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The European Union as a Community of values: safeguarding fundamental rights in times of crisis



FRA

EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS



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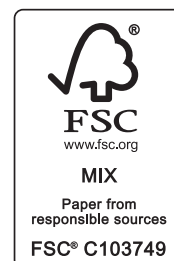
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Contents

INTRODUCTION	5
1 THE EUROPEAN COMMUNITY OF VALUES	7
1.1. Observing the founding values in Article 2 of the TEU	7
1.2. Observing fundamental rights obligations in Article 6 of the TEU	8
1.3. Observing social rights as laid down in the Charter of Fundamental Rights of the European Union	9
2 CRISIS SITUATIONS	11
2.1. Socio-economic crisis	11
2.2. Political crises	16
2.3. Constitutional crises	19
3 SAFEGUARDING EUROPEAN VALUES: CURRENT DEVELOPMENTS AND DISCUSSIONS	23
CONCLUSION	27
REFERENCES	29

Introduction

Rising unemployment rates, fiscal consolidation and austerity measures across the European Union (EU), as well as public protest and constitutional conflicts in some EU Member States, all captured headlines in 2012. The crisis that the EU has been facing over the course of the past five years transcends issues of finance. It has implications for democratic legitimacy and the rule of law, and therefore also for the respect of fundamental rights. The seriousness of the situation prompted discussions about the nature, scope and future of the EU. The crisis and its consequences called for action from institutional and policy actors at all levels of governance, civil society organisations and the general public to ensure that the EU and its Member States uphold their fundamental rights obligations.

The term 'crisis' generally describes a situation in which there are a lot of problems that must be dealt with quickly to avoid the situation getting worse; in other words, it is a time of great difficulty or danger. The EU has been and is still witnessing various situations that have led to great difficulties within the Union and in Member States. These difficulties are neither an expression of one single crisis, nor are they all related. They rather coincided so that the year 2012 can be characterised as one with several crises of a different nature. Some of these crises, such as the socio-economic crisis, affected the majority of EU Member States, whereas others, like the constitutional crises in Hungary and Romania, were limited to single Member States. All of these crisis situations are, however, of concern to the EU – an entity that is built equally on all its Member States, and their political and economic systems.

The socio-economic downturn is the most enduring crisis facing the EU for the past five years. As the Directorate-General for Employment, Social Affairs and Inclusion at the European Commission stated already in 2009, "the financial crisis that hit the global economy since the summer of 2007 is without precedent in post-war economic history. Although its size and extent are exceptional, the crisis has many features in common with similar financial-stress driven recession episodes in the past [...] However, this time is different, with the crisis being global akin to the events that triggered the Great Depression of the 1930s."¹ That depression led to a worldwide economic downturn, which many believe provided fertile ground for the rise of fascism and Nazism in Europe, and the fundamental rights violations perpetrated in the name of those doctrines.

That is not to say that the situation in the EU today can be compared with, or is even remotely similar to, the situation in Europe in the 1930s. The fundamental rights infrastructure that is now in place² constitutes an important difference to the previous period; this infrastructure and the values underpinning it guarantee a better level of protection for the population of the EU. Nevertheless, the question remains: what impact has this crisis had on the protection and promotion of fundamental rights.

The Focus of the FRA Annual report 2012³ is not limited to the socio-economic crisis, nor does it aim to explore its origins.⁴ Instead, it looks at the different crisis situations, including the constitutional crisis that unfolded in single EU Member States. It emphasises responses taken at EU and Member State level to safeguard the values 'common' to both Member States and the EU.

1 European Commission, Directorate-General for Employment, Social Affairs and Inclusion (2009a), p. 1.

2 FRA (2012a).

3 This Focus has been extracted from its original publication, the FRA Annual report 2012. All references in the text and the footnotes to "this report", and all references to chapters highlighted in colour, refer therefore to: FRA (2013), FRA Annual Report – *Fundamental rights: challenges and achievements in 2012*, Luxembourg, Publications Office.

4 For more on the origins of the economic crisis, see: European Commission, Directorate-General for Employment, Social Affairs and Inclusion (2009).

1

The European Community of values



The Treaty of Lisbon gave new impetus to a fundamental rights culture in the EU's institutional structure, including new internal procedures in the European Commission, European Parliament and Council of the European Union.⁵ The way the EU and its Member States, however, deal with threats to their shared values remains on the agenda.

The widespread socio-economic crises in the EU, plus the political and constitutional crises in specific EU Member States, have put the EU's commitment to shared values to the test. In this context, it is helpful to distinguish between a wider circle of values that address areas falling outside EU competence (Article 2 of the Treaty on European Union (TEU)) from an inner circle of fundamental rights obligations imposed on and by the EU (Article 6 of the TEU) and from socio-economic rights (especially Title IV 'Solidarity' of the Charter of Fundamental Rights of the European Union). Whereas, in their substance these values all overlap – social rights form part of fundamental rights and fundamental rights form part of the founding values in Article 2 TEU – the means to guarantee the respect for these rights appear to differ.

1.1. Observing the founding values in Article 2 of the TEU

When the European Council stressed in 1993 that EU membership requires "that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect

for and protection of minorities",⁶ it was aiming to prepare the ground for a certain degree of "constitutional homogeneity"⁷ within an enlarged EU of increasingly diverse membership. All Member States forming the EU in 1993 shared this political commitment and those Member States that acceded to the Union in 2004 and 2007, respectively, explicitly adhered to this shared commitment.

