Transposition*

[41] In England and Wales, Directive 2011/99/EU was transposed into law by virtue of the Criminal Justice (European Protection Order) (England and Wales) Regulations 2014. This was similarly transposed into Northern Irish law by virtue of the Criminal Justice (European Protection Order) (Northern Ireland) Regulations 2014. In Scotland, the European Protection Order (Scotland) Regulations 2015 transposed the directive into law, and was supplemented in Scotland by the Act of Adjournment (Criminal Procedure Rules Amendment No. 2) (European Protection Orders) 2015.

Question 2: *Executive/Administrative Implementation*

[42] There is little evidence available of implementation of the European Protection Order Directive in England and Wales. However, a recently published report in Scotland²² noted with approval of the importance of protection measures issued in one EU country to be recognised across the EU, and recommended the draft legislation, (now Act of Adjournment (Criminal Procedure Rules Amendment No. 2) (European Protection Orders) 2015) to be approved.

Question 3: *Judicial Interpretation*

²² Justice Committee, 6th Report, 2015 (Session 4): European Protection Order (Scotland) Regulations 2015 (Scottish Parliament, 2015).

[43] There has been no evident judicial interpretation of Directive 2011/99/EU on the European Protection Order.

1.1.2.2. Rights of suspects and accused persons

- Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings
- Directive 2012/13/EU of 22 May 2012 on the Right to Information in Criminal Proceedings

Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings

Question 1: Transposition

[44] This directive is part of the UK (England and Wales) criminal procedure system by virtue of Section 3(9), Criminal Procedure Rules 2014. Transposition of the Directive into Scottish law was made by virtue of the Right to Interpretation and Translation in Criminal Proceedings (Scotland) Regulations 2014.

Question 2: Executive/Administrative Implementation

[45] This directive has been implemented as part of the Criminal Procedure Rules 2014. Administrative implementation of this directive in England and Wales has been aided by the National Agreement for the Use of Interpreters in Criminal Proceedings until 2011, when it was criticised for systemic inefficiencies, lack of monitoring of interpreters' qualifications, and a shortage in some languages. The current system is guided by the Revised Agreement on the Arrangements for the Attendance of Interpreters in Investigations and Proceedings in the Criminal Justice System.²³ There is, however, no mention of the directive in this document. The current provision for interpretation is, according to HM Courts and Tribunal Service, a single service, Capita Translation Service supply interpreters to courts and tribunals throughout England and Wales.²⁴

Question 3: Judicial Interpretation

²³ Available from the Crown Prosecution Service, www.cps.gov.uk/publications/agencies/interpret.html.

²⁴ See public information on this at www.justice.gov.uk/courts/interpreter-guidance.

[46] While there has been no explicit judicial treatment of this Directive in England, Wales or Northern Ireland, the right to an interpreter during criminal proceedings has been interpreted as an aspect of the obligations under Article 6 ECHR, the Right to a Fair Trial.²⁵

[47] In Scotland, the High Court of the Justiciary, in *Kroupa v Donnelly*²⁶ cited the Directive as a strong support for the availability of an interpreter throughout the trial, relying on Article 2(8) aiming to guarantee the right of an effective defence. In this instance, the defendant, a Czech national, was charged with assaulting a police officer. An interpreter was made available to the defendant to assist him during trial, but was not made available to the defendant's only witness, who was also a Czech national. It was held that the provision of an interpreter to the witness was a matter of fairness, and the conviction was quashed.

Directive 2012/13/EU of 22 May 2012 on the Right to Information in Criminal Proceedings

Question 1: *Transposition*

[48] Implementation of obligations arising from Directive 2012/13/EU were brought into the UK by virtue of the Police and Criminal Evidence Act 1984 (Codes of Practice) (Revisions to Codes C and H) Order 2014. Revisions made by the Order bring into force two codes of practice under the Police and Criminal Evidence Act 1984, superseding previous codes of practice. Code C requires provides detainees with the right to a revised written notice setting out rights and entitlements in custody, reflecting substantive rights conferred by 2012/13/EU. In Scotland, the Right to Information (Suspects and Accused Persons) (Scotland) Regulations 2014/159 transposed the Directive.

Question 2: *Executive/Administrative Implementation*

[49] There is little evidence to suggest that executive or administrative practices with regards to the right to information in criminal proceedings is being directed by the 2012/13/EU Directive.

²⁵ For example, see *Cuscani v UK* [2002] All ER 139 wherein it was held that a plea is uninformed if the defendant did not fully understand the case against him due to inadequate knowledge of the language.

²⁶ *Kroupa v Donnelly* [2013] HCJAC 113, 2013 S.C.L. 1009.

Question 3: *Judicial Interpretation*

[50] There has been no evident judicial interpretation of this Directive.

1.2. EU legislation related to the protection of personal data

Directives considered in this Section:

- Directive 95/46 on the protection of individuals with regard to processing of personal data and on the free movement of such data (Data Protection Directive) [1995] OJ L281/31.
- Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector (ePrivacy Directive) [2002] OJ L201/37.
- Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive (Data Retention Directive) [2006] OJ L105/54. [annulled]

Data Protection Directive

Directive 95/46 on the protection of individuals with regard to processing of personal data and on the free movement of such data (Data Protection Directive) [1995] OJ L281/31.

Question 1: *Transposition*

[51] The Data Protection Directive (Dir 95/46) was transposed into UK law in the Data Protection Act 1998 (DPA 1998). The Act embodies 8 principles,²⁷ modelled on principles outlined in the Directive; which are (1) the *fair and lawful* processing of personal data; (2) that the *purposes* for which it is obtained is lawful; (3) that the personal data is *adequate, relevant and not excessive* in relation to the purpose for which it is processed; (4) that personal data is *accurate* and, where necessary, kept up to

²⁷ Schedule 1 Data Protection Act 1998.

date; (5) that personal data is not kept longer than necessary; (6) that personal data is processed in accordance with rights of data subjects;²⁸ (7) that personal data is secure, i.e. appropriate technical and organisational measures are taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data; (8) that personal data is not transferred outside the EEA unless that country or territory guarantees an adequate level of protection for the rights and freedoms of data subjects.

[52] There has traditionally been an antipathy in the UK towards the protection of the right to privacy,²⁹ and no general right to privacy exists in the common law.³⁰ Prior to the implementation of the Data Protection Directive by virtue of the Data Protection Act 1998, there had been unsuccessful attempts to protect privacy through the Right to Privacy Bill in 1961, and the Data Surveillance Bill in 1969. The DPA 1998 has, in addition to transposing the Data Protection Directive, replaced and consolidated earlier legislation of the Data Protection Act 1984, and the Access to Personal Files Act 1987. This move towards a greater recognition of privacy rights in the UK has been directed and influenced by the adoption of the Human Rights Act 1998 (incorporating the European Convention on Human Rights into UK law) and the Article 8 right to a private life; in addition to the Article 8 right to protection of personal data under the Charter. However, this does not imply that significant protection has yet been afforded to privacy, as will be seen in *Judicial Interpretation* below, and Section 2.2 on the Right to Privacy in the UK.

[53] The Commission has also highlighted that up to a third of the directive has not been transposed correctly.³¹ There have been concerns as to the transposition of the Data Protection Directive into UK Law by virtue of the Data Protection Act 1998, in terms of the implementation of the Act, and judicial interpretation of the Act which has been taken by the Courts in the UK. These will be considered in the next two sections. However, as an example of the possible uncertainties of interpretation in the Act, there has not been clear guidance as to the interpretation of certain sections. For example, the DPA 1998 requires that personal data is not kept longer than is necessary,

²⁸ These individual rights include a right of access to a copy of the personal information stored (s 7 DPA 1998); a right to object to the processing of data if it is likely to cause damage or distress (s 10 DPA 1998); a right to prevent processing for the purposes of direct marketing (s 11 DPA 1998); a right to object to decisions made by automatic means (s 12 DPA 1998); a right to claim damages for breach of the Act (s 13 DPA 1998); and a right in certain circumstances for personal data to be rectified, blocked, erased, or destroyed (s 14 DPA 1998).

²⁹ R. Clayton & H. Tomlinson, *Privacy and Freedom of Expression* (Oxford: Oxford University Press, 2010); and J. Wadham, H. Mountfield, E. Prochaska, & C. Brown, *Blackstone's Guide to the Equality Act 2010*, 6th ed. (Oxford: Oxford University Press, 2011), 196.

³⁰ *Kaye v. Robertson* [1991] FSR 62.

³¹ 'Data protection: Commission requests UK to strengthen powers of national data protection authority, as required by EU law' 24/06/2010 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/811>

but does not specify any minimum or maximum periods. This element of subjectivity on the part of data processors can lead to uncertainty as to the extent of what is considered to be longer than necessary. It likely allows a significant discretion on the part of the data processor.

Question 2: *Executive/Administrative Implementation*

[54] The administrative body with responsibility for the implementation of the Data Protection Act 1998 (and thus Directive 95/46) is the Information Commissioner's Office.³² This is an independent public authority with responsibility for upholding information rights in the public interest, promoting the following of good practice by data controllers, with the set aim of promoting openness of public authorities and data privacy for individuals. The ICO by this account has a dual function of promotion of good practice by data controllers through the provision of advice, and practice guides; but also the enforcement of the DPA 1998.³³

[55] According to some sources, UK implementation of the Data Protection Directive is 'widely acknowledged to be faulty'.³⁴ The following issues have been highlighted as deficiencies associated with the data protection regime in the UK:

- The significant lack of power of the ICO to enforce data protection rights, and the argued under-enforcement of the Act by the ICO;
- The limited rights of redress, and the absence of the availability of 'class action' or civil group access to the courts;
- The lack of redress for moral (or non-financial) harm;
- The notion of 'implied consent'³⁵ and the consequent loss of control of personal data;

³² Information for this body is available at <ico.org.uk>.

