

CHAPTER 23: JUDICIARY AND FUNDAMENTAL RIGHTS

According to Article 6 (1) of the Treaty on European Union (TEU), the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. These principles are common to the Member States and need to be complied with by candidate countries.

The rule of law principle and the right to a fair trial, as enshrined in Article 6 of the European Convention on Human Rights (ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union, provide that the **judiciary** must be independent and impartial. The content of these notions has been clarified in the jurisprudence of the European Court of Human Rights (ECtHR), which is an accepted reference for the EU *acquis* under Article 6 (2) of the TEU. In particular, courts must be established by law; there shall be no discrimination in the appointment procedures of judges; the judiciary must not be influenced in its decision-making by either the executive or the legislature; judges must act impartially and be seen to do so; their conditions of tenure must be adequately ensured by law; the grounds for disciplinary action or removal from the post must be limited and laid down in the law.

Furthermore, it is a general principle of EU law that the judiciary must have sufficient means to work efficiently; judges are expected to respect high ethical standards in the performance of their duties in accordance with the law. The Council of Europe (COE) Committee of Ministers Recommendation N° R (94) 12 on the Independence, Efficiency and the Role of Judges provides further clarifications. Similarly, the European Guidelines on Ethics and Conduct for Public Prosecutors (the Budapest guidelines) offer useful guidelines about a common European standard in the field.

Article 67 of the Treaty on the Functioning of the European Union (TFEU) mentions that preventing and combating **corruption** contributes to the establishment of an area of freedom, security and justice. The 1995 Convention on the Protection of the EC's Financial Interests and the 1997 Convention on the Fight against Corruption involving Officials of the EC or the Member States imply that "effective, proportionate and dissuasive" criminal law penalties are required to fight corruption. The Council Framework Decision on Combating Corruption in the Private Sector of 2003 defines active and passive corruption in the private sector as a criminal offence and prescribes the responsibility of legal persons for both active and passive corruption. Candidate countries are expected under the Communication from the Commission on a Comprehensive EU Policy against Corruption of 2003 to maintain strong political commitment at the highest level, develop and improve investigative tools and allocate more specialised staff to the fight against corruption, pursue training and specialisation, implement strategies and legislation in an effective manner and become fully aligned with the relevant international instruments. The latter include in particular the UN Convention against Corruption and the Council of Europe's Criminal and Civil Law Conventions on Corruption.

According to Article 6 (3) of the TEU and the case-law of the Court of Justice, the Union respects **fundamental rights**, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of European Union law. Thus, they are binding on the Union institutions in the exercise of their powers and on the Member States when they implement European Union law (Article 51 of the Charter of Fundamental Rights of the EU). In the interpretation of fundamental rights, the Court of Justice has mainly drawn on the provisions of the ECHR and, occasionally, on several other international sources such as the UN International Covenant on Civil and

Political Rights. Art. 6 (1) of the TEU makes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the EU binding for the Union.

The list of fundamental rights covers traditional civil rights, such as the right to life, the prohibition of torture and degrading treatment, the right to liberty and security of person imposing strict limits on pre-trial detention, the freedom of religion, freedom of speech and freedom of association and assembly. The Union also protects the fundamental right to respect for private life with regard to the processing of personal data. Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data is the basic instrument at the EU level. The data protection rules have been modernised with the so-called EU data protection package reform, which comprises i) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation),⁵² and Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.⁵³ The Regulation entered into force on 24 May 2016 and will enter into application on 25 May 2018. The Directive entered into force on 5 May 2016. Member States have to transpose it by 6 May 2018.

Directive 95/46/EC gives substance to, and amplifies the principles of the protection of the rights and freedoms of individuals contained in the COE Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data and its Additional Protocol 181. It provides for the free movement of such data within the EU/EEA for both the public and the private sectors under certain conditions such as legitimacy, good data quality, and observance of the principles of finality and proportionality. The Convention is currently being reviewed. The ongoing modernisation aims at addressing new data protection challenges related to the increased use of the ICT and at strengthening the implementation of the rules. The inter-governmental *ad hoc* Data Protection Committee (CAHDATA) has finalised its works on the amended text which will probably be submitted to the Committee of Ministers for approval next year (2017).

The EU's human rights list also contains a number of guarantees to secure equality. There is a general prohibition of discrimination on a variety of grounds; equality between men and women must be ensured; cultural, religious and linguistic diversity is to be respected. Furthermore, in line with Article 24 of the Charter of Fundamental Rights of the EU, the rights of the child need special protection; the contents of these rights may be drawn from the UN Convention on the Rights of the Child ratified by all Member States. Children have, in particular, the right to survival; development; protection from harmful influences, abuse and exploitation; and full participation in family, cultural and social life. Moreover, Directive 2011/93/EU of 13 December 2011 on combating sexual abuse and sexual exploitation of children, and child pornography harmonises throughout the European Union criminal offences relating to sexual abuse committed against children, the sexual exploitation of children and child pornography. It also lays down the minimum sanctions. This Directive also supplements the Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims.

According to Article 21 of the Charter of Fundamental Rights of the EU, members of national

⁵² OJ L 119, 4.5.2016, p. 1–88.

⁵³ OJ L 119, 4.5.2016, p. 89–131.

minorities shall not be discriminated against. Article 1 of the Framework Convention for the Protection of National Minorities confirms that human rights include minority rights. The latter include the right to non-discrimination of a person belonging to a national minority; the freedom of association, to assembly, of expression; the freedom of religion; the right to use one's language; and the effective participation in public affairs. Measures against racism and xenophobia cover areas such as anti-Semitism, Islamophobia, and anti-Gypsism. The importance of preventing and combating these phenomena is stressed in Article 67 of the TFEU. The Council adopted, in 1996, a Joint Action to combat racism and xenophobia.

Finally, the Union *acquis* in the field of fundamental rights contains a number of important judicial guarantees. According to Article 47 of the Charter of Fundamental Rights of the EU, everybody has the right to a fair trial and the right to an effective remedy. Legal aid should be given if the person charged does not have sufficient means; this initially concerned criminal cases but has been extended, under certain conditions, to civil ones when the interest of justice so requires. Furthermore, the principles of legality and proportionality of criminal offences and penalties need to be observed. The accused must also benefit from a presumption of innocence and enjoy defence rights.

The **EU citizens' rights** regard the right to vote and stand as a candidate in elections to the European Parliament and in municipal elections; the right to move and reside freely within the European Union; and diplomatic and consular protection.

I. THE JUDICIARY

(For detailed questions, see Political criteria)

II. ANTI-CORRUPTION

(For detailed questions, see Political criteria)

III. FUNDAMENTAL RIGHTS

(For detailed questions, see Political criteria)

IV. EU CITIZENS' RIGHTS

A. Right to vote and stand as a candidate in municipal elections

1. Which legal procedures would be necessary to allow EU citizens to vote for and/or stand for the local elections in Bosnia and Herzegovina, or to benefit from other electoral rights?

B. Right to move and reside freely

2. What documents do EU citizens and members of their families need in order to enter Bosnia and Herzegovina?
3. What documents do EU citizens not exercising an economic activity have to produce and which fee are they charged for a residence permit?
4. What are the reasons to refuse entry or residence to EU citizens?

C. Diplomatic and consular protection

5. Which measures (legal, institutional and others) would be necessary to allow EU citizens to benefit from protection of diplomatic and consular representations of Bosnia and Herzegovina, including the establishment of an emergency travel document?