With the entry into force of the Amsterdam Treaty and then the Lisbon Treaty, primary law explicitly provides for an EU "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities" (Article 2 of the TEU). These foundational values have normative implications for both candidate countries and EU Member States. Countries that wish to apply for EU membership must ensure they "respect" Article 2 values and are "committed to promoting" them (Article 49 of the TEU). EU Member States must also remain 'Article 2 compliant'. This holds true not only for fields where Member States act on behalf of the EU but in all contexts.⁸

The sanctioning procedure laid down in Article 7 of the TEU "enables the Union to suspend the rights of a Member State if it seriously and consistently breaches fundamental rights, regardless of whether a Member State acts within or outside the framework of Union law."⁹ In this sense, the value-obligation in Article 2 of the TEU is decoupled from EU legislative competences. Member States are therefore also liable under Article 2 of the TEU in fields where they "act autonomously".¹⁰

6 European Council (1993), *Conclusions of the Presidency*, 21–22 June 1993, point 7.A.iii, p. 13.

7 Schorkopf, F. (2000).

8 De Witte, B. and Toggenburg, G. N. (2004), pp. 59–82.

9 Commission of the European Communities (2005), p. 13.

10 Commission of the European Communities (2003).

5 See FRA (2012a).

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

Article 2 of the Treaty on European Union (TEU), OJ 2012 C 326, p. 17

To safeguard Article 2 values, Article 7 allows for three different interventions: the determination of a "clear risk of a substantial breach" of core EU values; the identification of a "serious and persistent breach" of these values; and, the imposition of political sanctions against the EU Member State concerned.

Since the threshold for setting any of these procedures in motion is high and the major players are political institutions, many consider Article 7 an 'atomic bomb' – designed to threaten but not to actually apply. Indeed, it has never been used. As a result, discussions, including at political level, have emerged questioning whether the mechanism available will suffice to safeguard the Union's founding values (see the section in this Focus on 'Observing social rights as laid down in the Charter of Fundamental Rights of the European Union').

1.2. Observing fundamental rights obligations in Article 6 of the TEU

Compared to the 'value obligations' in Article 2 of the TEU, the fundamental rights obligations in Article 6 of the TEU are more specific and equipped with more efficient enforcement mechanisms. In line with Article 6 of the TEU, the obligations are enshrined in three different legal sources.

First, there are the "rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union". These have the same legal value as the EU Treaties.¹¹ Then, there is the European Convention on Human Rights (ECHR), to which the EU is currently negotiating its accession, thereby following up on the obligation laid down in paragraph 2 of Article 6 of the TEU. The EU may also ratify additional international human rights instruments as its ratification of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) shows. Finally, the obligation to respect fundamental rights arises "from the constitutional traditions common to the Member States" which shall constitute general principles of EU law.¹²

In this respect, the EU is a fundamental rights community based on three different legal obligations combining an EU catalogue of rights with international obligations – such as the ECHR – and general principles of law that have their roots in the constitutional law of EU Member States. Therefore – as was presented in detail in the Focus of FRA's 2011 Annual report – the community of values is to be seen in the wider context of a multi-level governance perspective with the UN, the Council of Europe and EU Member States all providing their respective shares in a joined-up system of fundamental rights protection.¹³

Under EU law, where an EU Member State is violating its fundamental rights obligations, the standard procedures – including infringement procedures brought by the European Commission or preliminary procedures initiated by national courts – can be brought before the Court of Justice of the European Union (CJEU). The obvious limitation here – in contrast with what was said with regard to the Article 2 values – is that these procedures can only be activated where an incident falls within the scope of EU law.

According to Paragraph 1 of Article 51 of the Charter of Fundamental Rights of the European Union, an issue falls under the scope of EU law when the Member States are "implementing Union law".¹⁴ The CJEU, in line with its earlier case law on the fundamental rights obligations of the Member States, has interpreted this more widely as referring to situations that are "covered by European Union law".¹⁵ The same wording is used in Article 19 of the TEU under which EU Member States are obliged to "provide remedies sufficient to ensure legal protection in the field covered by Union law". More recently, the court established that the Charter's wording of Article 51 ("only when they are implementing Union law") "confirms the Court's case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union".¹⁶ In this sense, the CJEU might look at the fundamental rights compliance of national acts that do not explicitly implement or transpose Union law but share a specific purpose with a piece of Union law. Against such a wide reading of the Charter obligations, it was questioned whether each national measure, including national constitutions, must be pre-emptively 'Charter-proofed'.¹⁷ On the other hand, cases relating to social rights have shown a different picture and suggest that the limitation

¹¹ TEU, Art. 6, para. 1.

¹² TEU, Art. 6, para 3.

¹³ FRA (2012a).

¹⁴ Charter of Fundamental Rights of the European Union, OJ 2012 C 326, p. 406.

¹⁵ CJEU, C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres*, 15 November 2011, para. 72.

¹⁶ CJEU, C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, 26 February 2013, para. 18.

¹⁷ Morijn, J. (2013).

to the scope of EU law as defined in Article 53 of the Charter is operational and of practical relevance (see the section in this Focus on 'Observing social rights as laid down in the Charter of Fundamental Rights of the European Union').

It can thus be assumed that the exact scope of application of fundamental rights obligations under EU law remains open to interpretation and discussion.¹⁸ It is up to the court, also in part to guarantee legal clarity, to fine-tune the limits of the fundamental rights review offered by EU law.