³³ See Section 60(1)(a)-(b) Data Protection Act 1998.

³⁴ Open Rights Group, 'Call for Evidence: Data Protection Act' see <openrightsgroup.org/ourwork/reports/call-for-evidence-data-protection-act>

³⁵ It should be noted that concerns for the business burden associated with positive consent to all instances of data collection was a reason for the acceptance of the notion of implied consent in UK law.

- The lack of transparency as to the content, access to, and certainty of privacy policies of data processors;
- The lack of certainty as to the security of data exported to countries outside the EEA, such as the US, which have weaker data protection laws;

[56] These issues have been brought into sharp relief by the interpretation of the DPA 1998 by the Courts, as shown in the next section.

[57] As only individual actions are permitted under the Act, and the ICO is limited to action within its own enforcement powers, there is a significant difficulty for the enforcement of data protection in the UK due to the absence of general knowledge about the rights of the public under the data protection regime. Because of this, there is a high degree of likelihood that there is an under-enforcement of the rules.

Question 3: *Judicial Interpretation*

[58] Judicial interpretation of the Data Protection Act 1998 has been criticised for the narrowing of definitions within the Act. There are three identified issues with the interpretation taken by the UK courts in the definition of 'personal data':

- In the decision of *Durant v Financial Services Authorities*, the definition of 'personal data' by the Court of Appeal was on the basis of 'relevance or proximity' to the data subject. The test adopted by the Court is subjective. The definition is vague, and narrow and not in line with its interpretation elsewhere in the EU, or within the directive itself which is based on 'data relating to a person'
- IP addresses are not, by virtue of themselves, identifiers as to the person – nor are they considered personal data and thus subject to the protections of the regime. However, they can be used to identify individuals in conjunction with other information. The ubiquitous storage of IP addresses, their common use and public listing availability renders them potentially insecure to the privacy of sensitive personal information.

Similarly, the complications which result from new models of social media and cloud computing, in which users upload personal information of themselves and others, have caused issues for the purposes of determining data processors and data controllers, and responsibility for the protection of personal data. Third party access to the information uploaded to social media sites, including facebook, also poses a risk for the security and protection of personal data.

ePrivacy Directive

Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector (ePrivacy Directive) [2002] OJ L201/37

Question 1: *Transposition*

[59] The ePrivacy Directive was transposed into UK law by Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR 2003); which came into force on 11 December 2003. This law is a revision of existing regulation, and covers any technology (including computers, smartphones, and smart tvs) which can be used to track the activity of users online. The regulation also applies to devices which do not involve the processing of personal data. However, it should be noted in instances where the device is involved with the processing of personal data, service providers must comply with the additional requirements contained within the Data Privacy Act 1998. For example, the requirement is the third data protection principle, which prohibits the processing of excessive amounts of personal data.

[60] The PECR 2003 requires that the user (1) be given comprehensive and clear information with regard to the purposes of the storage of, and/or access to their information in the cases of cookies (or similar devices); and (2) that they have given their consent to the use or storage of that information. While the PECR 2003 is not prescriptive as to the content of the information to be given by the service provider, it must be clear and intelligible to the user. This has the effect of prohibiting direct marketing which has not been specifically consented to.

Question 2: *Executive/Administrative Implementation*

[61] Similar to the position in relation to the Data Protection Act 1998, the administrative body with responsibility for the implementation of the PECR 2003 (and thus the ePrivacy Directive) is the Information Commissioner's Office.³⁶

[62] When considering the transposition of the ePrivacy Directive into UK law, the UK Government drafted a letter with consultation from the Information Commissioner's Office, stating that the Directive is a 'well-meaning regulation that will be very difficult to enforce in practice'.³⁷ This has proved to be a correct presumption as one criticism with the current regime is the apparent lack of enforcement by the ICO, exemplified by the lack of penalties imposed for non-compliance with the PECR 2003.³⁸

[63] Another concern which has been raised has been related to the relative absence of advice and good guidance in relation to email tracking.³⁹

Question 3: *Judicial Interpretation*

Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive (Data Retention Directive) [2006] OJ L105/54. [annulled]

Question 1: *Transposition*

[64] The Data Retention Directive was transposed into UK law by virtue of the Data Retention (EC Directive) Regulations 2009. It came into force on 6 April 2009. In light of the European Commission's Memo,⁴⁰ and the successful Irish challenge to the Directive,⁴¹ the UK adopted an emergency act, the Data Retention and Investigatory Powers Act 2014. This Act re-implements the Data Retention Directive, but also grants power to the Secretary of State to make further provisions

³⁶ Information for this body is available at <ico.org.uk>.

³⁷ Available for download at <dcms.gov.uk/images/publications/cookies_open_letter.pdf>.

³⁸ T Sleath, "UK and EU ePrivacy: Where Are We Now?" The Guardian 6 November 2012.

³⁹ The Direct Marketing Association, a trade-organisation for data-driven marketers which seeks to 'advance and protect responsible data-driven marketing', has produced a good practice guide in response to these concerns. See <dma.org.uk/article/how-to-guide-email-and-cookies-legislation>

⁴⁰ European Commission, *Frequently Asked Questions: The Data Retention Directive* (Brussels, 8 April 2014).

⁴¹ Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Attorney General* (judgment 8 April 2014).

for the retention of data. Additionally, it widens the scope of the term 'telecommunications service' to include email services, as well as widening the scope of application of the legislation to warrants against persons in the UK, to companies not headquartered in the UK

Question 2: *Executive/Administrative Implementation*

[64] The new Act, the Data Retention and Investigatory Powers Act 2014 will be in force until the end of 2016.

Question 3: *Judicial Interpretation*

[65] No cases have been found concerning the Data Retention and Investigatory Powers Act 2014.

2. Enforcement of selected civil rights

In this second part of the questionnaire, which follows a *bottom up* approach, the idea is to focus on particularly problematic areas for the protection and exercise of particular civil rights. We ask you to identify at least three civil rights, irrespective of their source of protection, which are particularly salient and problematic from the point of view of the ability of EU citizens and other persons in the EU to effectively exercise them in the country under study. In the selection, bear in mind difficulties which may be specific to 'mobile' EU citizens and Third Country Nationals, and those which affect all EU citizens or Third Country Nationals irrespective of whether they have exercised their EU citizenship right to free movement or not. For each 'problematic right' identified, answer the questions set out further below.

Please, do *not* select rights which will be covered in the case studies later in the project:

D7.3. Case study exploring obstacles in exercising core citizenship rights (i.e right to move and reside), D7.4. Case study exploring difficulties faced by EU citizens when trying to enjoy the freedom of expression in the context of media law and policies (but freedom of expression outside of the media context can be analyze in this report).

D7.5. Case study on obstacles that (mobile) EU citizens and their families face in dealing with life events (e.g. recognition of civil status documents), in the context of specific national administrative rules or marital/family legislation.

D7.6. Case study on obstacles that (mobile) EU citizens and their families face in gaining access to travel documents)

2.1 Right to Equal Treatment

2.2 Right to Private and Family Life

2.3 Right to Protection Against Loss of Nationality

Question 1 – Source of protection

- ✓ What are the sources of protection of each of this right? Do you see any problems in this regard? (eg the right is recognized only in a lower level norm, or multiple sources with different authority and meanings, etc.)

Question 2 – Scope and limits of the right (including balancing with other rights)

- ✓ What is the scope and what are the limits of this right? Are there any deficiencies in this regard (eg non-compliance with EU or ECHR standards)? How are they balanced against other rights, values or interests?

Question 3 – Interpretation and application

- ✓ How is this right interpreted and applied by courts? Are there any deficiencies in this regard?

Question 4 – Case law protecting civil rights

- ✓ When the right in question is recognised through case law, how are they enforced? Is there a relevant doctrine of precedent? Can violation of judge-made principle be invoked in courts? Must judges bring up of their own motion civil rights violations? Etc.

Question 5 – Judicial enforcement institutions and bodies

- ✓ Which institutions are responsible for the enforcement of this rights in your country? Please expose here the structure of the judicial system of the country under study. Indicate, in particular, whether the country under study has a constitutional court or equivalent body. If not, how is compliance with international, European (including EU) and national (constitutional) civil rights guaranteed. Explain the role of other relevant bodies (eg ordinary courts, specialised courts, etc.)
- ✓ How are these institutions regulated at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other)
- ✓ Is the independence of these institutions and organs guaranteed? If so, how? Have there been concerns related to the independence of the judiciary in the country of study, which could undermine the effective enforcement of the selected civil right? Please indicate the different modes and modalities of enforcement of civil right carried out by the different judicial institutions involved.
- ✓ What are currently the main judicial procedures available to sanction, remedy or compensate for violations of the selected civil right (eg judicial review, damages, emergency measures, etc.). Indicate for each of them important information related in particular to time limits, costs, legal aid availability, length of proceedings, type of actions (eg collective action, class action), admissibility criteria (including standing conditions, delays, etc) as well as merits conditions (acceptable grounds, substantive conditions, degree of control, evidential aspects, burden of proof, etc.). What are the consequences of successful or unsuccessful legal actions under each of the procedures (annulment, compensation, sanctions, etc.)
- ✓ Is the judiciary effective and/or trusted to protect civil rights, or do people turn to alternative modes of action in order to protect these rights (ie demonstration, media involvement, social network activities, lobbying, etc)

Please indicate particular weaknesses and deficiencies, or on the contrary, elements of good practice, which are worth highlighting in that they are likely to have a particular impact on the enforcement of civil rights in the EU.

