



Committee on Civil Liberties, Justice and Home Affairs (LIBE)

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Hearing on the implementation of the EU Charter of Fundamental Rights

Session III: A citizens' agenda for fundamental rights

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Let me - first of all - thank the LIBE committee for inviting me to today's hearing. The subject is of great importance. We should indeed take time to assess and discuss the implementation of the Charter, and especially see how this may or should affect the citizens.

Two years after the entry into force of the Lisbon Treaty, I can conclude that in any case within the area of my competence - privacy and data protection - the legally binding character of the Charter has proven its value. Before explaining this further, let me briefly recapitulate how the Lisbon Treaty and the now binding Charter have changed the legal architecture of data protection in Europe.

One of the novelties of the Charter, when it was solemnly proclaimed as a *political* document in December 2000, was the introduction of a self standing right to data protection in Article 8. The provision was closely connected with the right to privacy, but had its own remit.

The provision spells out certain basic principles of data protection and lifts them to the primary EU level:

- Data 'must be processed fairly and for specified purposes'.
- Processing should be 'on the basis of the consent of the person concerned or some other legitimate basis laid down by law'.

- 'Everyone has the right of access to data which has been collected concerning him or her' 'and the right to have it rectified',

and last but not least:

- 'Compliance with these rules shall be subject to control by an independent authority'.

Indeed, as the Court of Justice has also stated in a case against Germany, the existence of independent supervisory authorities is 'an essential component' of data protection.

With the entry into force of the Lisbon Treaty, the right to data protection has been clearly confirmed as a general principle of EU law. But the Lisbon Treaty did more than that. The right to data protection is one of the few rights of the Charter which can also be found in the Treaty on the Functioning of the European Union (TFEU). Its Article 16 lays down the right to data protection and creates a separate, general legal basis for EU rules on data protection.

This duplication underlines the importance given to the proper protection of personal data on an EU wide scale. The Lisbon Treaty has given a great impetus for achieving a 'data protection culture' in Europe. It goes without saying that in the increasingly ICT and Internet driven society we live in today, this is a necessary development: personal data processing is now literally 'everywhere' and knows no borders. Article 16 TFEU implies that the EU is now fully competent to lay down rules in this area.

The Commission is currently working hard on the revision of the data protection rules. The challenge is to make the current rules more comprehensive, more effective in practice, and where possible also less burdensome and to keep, or even step up, the high level of protection EU citizens are entitled to.

In this revision process, several parameters are clearly set out by Article 8 of the Charter of Fundamental rights, as just mentioned. The Commission should for instance use the current revision of the data protection framework to better ensure that supervisory authorities at Member State level - and where necessary also at EU level - are effective and can do their work in complete independence.

The Lisbon Treaty changed the fundamental architecture of data protection in the EU and has instigated a revision process of the current rules on data protection. The outcome of the latter will be for the longer term. So what can we say about the *implementation* of the Charter in the

past two years? Did it have any concrete, practical effects? As already mentioned, for data protection it certainly did.

Let me illustrate this with two developments in the past two years: the ruling of the Court of Justice in the *Schecke* case in November 2010, and the Communication of the Commission on the strategy for the effective implementation of the Charter in October 2010.

In the *Schecke* ruling the Court had to answer the question whether EU law requiring the publication of the names of farmers receiving money from the agricultural funds, was in conformity with the rights to privacy and data protection as laid down in the EU Charter.

The Court issued an important judgment with relevance beyond the area of privacy and data protection. It annulled the EU legislation because it was in breach of the rights to privacy and data protection. The publication affected the rights of the farmers, and although the publication served an acceptable public interest, the Court considered the measure disproportionate. It was disproportionate since, according to the Court, there was 'nothing to show' that the legislator had considered alternative, less intrusive means.

This ruling strongly confirms that the EU legislator, when it intends to adopt a measure which intrudes on the fundamental rights of citizens - i.e. any fundamental right, not only privacy or data protection - should consider in the Impact Assessment alternative, less intrusive means and should explain and justify its final choice. In other words: the Court did not *exclude* the publication of names of farmers, but insisted on a greater degree of care to ensure adequate proportionality.

The *Schecke* judgment endorses the 'fundamental right reflex' the Commission is referring to in its Communication on the strategy for the effective implementation of the Charter. This is the second issue I wanted to highlight.

According to the Communication, the Charter must serve as compass for the Union's policy. The ambitions voiced in this Communication go beyond the inclusion of a proportionality test when *new* legislation is considered for which the Commission has set up a checklist. The Commission also emphasises the *ex post* evaluation of *existing* legislation.

We believe this ex post evaluation is of crucial importance, especially in the area of privacy and data protection; an area in which the EU legislator has been particularly intrusive at some points. EU instruments creating large scale data bases and stepping up cross border exchange of data should be evaluated regularly, as we have emphasised in many of our opinions. We have also insisted on the need of regular monitoring and reporting on the *effectiveness* of these instruments.

With an instrument in force for several years, it should be possible to make an *evidence-based* assessment of whether a certain measure is actually effective, and whether it indeed constitutes a *necessary and proportionate* measure.

The current evaluation of the Data Retention Directive is a clear example. Whatever may be said about the Directive, the Commission keeps to its ambitions set out in the Communication on the Charter and tries to collect qualitative and quantitative data in order to demonstrate the necessity of the current instrument. Although this proves to be difficult for several reasons, we are pleased to see this exercise taking place. It is partly a learning exercise. We believe that this evaluation should set the standard for the evaluation of other EU instruments which affect the privacy and data protection of EU citizens.

The *Schecke* ruling and the Communication on the Charter show that the Charter has had concrete effect in the past two years. Directly for citizens – for the time being the names of the farmers are no longer published – and somewhat less visibly and directly for citizens through the requirements to which the EU legislator is bound: a true and thorough analysis of alternative, less intrusive means and ex post evaluation of intrusive measures.

The ongoing revision of the EU legal framework for data protection, which was instigated by the Charter, will of course have a very great impact in the near future.

As European Data Protection Supervisor, we will continue to see to it that, within the area of our competence, the EU institutions in their daily work and also in their role as EU legislator do *indeed* navigate on the fundamental rights' compass set out by the Charter. We thereby hope to further contribute to the effective implementation of the Charter in the challenging years ahead of us.

I thank you for your attention.