The European Commission has discretion over whether to launch an infringement procedure. It may opt not to bring an issue before the CJEU even in cases clearly covered by EU law. The European Commission has, however, announced a "zero tolerance policy".¹⁹ In the informal phase of an infringement procedure, it can already exert pressure on EU Member States to effect a political change.²⁰ The vast majority of issues are in fact solved at this stage.²¹ Moreover, the political discretion of the European Commission as well as its limited resources are counterbalanced by the EU system's reliance on 'dual vigilance'. In other words, the European Commission's institutional vigilance is complemented by 'individual vigilance': individuals may request national courts to refer questions related to obligations under EU law to the CJEU.

The EU thus disposes of a judicial system that allows for prosecuting violations of EU law. Infringement actions as well as annulment procedures can be, and increasingly are, used for safeguarding fundamental rights obligations as laid down in Article 6 of the TEU.²² Continuing uncertainties as regards the general reach of EU law have, however, implications for the awareness and clarity of EU-imposed obligations in terms of fundamental rights. National court requests to the CJEU for clarification of Charter-related questions grew to 41 requests²³ in 2012 from 27²⁴ in 2011 and 18 in 2010. The number of CJEU judgements referring to the Charter double from year to year, while the overall numbers (87 in 2012)²⁵ remain rather low. This stems from limited awareness of EU law obligations and limited access to the CJEU for individuals. Even where cases reach the CJEU, there remain differences with the ECtHR, with the latter

hearing a large number of third-party interventions providing on-the-ground information and evidence.²⁶

1.3. Observing social rights as laid down in the Charter of Fundamental Rights of the European Union

The EU was often applauded for agreeing on the Charter of Fundamental Rights as the first legally binding human rights instrument in Europe, which deals in one single text with civil and political rights, as well as with economic, social and cultural rights (here referred to as social rights). In principle, the Charter thereby provides these two groups of rights, which are often kept separate, with the same standing.

Title IV on solidarity is among the longest parts of the Charter and deals in 12 articles with important core rights, including: workers' right to information and consultation within the company; collective bargaining and action; access to placement services; protection in the event of unjustified dismissal; fair and just working conditions; the protection against child labour and of young people at work; social security and social assistance; healthcare and access to services of general economic interest.

To gain political consensus on the inclusion of all these rights in the Charter, the drafters included a cross-cutting provision in paragraph 4 of Article 52. This provision differentiates between rights and "principles". The latter are "judicially recognisable" only in the interpretation of implementing acts.²⁷ Moreover, half of the rights listed in the Charter's title on solidarity refer back to "national laws and practices". This is, for example, the case for Articles 30 and 34 on protection in the event of unjustified dismissal, and social security and social assistance, respectively.

This approach responds to the fact that EU Member States differ in their legal handling of social rights. Some grant these rights constitutional standing, while others leave their regulation to statutory law. There are also Member States that combine social rights, social objectives and social policy clauses in their constitutions.

However different the status of social rights may be under national constitutional law, social rights often play a more prominent role in statutory law and particularly in national courts' case law.²⁸ Indeed, there appears to be no direct link between the successful

18 Groussot, X., Pech, L. and Petrusson, G.T. (2011).

19 See, for example: Reding, V. (2010).

20 For criticism of the European Commission's dual role as both the guardian of the Treaty and a political actor, see: Dawson, M. and Muir, E. (2011), pp. 751-775.

21 In 2011, the European Commission received 3,115 new complaints; the CJEU had delivered 62 judgments under Article 258 of the TFEU. See: European Commission (2012a).

22 See FRA (2012a).

23 European Commission (2013a), p. 22.

24 European Commission (2012b), p. 6.

25 European Commission (2013a), p. 22.

26 See Carrera, S., De Somer, M. and Petkova, B. (2012).

27 Ladenburger, C. (2007), pp. 311-365.

28 See, for example, Iliopoulos-Strangas, J. (2010).

management of the implications of the socio-economic crisis and whether or not social rights are enshrined in constitutional law. Observers instead underlined that systems recognising social justice as an important principle implemented by a solid body of law have a good chance of efficiently addressing the social costs of the crisis.²⁹

All of these aspects underline the inclusion of social rights in the fundamental rights obligations under EU law. The way, however, in which social rights are integrated in the EU Charter of Fundamental Rights reflects the existing diversity with regard to the status of social rights at national level. Consequently, their implementation will not always offer the same degree of protection as other rights.

²⁹ See, for example, Baron von Maydell, B. (2012), pp. 5–10.



2

Crisis situations



The year 2012 revealed multiple crises that affected the EU and its Member States in varying manners and degrees. Some EU Member States suffered particularly from the socio-economic crisis but others less so. Some Member States showed elements of political crisis, others did not. Two EU Member States – Hungary and Romania – faced a wider constitutional crisis in 2012. Such crises put to the test the values of the EU as enshrined in Article 2 of the TEU and the EU Charter of Fundamental Rights.