Question 6 – Non-judicial enforcement institutions and bodies relevant for the enforcement of the selected civil right

- ✓ Are there non-judicial/administrative procedures available to enforce the selected right against public authorities or private actors involved in public policy activities (eg delivery of public services, quasi-regulatory bodies, etc.) ?
- ✓ Are there non-judicial procedures available to uphold these rights against private actors (eg employers, landlords, etc.)?
- ✓ Which organs, institutions, or bodies contribute to promoting and enforcing the selected civil right? (eg equality body, ombudsperson, governmental supervisory authorities, etc.)
- ✓ How are procedures before these bodies regulated at national level (constitutions or constitutional instruments, special (ie organic) or ordinary laws, regulations and decrees, case law, local/municipal laws, other legal documents, policy instruments, other sources)?
- ✓ What is their respective mandate? Were/are they discussions as to expanding, or reducing their mandate?
- ✓ What are their powers? (eg consultation, information-gathering, reporting, adjudication/decision-making, regulatory powers, etc)? Were they/are they discussions as to expanding, reducing their powers?
- ✓ How independent are they from government, parliament, stakeholders, others? Please pay particular attention to powers of appointment, and termination of the mandate of actors, as well as the bodies' decision-making procedures?

Question 7 – Access to Justice

- ✓ Are access to justice rights (fair trial, due process, right to an effective remedy...) respected when it comes to the enforcement of the selected right? Are there particular problems in that respect. Please develop.
- ✓ Does the principle have a broad scope of application, or are there exceptions?

Question 8 – “Support structures”

- ✓ What is the role of NGO or other civil society actors (eg legal entrepreneurs, etc.) in bringing awareness about modes of enforcement of the selected civil right and in supporting actions to uphold the selected right using judicial or non-judicial means? Please give as many details as possible and identify the most relevant actors
- ✓ Does the organization and structure of the legal professions support the selected civil right claims? In particular, are there developed legal aid systems or pro bono schemes, or any other relevant support system which purports to enable public interest litigation aimed at promoting/supporting the development and effective enjoyment of the selected civil rights.

- ✓ Does legal training contribute or undermine the effective protection of the selected civil rights? Please give evidence based on standard law-school and/or bar-exams curricula?
- ✓ What are the relationship between legal elites, political/governmental elites and civil society organizations? Do they contribute or undermine civil rights litigation and enforcement?
- ✓ What is the role played by academic scholars in promoting and supporting the effective enforcement of the selected civil rights?

Question 9: Further practical barriers to the effective enjoyment of the selected civil rights

- ✓ Can you identify further barriers to an effective enjoyment of the selected civil rights in practice?
Please, include here (or repeat) particularly problematic barriers towards the enforcement of the selected civil rights (such as overbearing costs, judicial corruption, unavailability of legal aid in practice, lack of information about the rights, lack of expertise on the part of attorneys or other legal actors, intimidation towards people who want to enforce their rights, etc.)
- ✓ Can you identify linguistic barriers, and/or barriers related to difference between legal and judicial culture and practices which could undermine the effective enforcement of the selected civil rights, in particular for mobile EU citizens/Third Country Nationals?

Please, make sure to point out right-, gender-, or minority-specific differences with regard to an effective enjoyment of the selected civil rights.

Question 10: Jurisdictional issues in practice

- ✓ Personal
 - Is there any de jure or de facto difference in the effective enjoyment of the selected civil rights in your country depending on the status of the person? (differences between natural and legal persons; citizens of that state; EU citizens; third country nationals; refugee; long term resident; family members; tourists; etc.)
- ✓ Territorial
 - Are there any de jure or de facto differences in the effective enjoyment of the selected civil rights in different parts, provinces or territories in your member states?
- ✓ Material

- Are rights enforced differently in different *policy areas* (e.g. security exceptions, foreign policy exclusion, etc.)? Please, make an assessment on the basis of practice, too (eg more deference accorded in the balancing to the executive when it comes to these policy areas, though the legal framework – what you described in the response to the D7.1. questionnaire — is itself not different from other areas).
- ✓ Temporal
 - What is the temporal scope of protection in the enforcement of the selected civil rights? Are there any notorious or systematic deficiencies in how deadlines are determined or related to the length of proceedings in practice? Please, answer this question from the viewpoint of the practical application of the rules on deadlines for both initiating proceedings, reviews, etc., and for the court's duty, if there is any (next to Art 6 ECHR), to complete proceedings.

Please offer details as to how different rights are enforced to different *categories of persons in different location and policy contexts over time?*

Question 11: Systematic or notorious lack or deficient enforcement of the selected civil rights in the country under study?

Please, discuss here in detail any 'revealing' cases of weaknesses in the effective exercise of selected civil rights in your country. Try to identify the reasons (eg political influence, financial hurdles, lack of expertise, etc.). Feel free to either repeat here, or refer back to points elaborated upon in previous replies.

Question 12: Good practices

- ✓ Please highlight legal frameworks, policies, instruments or practical tools which facilitate the effective exercise of the selected civil rights in the country under study.

Explanatory Introduction

[66] Where issues or information concerning rights discourse in the UK overlaps, there will be references to the earlier statement of the state of affairs that exists in the UK. As the Judicial system, and jurisdictional issues of *Personal, Territorial, Material* and *Temporal* are shared across all three rights, they will be included at the end of this section on the Introduction to Human Rights Law in the UK. Any additional or unique information related to the rights which would otherwise come under these sections will be included in the sections related to those rights, with reference to the earlier, shared jurisdictional issues.

Introduction to Human Rights Law in the UK

Human Rights Discourse in the UK: Conceptual Difficulties

[67] The incorporation of the ECHR in the UK highlighted a cause for difficulty in identifying civil rights in the UK. There is no national Bill of Rights which enumerates civil rights in the UK, nor is there a single constitutional document which accounts for a source for civil rights or liberties, or determines the relationship between state powers in the UK. The British constitution is considered to be either 'unwritten' or 'uncodified'.⁴² It is accounted for in several sources, however, and there are a number of 'constitutional instruments'. According to the Supreme Court, these constitutional instruments include: the Magna Carta, the Petition of Right 1628, the Bill of Rights 1689, and the Claim of Rights Act 1689 (Scotland), the Act of Settlement 1701 and the Act of Union 1707, the European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005.⁴³ An additional complication is the fact that the UK is constituted of four countries – England, Scotland, Wales and Northern Ireland, three of which exercise devolved powers through a national Parliament (Scotland) or Assembly (Wales and Northern Ireland).

⁴² For introduction and analysis of constitutional law in the UK, see N. Parpworth, *Constitutional and Administrative Law*, 7th ed. (Oxford: Oxford University Press, 2012), Ch. 1; P. Leyland, *The Constitution of the United Kingdom: A contextual analysis* *Constitutions of the World*, 2nd ed. (Oxford: Hart. Publishing, 2012); and C. Turpin & A. Tomkins, *British Government and the Constitution: Text and Materials* (Cambridge: Cambridge University Press, 2007).

⁴³ *R. (HS2 Action Alliance) v. Secretary for State for Transport* [2014] U.K.S.C. 3, [2014] 1 W.L.R. 324, [207]. Of these, the Human Rights Act 1998 was intended as a means to incorporate rights under the European Convention on Human Rights.

National Sources of Civil Rights

[68] The framework of protection of civil rights in the UK has developed significantly over the past two decades in light of the incorporation of European civil rights norms into the national legal frameworks. Both the UK and Ireland are common law legal systems, and have incorporated human rights with a similar method in recent years, and so have significantly common elements in the discussion of civil rights. The law is not codified in the UK in a manner which is as clearly recognisable as in the rest of Europe.

[69] The following sections provide an introduction to the main sources of civil rights at national level, followed by an overview of the law relating to individual civil rights in the UK. The focus is placed on the laws of England and Wales, while the laws of Northern Ireland and Scotland are considered where they significantly diverge from the law in the rest of the UK. The legal framework for civil rights is complicated by its source and interpretation, but the following aims to provide guidance on civil rights protection in the UK.

[70] The most immediately identifiable legal source of civil rights in the UK is found in the Human Rights Act 1998, which has incorporated the European Convention on Human Rights into UK Law. The incorporation of the Human Rights Act 1998 was not intended to restrict other rights or freedoms conferred 'by or under any law having effect in any part of the United Kingdom',⁴⁴ and additional sources of rights protection can be found in legislation and the common law.

[71] In order to appreciate the constitutional significance of the Human Rights Act 1998, it is important to understand the doctrine of parliamentary sovereignty. This doctrine dictates that the will of Parliament, as expressed through legislation, is supreme over any other contrary law or measure. Parliament is permitted to make and unmake any law, and is immune from any higher authority or order. A bill of rights, or other constitutional document, which implies a possibility of immunity from any legislative change, is a concept which runs contrary to the doctrine of parliamentary sovereignty. On the same account, it is not possible for any court to invalidate primary legislation (Act of Parliament) on constitutional grounds,⁴⁵ and the doctrine has been employed to justify limiting the incorporation of the ECHR into UK law. However, the doctrine has been modified significantly since accession to the EU, and in light of case law concerning the direct effect and

⁴⁴ Human Rights Act 1998, s. 11.