2.1. Socio-economic crisis

The ongoing economic crisis led to increasing long-term unemployment. This bears a risk to result in marginalisation and poverty for groups that are at risk, as highlighted by the European Commission in its 2012 report on employment and social developments: “Groups already at a heightened risk of poverty, such as young adults, children and to some extent migrants, are now experiencing an even worse situation.”³⁰

Being unemployed and living in conditions of poverty and social marginalisation can have detrimental effects on the full enjoyment of rights and freedoms, as enshrined in the EU Charter of Fundamental Rights. Those rights and freedoms that are most at risk include: human dignity (Article 1); the freedom to choose an occupation and the right to engage in work (Article 15); non-discrimination (Article 21); protection in the event of unjustified dismissal (Article 30); social security and social assistance (Article 34); healthcare (Article 35); freedom of movement and of residence (Article 45).

³⁰ European Commission, Directorate-General for Employment, Social Affairs and Inclusion (2012), p. 3. See also Chapter 4 on ‘The rights of the child and protection of children’ for more information on child poverty.

Both the effects of the economic crisis on people living in the EU and of budget cuts driven by fiscal consolidation and austerity measures provide testimony to the potential vulnerability of these rights.³¹

2.1.1. The situation on the ground

The impact of the economic crisis on the ground is perhaps most visible in unemployment and poverty figures. The unemployment rate in the EU-27 climbed to 10.7 %, or just under 26 million people, in December 2012 from 10 % in December 2011, Eurostat data show. Of these 26 million people, about 5.7 million were under the age of 25, which brought the young persons’ unemployment rate up to 23.4 % in December 2012 from 22.2 % the previous year.³²

The crisis also increased the long-term unemployment rate. “[T]he number of people unemployed continuously for more than a year [...] increased by 14.3 % [by the second quarter of 2012] compared to the same quarter of the previous year to reach a total of close to 11 million.”³³

In addition, there is evidence to suggest that the “economic crisis is damaging labour market conditions [...] more rapidly and severely than initially thought. It is likely to hit immigrants and their families particularly hard, threatening most of the progress accomplished in recent years in terms of labour market outcomes,” as the Organisation for Economic Co-operation and Development (OECD) notes.³⁴

³¹ See Chapter 8 on ‘Access to efficient and independent justice’; and for more information on the impact of austerity measures on access to justice, see: FRA (2012b).

³² Eurostat (2013a).

³³ European Commission (2013b), p. 15.

³⁴ Organisation for Economic Co-operation and Development (2009), p. 2.

Unemployment can have detrimental effects not only on people's quality of life, but also on their full enjoyment of rights and freedoms. Unemployed persons are likely to experience reduced life satisfaction and greater social exclusion, Eurofound reported.³⁵ The European Commission notes that long-term unemployment is closely linked with a high risk of poverty,³⁶ which in turn leads to financial and social exclusion, as Eurobarometer data confirm.³⁷ Lower income is linked to poorer health outcomes,³⁸ the European Commission showed, with almost one third of EU citizens saying that by December 2011 they had more trouble affording the costs of general healthcare than in October 2010.³⁹

"2012 has been another very bad year for Europe. After five years of economic crisis, recession has returned, unemployment has reached levels not experienced in nearly two decades and the social situation is also deteriorating."

European Commission, Directorate-General for Employment, Social Affairs and Inclusion (2012), Employment and social developments in Europe 2012, Brussels, Directorate-General for Employment, Social Affairs and Inclusion, available at: <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7315>

Large proportions of financially vulnerable Europeans face difficulties in accessing financial services, such as mortgages, loans or credit cards, Eurobarometer reports.⁴⁰ Financially vulnerable persons here are understood as those who have difficulty paying bills on time or making ends meet, the unemployed and persons living in poor households. "[F]inancially vulnerable Europeans report feeling left out of society far more often than respondents as a whole. While 16 % of Europeans overall feel excluded, around a third of 'poor' Europeans feel this way."⁴¹

These findings should be considered against the fact that almost one in four persons in the EU is at risk of poverty. Almost a quarter, 24.2 %, ⁴² of the EU population was at risk of poverty or social exclusion in 2011, up from 23.6 % in 2010 (see Figure for definitions and data). This represents about 116 million individuals.

Women are more likely than men to be at risk of poverty in the EU, with a rate of 25.2 % for the former and 23 % for the latter in 2011. The difference is even more pronounced among persons over the age of 55, with 25.1 % of women in that age group at risk of poverty in 2011, compared with 19.7 % of men.⁴³

Nevertheless, "poverty or social exclusion for the older age group declined in most Member States between 2008 and 2011. The apparent improvement in the relative situation for the elderly reflects the fact that pensions have remained to a large extent unchanged during the crisis, and have in some cases brought pensioners' income above the poverty threshold due to the changes in the total income distribution while not altering in real terms their economic situation."⁴⁴ Child poverty is also an issue of concern, with 27 % of children in the EU at risk of poverty in 2011 (see Chapter 4 on 'The rights of the child and protection of children').⁴⁵

The fundamental rights dimension of poverty becomes evident when considering that those at risk of poverty are more likely to report housing problems, such as leaky roofs, damp walls, floors or foundations, rot in window frames and floors.⁴⁶ Large numbers of households are experiencing material difficulties, with increased deprivation observed in the majority of EU Member States. Eurostat estimates that about 43.5 million people in the EU lived in a situation of severe material deprivation in 2011.⁴⁷

Data published by FRA in 2012 show that between 70 % and 90 % of the Roma surveyed report living in conditions of severe material deprivation.⁴⁸ The same research also interviewed non-Roma living in the same area as or in the closest neighbourhood to the Roma interviewed: the results show that the proportion of non-Roma population living in conditions of severe material deprivation is significantly lower with substantial differences between EU Member States.⁴⁹