⁴⁵ The classic definition of Parliamentary Supremacy which has shaped UK constitutional discourse is A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th rev. ed. (Indianapolis: Liberty Fund Classics, 1985), Ch. IV, pt. 2.

primacy of Union law.⁴⁶ Additionally, there has been devolution of certain executive and legislative powers from Parliament in Westminster, to the Scottish Parliament, and the Northern Irish and Welsh Assemblies, which has impacted on the powers of Parliament.⁴⁷

[72] In response to the doctrine of parliamentary sovereignty, the courts have adopted certain approaches to protect rights. For example, it is not possible for rights to be subject to implied repeal by Parliament, and so a statute will not be construed by the courts so as to abrogate fundamental rights unless there is express wording to that effect. An alternative explanation of this principle is that fundamental rights cannot be overridden 'by general or ambiguous words'.⁴⁸ The justification for this is that Parliament is subject to political (and not legal) restraints,⁴⁹ and so should be subject to democratic accountability by the electorate. It is important to note that methods of statutory interpretation guided by precedent in the common law have also changed in recent years due to the Human Rights Act 1998, which has given direction on the interpretation of legislation in light of Convention Rights. This will be discussed below.

[73] A further feature of the UK is that the legal systems of England, Northern Ireland and Wales are based on the common law, whereby part of the body of law is derived from custom and judicial precedent. The law is in this sense not codified. The legal system of Scotland has mixed elements of common and civil law. In addition, the court systems of Northern Ireland, and Scotland are separate from that of England and Wales.

[74] There has been a wealth of discourse and development in the area of civil liberties over the centuries of the common law,⁵⁰ and some civil rights have existed as legal customs or principles in the common law prior to enumeration in a statute. One example of this is the concept of procedural fairness (an aspect of the right to a fair trial) which is a customary feature of a common law legal system. The traditional values of the common law have been property, the enforcement of agreements, reputation and fair procedures⁵¹ – all of which are elements of civil rights. However, the

⁴⁶ See *R. v. Secretary of State for Transport, ex p Factortame* (No 2) [1991] 1 A.C. 603; *R. v. Secretary of State for Employment, ex parte Equal Opportunities Commission* [1991] A.C. 603 (HL); and *R. (HS2 Action Alliance) v. Secretary for State for Transport* [2014] U.K.S.C. 3, [2014] 1 W.L.R. 324

⁴⁷ It is important also to note that a referendum on the independence of Scotland will be held in September 2014.

⁴⁸ *R. v. Secretary of State for the Home Department, ex p (Simms)* [2000] 2 A.C. 115, 131 (Lord Hoffman); *R. v. Secretary of State for the Home Department, ex p Pierson* [1998] A.C. 539, 575 (Lord Browne-Wilkinson).

⁴⁹ *R. v. Secretary of State for the Home Department, ex p (Simms)* [2000] 2 A.C. 115, 131 (Lord Hoffman).

⁵⁰ See further, Clayton & Tomlinson, *The Law of Human Rights*, 37 et seq.; and T. Allen, *Constitutional Rights and the Common Law: Law, Liberty and Justice* (Wotton-under-Edge: Clarendon Press, 1993), Ch. 6.

⁵¹ H. Davis, *Human Rights and Civil Liberties* (Milton: Willan Publishing, 2003), 16.

common law has traditionally been associated with *negative* liberties (or the freedom of interference from others), and has not developed an account of positive rights.⁵²

[75] The call for a UK-based bill of rights resulted in political and popular reluctance for the introduction of justiciable rights which would impact on parliamentary sovereignty.⁵³ There was also judicial opposition to the introduction of a UK Bill of Rights, as it was argued that it would impact on judicial independence and the reputation for impartiality of the courts, and so public confidence in the judicial system.⁵⁴ The introduction of the Human Rights Act 1998, was welcomed as a popular alternative, which incorporated Convention rights into UK law, while respecting the unique constitutional arrangement of the State.⁵⁵

The Human Rights Act 1998 (UK)

[76] The incorporation of the European Convention on Human Rights through the Human Rights Act 1998 has led to direct engagement with human and civil rights norms by the Parliament and the courts.⁵⁶ However, the scheme of the Human Rights Act 1998 (UK) is both 'complicated and unique'.⁵⁷ The central principle of the Act is that it is unlawful for public authorities to act in a manner which is incompatible with convention rights.⁵⁸ However, these rights, including civil rights, have only been indirectly incorporated into UK law.

[77] The Human Rights Act creates an obligation on the courts to interpret primary legislation in a manner which is compatible with Convention rights in so far as is possible.⁵⁹ In the event that this is not possible, the courts may issue a declaration of incompatibility.⁶⁰ This declaration does not affect the validity, operation or enforcement of the legislation.

[78] The Human Rights Act 1998 imposes a duty on public authorities to act in accordance with Convention rights, unless it is impossible to do so under the current legislative schema. A failure to

⁵² F. Klug, K. Starmer & S. Weir, *The Three Pillars of Liberty* (Routledge 1998), though please note this publication is prior to the Human Rights Act 1998. See also: Gearty, *Civil Liberties*.

⁵³ See eg, K. Ewing, 'The Futility of the Human Rights Act' *Public Law* (2004): 829.

⁵⁴ Lord Denning, 269 H.L. Deb., 25 March 1976, cols. 797–98.

⁵⁵ Clayton & Tomlinson, *The Law of Human Rights*, ch. 2.

⁵⁶ The judicial function of the House of Lords was separated from legislative function in October 2009, becoming the Supreme Court of the United Kingdom.

⁵⁷ S.H. Bailey, N.W. Harris & ors., *Bailey, Harris & Jones civil liberties: cases, materials, and commentary*, 6th ed. (Oxford: Oxford University Press, 2009), 33.

⁵⁸ Art. 6(1) Human Rights Act 1998.

⁵⁹ s. 3 Human Rights Act 1998.

⁶⁰ s. 4 Human Rights Act 1998.

act in accordance with convention rights give a public law right of action to an aggrieved party, and they can seek damages or other relief in the courts.⁶¹ A victim of a breach of convention rights may also rely on these right in legal proceedings.⁶² The process of judicial review in the UK enables claimants to challenge the decision of a body performing a public function in the High Court. The grounds upon which the decision may be challenged are either that the body has acted or illegally (including for breach of human rights), or not reached using the correct procedures, or that the decision was reached unfairly or irrationally.

[79] A potential weakness in the method of incorporation of civil rights is the limited possibility of judicial review under the current legal framework, compared with other Member States of the EU. The UK courts have the power to strike down subordinate legislation on the basis that it is *ultra vires* the primary legislation.⁶³ However, the courts do not have the power to strike down primary legislation. The suggestion of strengthening the justiciability of rights to include the power to strike down primary legislation has caused concern and objection for a number of reasons. One objection is that it involves the courts in political and social matters to a greater extent than ought to be the case in a democracy.⁶⁴ Cases which involve positive rights could also call upon the court to consider matters of government spending, which is considered to be solely a matter for the Government.⁶⁵ An argument against this position is that the courts are often called upon to rule on matters of sensitive political or social issues, and is furthermore better placed to adjudicate on issues concerning minorities or individuals, as it is insulated from government directed by majoritarian politics.

Judicial Institutions and Bodies

[80] The Court System of the UK has responsibility for adjudicating in instances of conflict, or where there is a perceived violation of rights. The structure of the judicial system in the UK may appear complicated to the outside observer. For example, the court system of England and Wales is separate from that of Scotland and Northern Ireland, although the tribunal system may (in some instances)

⁶¹ s. 8 Human Rights Act 1998.

⁶² s. 7 Human Rights Act 1998.

⁶³ This is the case in which a statutory instrument acts beyond the powers or scope given to it by the primary legislation.

⁶⁴ Bailey, & Harris, *Civil Liberties*, ch. 1.

⁶⁵ cf the Irish context, the series of cases concerning the reluctance of the Court to impose positive duties on the government in light of the right to education based on the separation of powers: *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20; *TD v. Minister for Education* [2000] 3 I.R. 62; and *Sinnott v. Minister for Education* [2001] 2 I.R. 545.

include cases from Scotland and Northern Ireland.⁶⁶ Each tier of the judicial system has divisions, specialising in criminal, civil, or (in the instance of the lower courts) family law matters.

[81] Trials for most civil cases will begin in County Courts. Appeals from County Courts are heard by the High Court (made up of the Chancery, Queen's Bench and Family Divisions). Further appeals, on points of law only, may be heard by the Court of Appeal. Appeals from the Court of Appeal, again only on points of law, are heard by the Supreme Court of the United Kingdom, formerly the House of Lords.⁶⁷ Alternatively, within the Tribunal system, appeals from cases within the tribunal system (for example the Employment Tribunal with jurisdiction over England, Wales and Scotland) may be heard first by the Upper Tribunal, and then may be appealed directly to the Court of Appeal.

[82] The Supreme Court is the highest court in the United Kingdom, and decisions bind all lower courts. The Supreme Court is also legally separate from the courts of England and Wales, and, as a UK body, is the final court of appeal for England, Wales, Scotland and Northern Ireland. With regard to this, the Supreme Court hears appeals from the Court of Session (Scotland) and the Court of Appeal of Northern Ireland. It should be noted that the Supreme Court is not referred to as a 'constitutional court' in a manner familiar to civil law systems. While it has adjudicated on constitutional matters,⁶⁸ the strong doctrines of parliamentary sovereignty, judicial independence, and the separation of powers, has meant that it does not define itself as a Constitutional Court or Council of State.