Whereas it is difficult to assess causal links between the socio-economic crisis and vulnerability, including of persons who do not necessarily belong to vulnerable groups, vulnerability rises in times of crisis. For instance, the "economic downturn [...] has had some impact on the overall extent of homelessness. For Greece, Ireland, Italy, Portugal, Spain, and the UK, the crisis was identified as a key driver of increased homelessness in the past 5 years,"⁵⁰ as the European Federation of National Organisations working with the Homeless (Feantsa) reports. Feantsa also highlights that the rate of homelessness has increased by 25 % to 30 % in Greece, Portugal and Spain since the beginning of the economic crisis. It observes a trend to more homeless migrants, due to "cuts in welfare, housing, health,

35 Eurofound (2012).

36 European Commission Directorate-General for Employment, Social Affairs and Inclusion (2012), p. 13.

37 Eurobarometer (2010).

38 European Commission (2013b), p. 44.

39 Eurobarometer (2012).

40 Eurobarometer (2010), p. 49.

41 *Ibid.*, p. 52.

42 Eurostat, *Headline indicators 2005-2012*.

43 *Ibid.*

44 European Commission (2013b).

45 Eurostat (2013b).

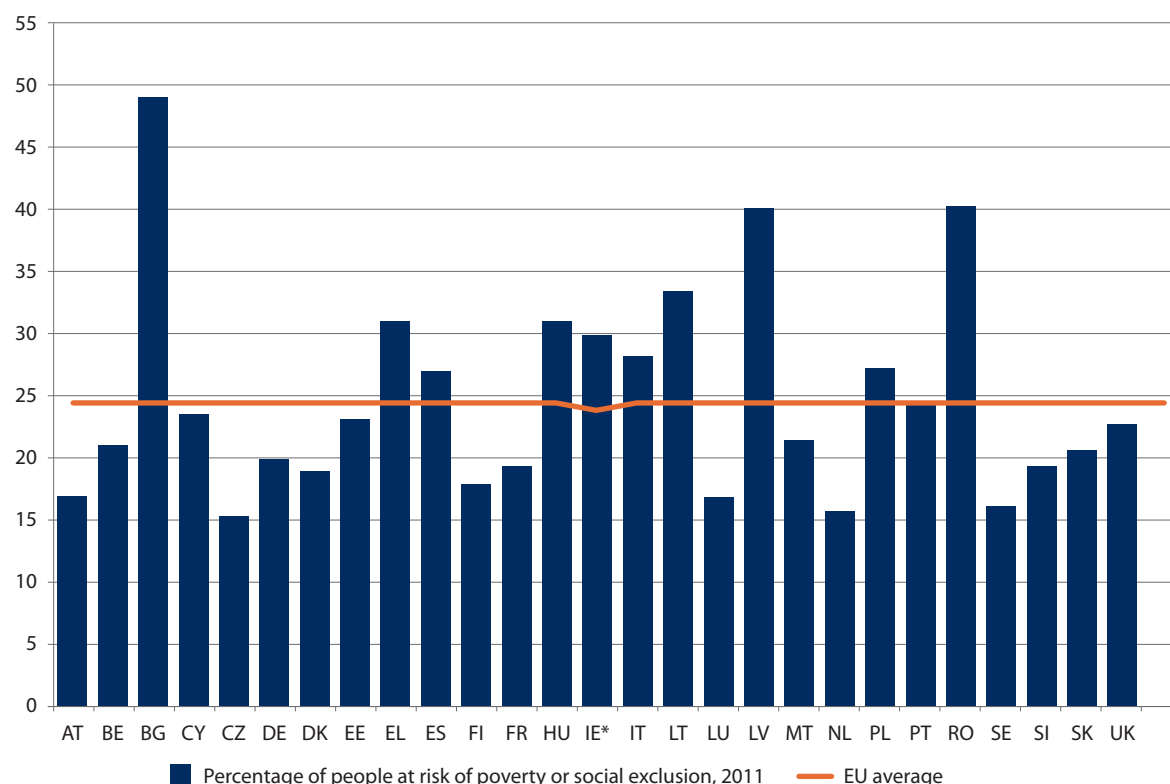
46 European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities (2009b), p. 7.

47 Eurostat (2012c).

48 See FRA (2012c).

49 On the situation of Roma, see also Chapter 6 on 'Racism and ethnic discrimination' and FRA (2012c).

50 European Federation of National Organisations working with the Homeless – Feantsa (2012), p. 21.

Figure: Persons at risk of poverty or social exclusion, by EU Member State, 2011 (%)

Notes: * Data for Ireland cover 2010.

Eurostat defines the at-risk-of-poverty rate as “the share of people with an equivalised disposable income (after social transfer) below the at-risk-of-poverty threshold, which is set at 60 % of the national median equivalised disposable income after social transfers.” – Eurostat (2012a), At-risk-of-poverty rate, available at: http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Glossary:At-risk-of-poverty_rate.

Eurostat defines the “equivalised disposable income is the total income of a household, after tax and other deductions, that is available for spending or saving, divided by the number of household members converted into equalised adults; household members are equalised or made equivalent by weighting each according to their age.” – Eurostat (2012b), Equivalised disposable income, available at: http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Glossary:Equivalised_disposable_income.