[83] The Human Rights Act 1998 gives jurisdiction to the Supreme Court to hear cases concerning issues of human rights. The Act also created the possibility of challenging a decision by a UK court in the European Court of Human Rights, in the event that all appeals have been exhausted. In terms of the relationship between the Court and the European Court of Human Rights, the Supreme Court has taken a strong position of taking account of decisions made by the ECtHR, with Lord Bingham stating that [no national court] should "without strong reason dilute or weaken the effect of the Strasbourg case law"⁶⁹ The Court has rarely departed from ECtHR jurisprudence, for example in *R v Horncastle*, Lord Phillips stated that '[t]here will, however, be rare occasions where the domestic court has

⁶⁶ A helpful guide to the structure of the judicial system in the UK is provided by the Courts and Tribunal Judiciary website, available at www.judiciary.gov.uk/about-the-judiciary/the-justice-system/court-structure.

⁶⁷ The judicial function of the House of Lords was separated from legislative function in October 2009, becoming the Supreme Court of the United Kingdom.

⁶⁸ Most recently, the *HS2* decision, *R. (HS2 Action Alliance) v. Secretary for State for Transport* [2014] U.K.S.C. 3, [2014] 1 W.L.R. 324, [2014] 1 A.C. 1, represents a strong statement from the Supreme Court for the possibility of judicial review of legislative action.

⁶⁹ *R. (Ullah) v. Special Adjudicator* [2004] U.K.H.L. 26, [2004] 2 A.C. 323 [per Lord Bingham].

concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances, it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course.⁷⁰ Since this case, there have been positive steps to engage in 'dialogue' with the ECtHR,⁷¹ which has also been indicated in case law relating to the proportionality test to be applied in ECHR cases.⁷²

[84] Public perception of the judiciary is, in general, positive, reporting administrative bodies least likely to engage in corrupt behaviour.⁷³ The most recent widespread social demonstrations in 2011 were not aimed at deficiencies in the judicial system, but at anti-austerity measures undertaken by the British government.⁷⁴ However, separate demonstrations followed the death of Mark Duggan, who had been shot by police.⁷⁵ Related disturbances including arson, and looting, resulted in advice given to the courts to hand down tougher sentences in cases related to these incidents. The direction to ignore existing guidelines was criticised by political parties and civil rights campaigners.⁷⁶

2. Jurisdictional Issues

Personal

[85] Under the Human Rights Act 1998, only 'victims' of an unlawful act have standing to bring proceedings for a breach of Convention rights.⁷⁷ The test for standing is the same for the Act as under the Convention, and direct harm caused by an act or omission must be shown.⁷⁸ 'Victims' can

⁷⁰ *R. v Horncastle* [2009] U.K.S.C. 14, [2010] 2 A.C. 373.

⁷¹ See *Al-Khawaja v United Kingdom* [2011] E.C.H.R. 2127.

⁷² See *Manchester City Council v Pinnock* [2010] U.K.S.C. 45; *Mayor and Burgesses of the London Borough of Hounslow v Powell* [2011] U.K.S.C. 8; and *Kay v UK* [2010] E.C.H.R. 1322.

⁷³ Committee on Standards in Public Life, *Public Perceptions of Standards in Public Life in the UK and Europe* (25 March 2014), available at www.gov.uk/government/publications/public-perceptions-of-standards-in-public-life-in-the-uk-and-europe.

⁷⁴ W. L. Addams, "Anti-cuts March for the Alternative draws 500,000 protestors in London" (Time, 26 March 2011); "Public sector strike rallies held across UK" (BBC News, 30 November 2011).

⁷⁵ S. Payne "London riots map: all incidents mapped in London and around the UK" (*The Daily Telegraph*, 9 August 2011); C. Milmo, "The night that rioters ruled and police lost control of the streets of London" (*The Independent* (UK), 10 August 2011).

⁷⁶ J. Meikle and S. Rogers "UK riots: Judges warned by Law Society not to hand down 'rushed justice'" (*The Guardian*, 12 August 2011); M. Settle "Coalition split on sentences linked to riots" (*The Herald*, 18 August 2011); .

⁷⁷ s. 7(1) Human Rights Act 1998.

⁷⁸ See *Klaus v. Germany* (1979-80) 2 E.H.R.R. 214.

include any persons (include children, and others who might lack capacity according to domestic law),⁷⁹ non-governmental organisations,⁸⁰ or a group of individuals.⁸¹

[86] It is possible for a legal person (as opposed to a natural person) to bring proceedings in a claim for a breach of civil rights including the freedom of expression, freedom of assembly and association, the right to a fair trial, the right to property and freedom from discrimination. In the UK courts, there has also been recognition of the right of privacy for legal persons under Art 8.⁸² In this way, there is a limited scope of protection for the civil rights of legal persons. This can be contrasted with the position of other non-natural bodies. The House of Lords has held that convention rights cannot be extended to public authorities, including local councils.⁸³ This is a position which is consistent with Strasbourg case law.⁸⁴

Territorial

[87] In the UK, the territorial scope of protection of civil rights can be considered under two categories, first so-called 'foreign' cases – where UK courts are called to consider whether someone should be extradited or deported to another country from the UK, and this should be disallowed on the basis of human rights. A second category of cases concerns the circumstances in which the UK will be held to account for actions taken extra-territorially. Case law has often directed the territorial scope of civil rights norms, especially in terms of the application of the Human Rights Act outside of British territory. There is an indication from the Supreme Court⁸⁵ that the test for the circumstances in which the state can be held to account for its actions concerning citizens (in this case, soldiers) extraterritorially are 'whenever the state through its agents exercises control and authority over an individual, and thus jurisdiction'.⁸⁶ However, the scope of protection guaranteed for convention rights is contextual on the circumstances – the same degree of expectation may be impossible.

⁷⁹ See for example, *Covezzi and Morseli v. Italy* Judgment 9 May 2003; and *Winterwero v. Belgium* (1979) E.H.R.R. 387.

⁸⁰ These organisations on its own account only, and cannot challenge a measure on behalf of its members: *Ahmed v. United Kingdom* (2000) 29 E.H.R.R. 1.

⁸¹ Art. 34 ECHR.

⁸² *Office of Fair Trading v. X* [2004] I.C.R. 105.

⁸³ For example, a defamation case cannot be brought by a public authority: *Derbyshire County Council v. Times Newspapers* [1993] A.C. 534. See also *Aston Cantlow v. Wallbank* [2004] 1 A.C. 246.

⁸⁴ See for example *Province of Bari, Sorrention and Messeni Nemagna v. Italy* Decision of 22 March 2001; and *Ayuntamiento de Mula v. Spain* Decision of 1 February 2001.

⁸⁵ *Smith v. Ministry of Defence* [2013] U.K.S.C. 41, [2014] A.C. 52.

⁸⁶ *Al-Skeini v. United Kingdom* (2011) 53 E.H.R.R. 18; this case resolved the conflict between *Issa v. Turkey* (2005) 41 E.H.R.R. 27 and *Bankovic v. Belgium (Admissibility)* 11 B.H.R.C. 435, in favour of the test of authority and control (*Issa*) rather than mere territory (*Bankovic*).

[88] The consideration of 'foreign' cases is most clearly seen in the context of asylum seekers to the UK. The right to asylum when a person is in fear of persecution is protected by the Convention on the Status of Refugees 1950, incorporated in UK law by virtue of the Immigration Act 1971. In cases concerning convention rights for asylum seekers, fearing persecution in the event of a forced return to their home countries, the House of Lords has held that "the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less".⁸⁷

[89] In the interests of clarity, it is important to note that the scope of territorial protection for Acts depends on the legislation in question. It is often the case that the scope of protection of civil rights contained in an Act will be confined to either England and Wales, Scotland or Northern Ireland due to the devolution of legislative powers. For example, in terms of the Equality Act 2010, the Act governs the laws of England and Wales, and (with two exceptions) also applies to Scotland,⁸⁸ and with further qualifications to Northern Ireland.⁸⁹

Temporal

[90] The temporal limitations of claims for breach of civil rights are dictated by the relevant legislation in the UK. Under the Human Rights Act 1998,⁹⁰ cases against a public authority for a breach of rights must be brought within a year of the beginning of the offending action. This time limit is also subject to any stricter time limits, and so may be shorter. Judicial review proceedings must be taken within three months. There is scope for the court, on equitable consideration of the circumstances, to extend the one-year time limit. The Court has identified factors in any decision to extend the time limits, which have included the conduct of the public authority after the claim arose, the reasonable action of the claimants, and the cogency of their claim.⁹¹ In this regard, the Court interpreted the limitation section of the Human Rights Act 1998 to contain the directions on equitable considerations within the Limitation Act 1980.⁹²

[91] As the EU Charter has been incorporated into UK law by virtue of the European Communities Act 1972, there is no clear domestic legislation outlining the temporal limitations of claims that can be brought for civil rights violations under the Charter. The continuing uncertainty as to the scope and impact of the Charter in the UK also creates some uncertainty as to when proceedings must be

⁸⁷ *R. (Ullah) v. Special Adjudicator* [2004] U.K.H.L. 26, [2004] 2 A.C. 323, (Lord Bingham).

⁸⁸ Equality Act 2010, s. 217(2).

⁸⁹ Equality Act 2010, s. 217(3).

⁹⁰ s. 7(5) Human Rights Act 1998.

⁹¹ *Rabone v. Pennine Care NHS Foundation Trust* [2012] H.R.L.R. 10, [2012] 2 A.C. 72.

⁹² s. 33(3) Limitation Act 1980.

initiated. Neither the Limitation Act 1980, nor the Human Rights Act 1998 contain reference to limitations on proceedings under the Charter.

Material

[92] Concerns for national security have had an unprecedented impact on civil rights in the UK. This impact can be seen in civil rights protection including the right to free speech (for example, though the creation of the offence of 'glorification' of terrorism⁹³); the protection against loss of citizenship,⁹⁴ and the right to effective judicial protection.⁹⁵ Policy regarding police powers is informative in this area, to illustrate how rights have different material protection in the UK.

[93] Police powers of surveillance and search have been examined in light of the right to privacy. The use of CCTV video surveillance is regulated by the Data Protection Act 1998, and the Code of Practice for users of Closed Circuit Television. In terms of covert surveillance, the Police Act 1997, PT III regulates powers to authorise entry and surveillance of property. The Act provides immunity from civil and criminal liability for any acting under it. In England and Wales, the Regulation of Investigative Powers Act 2000 aims to provide a comprehensive code for surveillance. In terms of police powers regarding entry, search and seizure – there is some divergence between Scots law and the law of England and Wales.

[94] In Scots law, there is uncertainty as to when warrants must be issued, and where it is necessary, and the right to privacy is not determinative of the inviolability home.⁹⁶ There has been commentary to suggest that the incorporation of the ECHR is 'unlikely to be the catalyst for radical reform',⁹⁷ and recent concern has been highlighted over police powers to stop and search minors.⁹⁸ The scope of protection of rights in the policy area of security and policing in the UK is notably different from the protection afforded to civil rights in the context of other areas as illustrated above.⁹⁹

⁹³ Terrorism Act 2006.

⁹⁴ Immigration Act 2014.

⁹⁵ For example, in the recent effort to hold the first fully-secret trial in modern British legal history.

⁹⁶ *Birse v. H.M. Advocate* [2000] SLT 869.

⁹⁷ K.D. Ewing & K. Dale-Risk, *Human Rights in Scotland* (Edinburgh: W. Green Publishers, 2004), 310.

⁹⁸ M. Ellison, 'Police Scotland stopped and searched thousands of children', available at <http://www.bbc.co.uk/news/uk-scotland-27627154>.

⁹⁹ See above Question 2.

2.1 Right 1: Right to Equal Treatment

2.1.1 – Source of Protection

[95] The main sources of protection for the right to equal treatment in Great Britain are the Equality Acts 2006 and 2010.¹⁰⁰ These Acts identify protected categories of persons, against which discrimination is prohibited. They both further clarify the contexts in which discrimination is prohibited. The Equality Act 2010 (UK) identifies ‘protected categories’ as:

- Age
- Disability
- Marriage and Civil Partnership
- Gender reassignment
- Pregnancy and Maternity
- Race
- Religion and Belief
- Sex
- Sexual Orientation

[96] The Act sets out the different prohibited forms of discrimination, including both direct and indirect discrimination, harassment, and failing to make a reasonable adjustment for a disabled person. It prohibits discriminatory or unfair treatment in employment, provision of goods and services, education, in public function, management of premises and by associations.

[97] The Equality Act 2010 has been supplemented by additional legislation. The Equality Act 2010 (Specific Duties) Regulations 2011 which sets out certain equality duties which public sector authorities must comply with. A general duty of equality requires public bodies in the exercise of their functions to have due regard to the elimination of discrimination, harassment and victimisation. In practice, this is the requirement to take positive steps to meet the needs of protected groups, to encourage their participation and to minimise or remove disadvantages suffered by protected groups due to their protected characteristics.

[98] The National Assembly for Wales has regulated specific duties under the Equality Act 2010, with the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011. These duties include a statutory obligation to report Equality Impact Assessments on all policies, processes and practices (including the Budget) of the public sector in Wales. Similarly, in Scotland, the Scottish Parliament enacted the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012. These regulations creates duties

¹⁰⁰ The 2010 Act applies to Great Britain, however, separate provisions are made for Northern Ireland. See Territorial scope below.

including the publication of equality progress reports every two years, impact assessments, reports of positive actions.

[99] In addition to these measures across the UK, the Human Rights Act 1998 has incorporated relevant rights for equal treatment under the ECHR. Article 14 also covers a prohibition on discrimination based on political opinion, economic or social status as well as 'any other status'.

2.1.2 – Scope and limits of the right (including balancing with other rights)

[100] All rights which can be identified at common law have been to some extent superseded by the ECHR jurisprudence under the Human Rights Act 1998, this includes the three rights which are the focus of this section. The majority of civil rights are not absolute, and are instead qualified and subject to other considerations. Notably for the purposes of this report, civil rights including the right to respect for a private and family life, and the freedom of thought, conscience and religion are qualified, and must be balanced against other rights and public interests. Any interference with a right must be (a) lawful, (b) for a legitimate purpose or aim, (c) necessary, and (d) proportionate to that aim, or go no further than is necessary. If a public authority interferes with a right and does not match these four criteria, it will have been acting unlawfully.¹⁰¹

2.1.3 – Interpretation and application

[101] Commentary on the interpretation of anti-discrimination and equality legislation in the UK has considered the Courts to, generally, adopt a purposeful approach.¹⁰²

2.1.4 – Case law protecting civil rights

[102] Equal treatment cannot be limited to seeking a guarantee of equality in the employment context. One serious concern regarding equal treatment in Court arises from a report published in

¹⁰¹ See further P. Craig, 'Proportionality, Rationality and Review' *New Zealand Law Review* (2010): 265.

¹⁰² B. Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford: Oxford University Press, 2013), ch 11.

2003 in which it was concluded that ethnic minority defendants routinely suffered discrimination in court proceedings.¹⁰³

2.1.5 – Judicial enforcement institutions and bodies

[103] See “Judicial Institutions and Bodies” above.

2.1.6 – Non-judicial enforcement institutions and bodies relevant for the enforcement of the selected civil right

[104] A new body, the Equality and Human Rights Commission (EHRC) opened in 2007. This body has powers to promote and monitor human rights, and to publish codes of practice on equality legislation. As part of this body, from 2013, an Equality Advice and Support Service provides information and support to individuals with equality concerns, or human rights complaints. The EHRC is responsible for England, Wales, and Scotland. Wales and Scotland additionally have statutory committees already mentioned. Northern Ireland has its own body, the Equality Commission. The EHRC provide information and advice, and can use statutory powers to enforce duties under equality legislation. The body also seeks to influence the legislature, and endeavour to ensure that government takes account of human rights and equality.

[105] However, there has been some concern that the powers of this body to promote the right to equal treatment have been substantially hindered by a reduction in their budget, and a failure to maintain the specific requirement among public bodies of engagement with equal treatment.¹⁰⁴

2.1.7 – Access to Justice

[106] A serious concern in terms of access to justice is the lack of legal aid available to vulnerable members of protected categories. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (applicable to England, Scotland, and Wales) removed financial support for most cases involving housing, welfare, medical negligence, employment, debt and immigration. The cut in financial support in these areas disproportionately affects the most vulnerable of the protected categories listed above. The cut in the availability of legal aid has consequently had a detrimental effect on the possibility of protected categories seeking to remedy any situation in which their right to equal

¹⁰³ Prof G John, *Race for Justice* (Crown Prosecution Service, 2013); see also H Mulholland, “Ethnic Minority Defendants ‘denied equal treatment in Court’” (The Guardian, 21 October 2003).

¹⁰⁴ B Hepple, “Enforcing equality law: two steps forward and two steps backwards for reflexive regulation” (2011) ILJ 315.

treatment has been violated.¹⁰⁵ A lack of legal advice, linked with cuts to the funding of the Equality and Human Rights Commission which has responsibility to promote and monitor human rights, could lead to an overall sense in which the system to protect the vulnerable of the protected categories is failing.

2.1.8 – “Support structures”

[107] There are also numerous civil rights campaigners in the UK, including the National Council for Civil Liberties (‘Liberty’) which promotes civil rights through test case litigation, lobbying, campaigning and the provision of free advice. They do not appear to be actively involved in the setting of civil rights standards, but rather aim to influence their development.

[108] There are also national ombudsmen to whom it is possible to make a complaint. These are in some cases also country-based, in Scotland, for example, there are a number of different ombudsmen and commissioners with relation to civil rights protection. These include, the Scottish Public Services Ombudsman; the Scottish Legal Complaints Commission; and the Commissioner for Ethical Standards in Public Life in Scotland.

2.1.9: Further practical barriers to the effective enjoyment of the selected civil rights

[109] One highlighted concern from the point of view of EU citizens seeking to live and work in the UK is that the Citizens Directive (2004/38) does not guarantee an absolute right to equal treatment, in one pressing example – the right to access to the social care system is qualified by activity and duration of residence in the United Kingdom.

[110] One additional difficulty is the diversity of the protected categories which ought to be protected by the legislation. The concerns of each category, while having a shared goal of equal treatment, are different. For example, women in the work place might generally be concerned for equal pay, maternity cover availability, and the possibility of discrimination in work after a pregnancy; while members of certain under-represented races or those with disabilities may be concerned for discriminatory hiring practices. The diversity of issues related to equal treatment in employment creates additional difficulties to be addressed, which cannot be remedied with a ‘one-size-fits-all’ solution.