Source: Eurostat (2013), *ilc_peps11*, available at: http://epp.eurostat.ec.europa.eu/portal/page/portal/statistics/search_database

probation services, education and training”.⁵¹ Feantsa also saw an apparent increase of homeless persons in Lithuania who come from care institutions.

The socio-economic crisis created an “exogenous demand shock” for the social housing market. An increase in poverty rates and housing exclusion was observed in the majority of EU Member States.⁵² Ireland, for example, reported an increase in the number of people in need of local authority housing of 75 % since 2008, rising from 56,000 applicants to 98,000 in 2011. A growing demand for social housing resulted in an upward trend of people registered on social housing waiting lists in almost all EU countries.⁵³

⁵¹ *Ibid.*

⁵² European Parliament (2013), p. 6.

⁵³ *Ibid.*, p. 15.

“There is growing evidence that budget cuts are affecting persons with disabilities in a particularly harsh way. [I]t would be a tragic irony if the ratification of the CRPD [Convention on the rights of persons with disabilities] by EU Member States were to coincide with a dramatic decrease of the enjoyment of rights laid down in that very Convention. I urge European States to ensure that the most vulnerable in their societies aren’t seen as the ‘softest targets’, the groups to which cuts can be most easily applied.”

Statement by Navi Pillay, United Nations High Commissioner for Human Rights at the FRA Fundamental Rights Conference 2012, Brussels, 6 December 2012, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12885&LangID=E

The economic crisis may also put persons with disabilities at risk. As one example, the British government announced plans in December 2012 to introduce in April 2013 a new benefit called Personal Independence Payment for eligible working age people from 16 to 64 years of age, replacing the Disability

Living Allowance.⁵⁴ Civil society organisations criticised the new scheme, estimating that adopting it would significantly cut the benefits of about 300,000 persons with disabilities⁵⁵ (see also Chapter 5 on 'Equality and non-discrimination').

2.1.2. Which role for the European Community of values?

The EU and its Member States have responded to the socio-economic crisis by working "closely together to support growth and employment, ensure financial stability, and put in place a better governance system for the future".⁵⁶ The EU and Member States also adopted measures within the framework of the Europe 2020 Strategy to tackle poverty and social exclusion, with the key challenges of eradicating child poverty, promoting active inclusion, especially that of Roma, overcoming discrimination and tackling financial exclusion.⁵⁷ Specifically concerning youth unemployment, the European Commission – acting upon a request from the Council of the European Union and the European Parliament – proposed a number of initiatives to tackle the issue in the Youth Employment Package⁵⁸ in December 2012, building on the Youth Opportunities Initiative it launched in December 2011.⁵⁹

At the same time, the crisis management agreed at European level (but partly outside the EU structures) provided the framework for budget cuts and what became labelled as 'austerity measures'.

In times of austerity and rising unemployment, social rights become more relevant and any commitment to those rights is put to the test, as cases before the Council of Europe's European Social Committee of Social Rights (ECSR) show.⁶⁰ Of the 12 cases filed in 2012, five are related to Greek pensioners' organisations that considered that pension cuts violated social rights under the European Social Charter.⁶¹

In view of the current context of austerity policies and soaring unemployment in many Council of Europe member states, the ECSR conclusions in 2012 under Article 1 of the European Social Charter, and more specifically

under Article 1 paragraph 1, which obliges states to pursue a policy of full employment and to adequately assist the unemployed in finding work, are particularly noteworthy. It is perhaps not surprising that the ECSR found 12 countries to be in breach of this obligation, including five EU Member States (Bulgaria, Greece, Italy, Latvia, Slovakia) and Croatia. These states were found not to have demonstrated that their efforts in terms of job creation, training and assistance for the unemployed were adequate in the light of the economic situation and the level of unemployment, which was very high in most of these countries.

Under EU law, the exact reach of social rights was not entirely clear even before the crisis, with rulings by the CJEU largely showing that Common Market principles tended to trump concerns based on social rights.⁶² This might very well create frictions. In a well-known case in this regard – the *Laval* case – the Swedish follow-up legislation was challenged under the European Social Charter.⁶³

The crisis throws up the question of whether crisis-related measures must conform to the social rights enshrined in EU law. For instance, in early 2012, a Portuguese Court addressed the following question to the CJEU: "As a salary cut is not the only possible measure and is not necessary and fundamental to the efforts to consolidate public finances in a serious economic and financial crisis in the country, is it contrary to the right laid down in Article 31 (1) of the Charter of Fundamental Rights of the European Union to put at risk the standard of living and the financial commitments of employees and their families by means of such a reduction?"⁶⁴

Recent jurisprudence can help clarify the reach of social rights as enshrined in the EU Charter on Fundamental Rights. In the *Polier v. Najar* case, a similar question as the one mentioned above arose: the CJEU was asked to rule whether a new French law violated the EU Charter of Fundamental Rights, ILO Convention 150 and the European Social Charter. The law allows individuals to be dismissed without justification in certain circumstances during the first years of employment.

The CJEU acknowledged that the EU treaties cover the "protection of workers where their employment

54 United Kingdom, Department for Works and Pensions (2012).

55 See: United Kingdom, Disability Rights Watch (2012); United Kingdom, UK Disabled People's Council (2012).

56 European Commission (2013c); European Commission (2012c).

57 European Commission (2010a).

58 European Commission (2012e).

59 European Commission (2011).

60 See, for example, decision on Collective Complaint No. 65/2011 as of 23 May 2012, *General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants Trade Unions (ADEDY) v. Greece*.