¹⁰⁵ A Langdon, “Legal Aid Cuts have Worsened the Plight of the Vulnerable” (The Guardian, 1 April 2015).

2.1.10: Jurisdictional issues in practice

- ✓ Personal See above 2.0
- ✓ Territorial See above 2.0
- ✓ Material See above 2.0
- ✓ Temporal See above 2.0

2.1.11: Systematic or notorious lack or deficient enforcement of the selected civil rights in the country under study?

[111] Discrimination on the basis of gender is prohibited in the UK, however, there are still many issues facing women and the protection of their civil rights in the UK. Women's advocacy groups focus on access to justice, legal aid, and family rights, as well as tackling the legal issues surrounding sexual and domestic violence. It might be considered that civil rights such as freedom of expression, or the practice of religion, do not hold the same resonance or importance with women's issues as equality, and access to effective judicial protection.

2.1.12: Good practices

[112] Numerous good practice guides are available to businesses, educational institutions, and other targeted organisations subject to the equality legislation. These are published by Government departments, for example official publications outlining changes for businesses, the public and voluntary sector and for the public are available from the Government Equalities Office.¹⁰⁶ In addition, private enterprise has developed to provide monitoring services and guidance for equality and diversity in employment to targeted institutions.¹⁰⁷

¹⁰⁶ See further at www.gov.uk/government/organisations/government-equalities-office.

¹⁰⁷ For example, ACAS (www.acas.org.uk) and Stonewall (www.stonewall.org.uk) produce good practice guides for businesses.

2.2 Right 2: Privacy Rights in the UK

2.2.1 – Source of Protection

[113] There has traditionally been a perceived antipathy in the UK towards the protection of the right to privacy,¹⁰⁸ and no general right to privacy exists in the common law.¹⁰⁹ As recently as 2003, in *Wainwright v. Home Office*,¹¹⁰ the House of Lords declined to develop a general tort of breach of privacy, concluding that existing actions gave specific and effective remedies, thus negating the need for an autonomous tort. It has been argued in the UK that there is indirect protection of privacy under different categories of law. For example – the law regarding defamation can protect reputation; the privacy of the home and property can be protected under laws of property and the tort of trespass; and bodily integrity can be protected under criminal law or the tort of trespass on the body.

2.2.2 – Scope and limits of the right (including balancing with other rights)

[114] As noted above, civil rights including the right to respect for a private and family life, and the freedom of thought, conscience and religion are qualified, and must be balanced against other rights and public interests. Any interference with a right must be (a) lawful, (b) for a legitimate purpose or aim, (c) necessary, and (d) proportionate to that aim, or go no further than is necessary. If a public authority interferes with a right and does not match these four criteria, it will have been acting unlawfully.¹¹¹

[115] The right to privacy is closely related to the right to family life, and must also often be balanced against the conflicting right to freedom of expression. Many cases concerning privacy have involved the media. The recent phone-hacking scandal has resulted in investigations by the Leveson Inquiry. The legal test for the misuse of private information, as affirmed in *Murray*,¹¹² is whether, first, there is a reasonable expectation of privacy, and, if yes, the court must then balance the competing rights of the freedom of expression and the right to privacy. In terms of confidential information, it has been established that a duty of confidence arises where a person has notice that the information is confidential.¹¹³ Similarly, while it has been reaffirmed that there is no general tort for breach of privacy in the UK, the development of law in breaches of confidence can provide a remedy where the

¹⁰⁸ R. Clayton & H. Tomlinson, *Privacy and Freedom of Expression* (Oxford: Oxford University Press, 2010); and J. Wadham, H. Mountfield, E. Prochaska, & C. Brown, *Blackstone's Guide to the Equality Act 2010*, 6th ed. (Oxford: Oxford University Press, 2011), 196.

¹⁰⁹ *Kaye v. Robertson* [1991] FSR 62.

¹¹⁰ *Wainwright v. Home Office* [2003] U.K.H.L. 53, [2003] 3 W.L.R. 1137.

¹¹¹ See further P. Craig, 'Proportionality, Rationality and Review' *New Zealand Law Review* (2010): 265.

¹¹² *Murray v Express Newspapers Plc* [2008] E.W.C.A. Civ. 446, [2008] 3 W.L.R. 1350.

¹¹³ *Attorney General v. Guardian newspapers Ltd (No 2)* [2004] U.K.H.L. 22, [2004] 2 A.C. 457.

information is private. This has been echoed in case law in Scotland,¹¹⁴ and there is reason to believe that the law of confidentiality may also be used to protect individuals from unwanted press publicity.¹¹⁵

2.2.3 – Interpretation and application

[116] In some instances, the higher courts have not considered actions to fall under the Right to Privacy. For example, in *Wainwright*, it was held by the House of Lords that there is no obligation to justify strip searches under Article 8(2) ECHR, as they would not constitute a violation of the right to privacy under Article 8(1) ECHR. Similarly, the legality of the power to stop and search was not considered substantively addressed under the right to privacy;¹¹⁶ a decision which was criticised by the European Court of Human Rights.

2.2.4 – Case law protecting civil rights

[117] The position of the House of Lords, and then Supreme Court of the UK has been criticised by the European Court of Human Rights, and both Courts have often arrived at opposing positions in regards the right to privacy.¹¹⁷ For example, the retention of data including fingerprints and DNA material by the police were unanimously held by the House of Lords not to constitute a violation of a right to privacy;¹¹⁸ whereas the European Court unanimously held that retaining data pertaining to the private life of an individual constitutes a clear interference within the meaning of Article 8 ECHR.¹¹⁹ In response to the judgment of the European Court, the Protection of Freedoms Act 2012 was enacted, limiting retention of biometric information to a period of 3 years, though this period may be extended on grounds of national security.

¹¹⁴ *Martin v. McGuinness* [2003] SLT 1424 (Lord Bonomy).

¹¹⁵ *Campbell v. MGN Ltd* [2004] U.K.H.L. 22, [2004] A.C. 457.

¹¹⁶ *R. (Gillan) v. Commissioner of Police for the Metropolis* [2006] U.K.H.L. 12, [2006] 2 A.C. 307. It was held unanimously by the House of Lords that it did not constitute a violation of Art. 5 ECHR.

¹¹⁷ For example, the House of Lords denied that the right to a private life was applicable in situations concerning individuals wishing to end their lives, *R. (on application of Pretty) v. DPP* [2001] U.K.H.L. 61, [2002] 1 A.C. 800. See also *ADT v. UK* (2001) 31 E.H.R.R. 33.

¹¹⁸ *R. (S) v. Chief Constable of the South Yorkshire Police* [2004] U.K.H.L. 39, [2004] 1 W.L.R. 2196.

¹¹⁹ *s. and Marper v United Kingdom* [2008] ECHR 1581. Measures limiting data retention were introduced in the Protection of Freedoms Act 2012, based partly on the Scottish approach in the Criminal Procedure (Scotland) Act 1995, amended by the Police, Public Order and Criminal Justice (Scotland) Act 2006. The Data Protection Act 1998 (UK) gives effect to the European Data Protection Directive 95/46/EC, on the protection of individuals with regard to the processing personal data and the free movement of such data.

[118] Balancing the rights of privacy and freedom of expression are often at issue in the UK Courts, and a significant proportion of case law on privacy relates to privacy complaints against the media. The traditional perception in the UK has been a preference for ensuring the freedom of the press. A concern for the 'chilling effect' of censorship of the media has led judges to examine closely constraints which might amount to censorship by private individuals.¹²⁰

2.2.5 – Judicial enforcement institutions and bodies

[119] See "Judicial Institutions and Bodies" above.

2.2.6 – Non-judicial enforcement institutions and bodies relevant for the enforcement of the selected civil right

[120] See 2.1.6.

2.2.7 – Access to Justice

[121] See 2.1.7.

2.2.8 – "Support structures"

[122] See 2.1.8.

2.2.9: Further practical barriers to the effective enjoyment of the selected civil rights

[123] The relative vilification of the 'right to be forgotten' in the British media is indicative of a general antipathy towards the right to privacy of the individual.

2.2.10: Jurisdictional issues in practice

- ✓ Personal See above 2.0
- ✓ Territorial See above 2.0
- ✓ Material See above 2.0
- ✓ Temporal See above 2.0

¹²⁰ See, for example, *Mosley v United Kingdom* [2011] 53 EHRR 30.

2.2.11: Systematic or notorious lack or deficient enforcement of the selected civil rights in the country under study?

[124] While there has been a notorious and long-standing conflict between the freedom of expression and the right to privacy, it has come into sharp relief in light of the recent series of high profile cases involving the media. As has been considered above,¹²¹ the right to privacy was not a feature of the British legal system prior to the incorporation of the EHCR. The right to freedom of expression, on the other hand, has a long history in the British legal system, and is considered an essential element of a democratic society. Although there is an emphasis on the 'balancing' of rights in judicial discourse, and the right to the freedom of expression is in the ECHR a qualified right, it seems that the Courts will often favour the media's arguments founded on the freedom of expression, giving a broad interpretation of 'public interest'.¹²² A strong conception of the right to privacy does not find widespread support in the UK, even in light of the endemic abuse by many members of the press uncovered in the Leveson Inquiry, despite the continuing conflict in the courts.