▶ 61 See Chapter 10 on 'EU Member States and international obligations' of this FRA Annual report.

62 See CJEU, C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line*, 11 December 2007 and C-341/05, *Laval v. Svenska Byggnadsarbetareförbundet*, 18 December 2007.

63 The collective complaint was registered on 27 June 2012 (*Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden*, complaint No. 85/2012).

64 CJEU, C-128/12, *Sindicato dos Bancários do Norte and Others v. BPN – Banco Português de Negócios* (pending), lodged on 8 March 2012.

contract is terminated".⁶⁵ The CJEU stressed, however, that where a legislative basis in the treaties has not yet been used by the EU legislator, the situation cannot fall within the scope of Union law. And, whereas there are a number of directives which touch upon dismissal (for example, the Collective Redundancies Directive 98/59) this concrete case was not covered by Union law. Therefore, the CJEU concluded that it "manifestly does not have jurisdiction to answer the questions posed".⁶⁶

The CJEU took a similar position in the *Corpul Național al Polițiștilor* case, when asked whether the reductions in remuneration, such as those imposed by the Romanian State under Law No. 118/2010 and Law No. 285/2010, violate the rights enshrined in the EU Charter of Fundamental Rights on property, equality and non-discrimination.

The Romanian national court wanted to know whether the state was obliged to compensate employees for a 25 % cut in remuneration due to the economic crisis and the need to balance the state budget. More concretely, the national court enquired whether the phrase "in the public interest" in the Charter provision on the right to property can be interpreted as relating to an economic crisis. The national court wanted to understand whether the Charter text: "use of property [...] in so far as is necessary for the general interest" could be interpreted as covering a 25 % cut in public sector employees' salaries.⁶⁷

The CJEU did not enter into the substance of these questions, saying that it lacked jurisdiction to reply to the Romanian court's questions because the laws at stake did not implement EU law ("*la décision de renvoi ne contient aucun élément concret permettant de considérer que les lois n^{os} 118/2010 et 285/2010 visent à mettre en œuvre le droit de l'Union*").⁶⁸

There is also case law before national courts invoking the EU Charter of Fundamental Rights in the context of ► 'austerity measures' (see Chapter 8 on 'Access to efficient and independent justice'). Recent national cases concerned, for example, the legality of: strikes;⁶⁹ a law

abolishing special pensions paid to former army staff, police and prison staff, judges and court clerks, diplomatic personnel and deputies and senators;⁷⁰ an Act allowing the dismissal of government officials without employer justification;⁷¹ dispositions covering the designation of a union delegate to inter-professional unions;⁷² a flat daily pay rate agreement concluded between an employer and his employee;⁷³ or an entitlement to unemployment insurance under a constitution.⁷⁴

Courts responses ranged from ruling it lacked competence in the matter to establishing whether or not national law violated the Charter⁷⁵ to explicitly assessing the compatibility of national norms with the Charter.⁷⁶ Charter references appeared in cases which included references to applicable norms of EU secondary law as well as in those where no act of EU secondary law is applied. There were references to the Charter even in cases where EU law did not appear to be applicable.⁷⁷

Charter-related case law indicates that the EU Charter of Fundamental Rights does not offer judicial tools across the board to guarantee that austerity measures and other public interventions are 'social rights compliant'.

Admittedly, it is not a given that the possibility of directly invoking social rights would necessarily lead to better protection for all. This was for instance argued with regard to Article 30 of the Charter which protects against unjustified dismissal. An expert queried whether "trade unions and others [should] be able to challenge reforms – reductions – in labour law protection at a time when youth unemployment is crippling(ly) high in a number of Member States, including those in receipt of bail-outs (Spain, Portugal and Greece)". Such an approach might lead to "further protecting the insiders to the detriment of the outsiders?"⁷⁸ The divide between labour market insiders (or jobholders) and outsiders is something the European Commission has criticised in its Flexicurity Pathways.⁷⁹

65 See Article 153 (1) (d) TFEU.

66 CJEU, C-361/07, *Polier v. Najar* EURL, Order, 16 January 2008.

67 See reference for a preliminary ruling from the Regional Court in Alba (*Tribunalul Alba*), Romania, in the case *Corpul Național al Polițiștilor – Biroul Executiv Central v. Ministerul Administrației și Internelor et al.*, lodged on 22 August 2011, OJ 2011 C 331, p. 10.

68 CJEU, C-434/11, *Corpul Național al Polițiștilor v. Ministerul Administrației și Internelor (MAI) and Others*, Order, 14 December 2011, para. 16. Another reference was rejected on similar grounds: CJEU, C-134/12, *Ministerul Administrației și Internelor (MAI), Inspectoratul General al Poliției Române (IGPR) and Inspectoratul de Poliție al Județului Tulcea (IPJ) v. Corpul Național al Polițiștilor - Biroul Executiv Central*, Order, 10 May 2012.