[125] Significantly in recent years, national security has become a determining factor in the public interest to curtail rights, and has been the source of much litigation in the area of civil rights in the UK. National security has been a justification in cases alleging interference with rights including the right to a fair trial, the freedom of speech and privacy. For example, the right to freedom of expression is qualified, most heavily under legislation concerning national security. The Terrorism Act 2006 has created new offences in the UK, which criminalise the encouragement or 'glorification' of terrorism. It has been reported by the UK government,¹²³ that the act does not seek to curtail political debate, and will not apply in situations where there was no intent to encourage terrorism. This is an example of how public policy concerning national security has often come into conflict with civil rights in the UK.

¹²¹ The Right to Privacy, Question 2, paras. [38]–[40]

¹²² P. Wragg, 'Leveson's Vision for Press Reform: One Year On', *Communications Law* (2014): 6.

¹²³ ICCPR 7th Periodic Report from the United Kingdom (12 December 2012).

2.3 Right 3: Citizenship and Civil rights: the Right to Protection Against Loss of Citizenship

2.3.1 – Source of Protection

[126] Essential to the understanding of the state of civil rights in the UK is also an understanding of the nature of citizenship in the United Kingdom. The current basis for nationality law in the UK is the British Nationality Act 1981. It has been significantly amended by subsequent acts, including the Nationality, Immigration, and Asylum Act 2003, the Immigration, Asylum and National Act 2006, and the Borders, Citizenship and Immigration Act 2009.

[127] In terms of EU citizens, both UK nationals and nationals of other Member States, and third country national family members of EU citizens, it is important to lay out the legislation which governs citizenship and nationality in the UK, as the first source of civil rights protection is the guarantees which flow from citizenship.

2.3.2 – Scope and limits of the right (including balancing with other rights)

[128] Under the 2006 Immigration, Asylum and Nationality Act, the Home Office or the Home Secretary has the power to revoke British citizenship. Under the legislative provisions, any dual national can be stripped of their citizenship if it is deemed in the public interest to do so. This represents a lowering of the standard of proof necessary for the Home Secretary to strip citizenship, from the standard of 'seriously prejudicial to the vital interests of the UK' to simply if the Home Secretary believes it 'conducive to the public good'. Orders for the deprivation of citizenship can be made without judicial approval and have immediate effect. They can only be challenged in court after the fact. However, as has been highlighted, access to justice to challenge a public order is difficult, if not impossible, where the affected person is not permitted to return to the UK for judicial proceedings.¹²⁴

2.3.3 – Interpretation and application

[129] In light of the Syrian crisis, and the involvement of British citizens, there has been indications of significant development in terms of the protection against loss of nationality. The Home Secretary, Theresa May, announced plans in late 2013 to expand the powers of the Home Office to strip British citizenship, even in cases where the result would be statelessness for the individual. Though there are International Conventions to which the UK is signatory, including the UN Convention on

¹²⁴ K. Bennhold, 'Britain Increasingly Invokes Power to Disown its Citizens' (New York Times, 9 April 2014).

Statelessness, which forbid the removal of citizenship where the consequence would be statelessness, there have been efforts to avoid the international obligations.

[130] It has been variously reported that the position of the Home Office is that British citizenship is a 'privilege, not a right'.¹²⁵ This statement has been echoed by the Immigration Minister, Mark Harper, A proposed amendment to the Immigration, Asylum and Nationality Act 2006 providing for the removal of citizenship of naturalised British citizens, even in cases where the consequence would be statelessness, was rejected by the House of Lords. Criticising the lack of scrutiny of the Bill, and the speed with which it was passed, it was returned to the House of Commons.

2.3.4 – Case law protecting against Loss of Citizenship

[131] The Supreme Court has ruled that it illegal to strip citizenship where the consequence would leave the individual stateless.¹²⁶ This action is also prohibited under Art. 8 ECHR.¹²⁷ The difficulty faced by

2.3.5 – Judicial enforcement institutions and bodies

[132] See "Judicial Institutions and Bodies" above.

2.3.6 – Non-judicial enforcement institutions and bodies relevant for the enforcement of the selected civil right

[133] See 2.1.6.

2.3.7 – Access to Justice

[134] The difficulty faced by potential claimants, such as refugees, UK residents and non-British family members, even if they qualified as 'victims' under the Convention, is access to the Courts. This

¹²⁵ 'Government using 'sinister powers' to strip British citizenship' (The Telegraph, 28 February 2013); A Travis, 'Theresa May plans new powers to make British terror suspects stateless' (The Guardian, 12 November 2013); and A. Ross, P. Galey & N. Morris, 'Exclusive: No way back for Britons who join the Syrian fight, says Theresa May' (The Independent, 23 December 2013).

¹²⁶ *Secretary of State for the Home Department v. Al-Jedda* [2013] U.K.S.C. 62, [2014] A.C. 253.

¹²⁷ However, upon accession to the ECHR, the UK declared that this article did not change a long standing position whereby the Government could strip British citizenship for actions 'seriously prejudicial to the vital interests' of the UK.

is especially concerning in the case of individuals stripped of their British citizenship abroad. As they have no legal right to return to the UK, it is difficult, if not impossible to bring proceedings to appeal the decision of the Home Secretary. There also may be practical issues related to gaining access to the courts, including finding information and advice. There may also be great impact on the protection of civil rights in the UK due to the recent cut-backs in legal aid provision in the UK.

2.3.8 – “Support structures”

[135] Support for citizens in terms of access to information about their rights and responsibilities has been made available by some dedicated charities. Notably, the Citizens Advice Bureau is part of a network of NGOs which provides free, confidential independent and impartial advice and services throughout the UK and Northern Ireland.

2.3.9: Further practical barriers to the effective enjoyment of the selected civil rights

[136] There currently exists a lacuna in UK law in terms of the rights enjoyed by UK Nationals as EU citizens in the territory of the UK. There are instances in which EU citizenship can hold a comparative advantage over national citizenship in terms of familial rights. An example of this is that an EU citizen who is a non-UK national exercising free-movement rights to live and work in the UK holds a comparative advantage over resident British citizens: by entering under EU regulations, they avoid the stringent legal and financial requirements of immigration for a non-EU spouse or family member. However, a method to avoid these requirements was confirmed in the case of *Surinder Singh*, wherein it was confirmed that a British citizen may equally come under EU law, as opposed to British law, by spending three months working in another EU member state before returning to the UK.¹²⁸

[137] The result of this has been a strengthening of UK law to restrict the reliance on EU citizenship rights and privileges by UK citizens. There now exists a lacuna in the law whereby, if an EU citizen of another Member States naturalises in the UK, he or she will be no long able to rely on EU free movement rights. As a result of amendments to the Immigration (EEA) Regulations 2006, the definition of an ‘EEA national’ is ‘a national of an EEA State who is not also a United Kingdom national’. This has the effect of barring EU nationals naturalised in the EU, as well as UK nationals from benefitting from the rights of residence and support for family and dependants under Directive 2004/38/EC.

¹²⁸ *R v Immigration Appeal Tribunal and Surinder Singh ex parte Secretary of State for the Home Department*, [1992] 3 CMLR 358.

2.3.10: Jurisdictional issues in practice

- ✓ Personal See above 2.0
- ✓ Territorial See above 2.0
- ✓ Material See above 2.0
- ✓ Temporal See above 2.0

2.3.11: Systematic or notorious lack or deficient enforcement of the selected civil rights in the country under study?

[138] The primary deficiency with regard to the right to citizenship is the lack of recognition of this right. The pervading political opinion is that UK citizenship (and by consequence, the concept of citizenship) is a privilege and not a right.¹²⁹ Although it has been clear that the Courts are unwilling to strip citizenship in instances where the person would otherwise be rendered stateless, there is nevertheless a lack of political incentive to strength the core notion of the inviolability of a person's citizenship, especially in instances where it is there only citizenship. With national security concerns related to the rise of ISIS, and the wide media coverage of persons with UK citizenship travelling to Syria and other ISIS strongholds to join the group, it is unlikely that any strong statement will be made defending the rights of those who leave the UK to maintain their claim to British citizenship.

2.3.12: Good practices

[139] There are no guides relevant to the right to protection against loss of citizenship (broadly construed).

¹²⁹ 'Government using 'sinister powers' to strip British citizenship' (The Telegraph, 28 February 2013); A Travis, 'Theresa May plans new powers to make British terror suspects stateless' (The Guardian, 12 November 2013); and A. Ross, P. Galey & N. Morris, 'Exclusive: No way back for Britons who join the Syrian fight, says Theresa May' (The Independent, 23 December 2013).

Annex

Relevant National Provisions

Act of Adjournment (Criminal Procedure Rules Amendment No. 2) (European Protection Orders)

2015

Civil Jurisdiction and Judgments Act 1982

Constitutional Reform Act 2005

Crime (International Cooperation) Act 2003

Criminal Justice (European Protection Order) (England and Wales) Regulations 2014

Criminal Justice (European Protection Order) (Northern Ireland) Regulations 2014

Criminal Justice and Licensing (Scotland) Act 2010

Data Protection Act 1998

Data Protection Act 1998

Data Retention and Investigatory Powers Act 2014

Equality Act 2010

European Communities Act 1972

Extradition Act 2003

Freedom of Information Act 2000

Human Rights Act 1998 (incorporating the European Convention on Human Rights)

Immigration Act 2014

Limitations Act 1980

Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR 2003)

Repatriation of Prisoners Act 1984

Terrorism Act 2006

Victims and Witnesses (Scotland) Act 2014

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