69 Lithuania, Constitutional Court, Decision in the Case 3K-3-81/2012, 6 March 2012.

70 Romania, Constitutional Court, Decision No. 1471 in the Case 4.786-4790D/2010, 8 November 2011.

71 Hungary, Constitutional Court, Decision 8/2011, 18 February 2011.

72 France, Court of Cassation, Judgment in the Case No. 889, 14 April 2010.

73 France, Court of Cassation, Judgment in the Case No. 1656, 29 June 2011.

74 Estonia, Administrative Law Chamber of the Supreme Court, Judgment in the case 3-3-1-27-1, 11 November 2011.

75 Hungary, Constitutional Court, Decision 8/2011, 18 February 2011.

76 France, Court of Cassation, Judgment in the Case No. 889, 14 April 2010.

77 Estonia, Administrative Law Chamber of the Supreme Court, Judgment in the Case 3-3-1-27-1, 11 November 2011.

78 Barnard, C. (2013).

79 See, for example, European Commission, The Expert Group on Flexicurity Pathways (2007).

Against this backdrop, the same expert proposes an alternative procedure-oriented approach based on consultation, under which the EU Charter of Fundamental Rights would require that the Member States engage “in appropriate discussions with interested parties prior to deciding on the reforms necessary”.⁸⁰ In this sense, even if its reach might appear to be limited before courts, the Charter offers new political arguments and momentum to emphasise the social dimension in legal and political decisions – also and especially in times of crisis.

2.2. Political crises

The crisis situations in 2012 were not limited to the fields of employment or economic policies in general. The year 2012 saw a variety of situations that were critical for political systems. Some but not all EU Member States witnessed social unrest, public protest, anti-migrant initiatives by political parties, decreasing trust in government or neighbouring states, or the violent expression of extremist ideology (including murder) in 2012.

2.2.1. The situation on the ground

Greece serves an example of a country facing a threat to the overall political system. The seriousness of the situation was, for instance, recognised by the General Court in Luxembourg (GCEU), which referred to the risk of major crisis-induced social unrest in the context of the question of whether or not Greece was suffering a ‘serious disturbance’ in the sense of Article 107 paragraph 3 lit (b) of the TFEU. In September 2012, the Court found that Greece was indeed in the throes of such a disturbance and ordered the European Commission to suspend its decision requiring Greek authorities to recover sums paid to Greek farmers. The case involved € 425 million in compensation payments made to Greek farmers in 2009 and the question whether these payments violated the EU state aid regime.⁸¹

The Court reasoned that in the climate of tension characterised by “violent demonstrations against the draconian austerity measures adopted by the Greek public authorities [and by] the marked advance of certain parties on the extreme right and the extreme left in the most recent parliamentary elections in Greece [...] may trigger demonstrations liable to degenerate into violence [...] It is evident that the perturbation of public order that is brought about by such demonstrations and by the excesses to which, as recent dramatic events

have shown, they may give rise would cause serious and irreparable harm, which the Hellenic Republic may legitimately invoke.”⁸²

Two other examples illustrate another aspect of political crisis, namely the more open expression of xenophobic and discriminatory attitudes. The first comes from the Netherlands, where the Freedom party (*Partij voor de Vrijheid*, PVV) set up an internet hotline in February 2012, enabling people to report what they considered inappropriate behaviour on the part of central and eastern European migrants.

While EU⁸³ and national⁸⁴ officials and bodies criticised the hotline, the PVV declared it a success, with more than 40,000 complaints registered against EU citizens from Bulgaria, Poland and Romania. The most common complaints related to the perception that these nationals were taking away housing and jobs from Dutch citizens.⁸⁵

A comparable development also occurred in Belgium where the Flemish interest party (*Vlaams Belang*) set up a hotline to denounce ‘illegality’ (*Meldpunt illegaliteit*). This scheme mainly targeted irregular migrants, whom the party describes as a nuisance to the general population because, in its view, they live in derelict buildings, take part in criminal activities and are a source of unfair competition on the marketplace as they work undeclared.⁸⁶

The crisis has also affected how people living in the EU view one another, straining solidarity, according to research carried out in the framework of the Pew Global Attitudes Survey.⁸⁷ This is particularly true as regards Greece, one of the EU Member States hardest hit by the economic crisis: just 27 % to 48 % of respondents in the Czech Republic, Germany, France, Italy, Poland, Spain and the United Kingdom said they viewed Greece favourably as a country. These figures are much less favourable than those towards other EU Member States (Table). The same survey shows that favourable ratings of Greece among inhabitants of other EU Member States declined between 2010 and 2012, with a drop of between 12 and 28 percentage points. Conversely, 21 % of Greek respondents surveyed said they viewed Germany favourably, far lower than the 67 % to 84 % ratings Germany earned in the other EU Member States surveyed.

The unfavourable ratings for Greece have implications for the value of solidarity, an important value of the

80 Barnard, C. (2013). She also mentions a “more radical version” of the *ex ante* control, namely to subject the proposed changes to national legislation to screening by the ILO, which has offered to provide this service.

81 See GCEU, Case T-52/12, *Hellenic Republic v. European Commission*, Order, 19 September 2012.

82 *Ibid.*

83 Reding, V. (2012).

84 Netherlands, *College voor de rechten van de mens* (2012).

85 Netherlands, *Partij voor de Vrijheid* (2012).

86 Belgium, *Vlaams Belang* (2012).

87 Pew Research Center (2012).

European Community. There have, for instance, been repeated calls, some vehement, in several EU Member States for Greece to be thrown out of the euro or the EU.⁸⁸

The policy reaction has, however, come to the aid of Greece through rescheduling and cutting its debt.⁸⁹ The consequence for Greece was a push for more austerity and fiscal consolidation measures, which many other EU Member States also took.

Table: Favourable rating of other EU Member States, April 2012 (%)

Favourable rating by ↓	Favourable rating for →					
	DE	EL	ES	FR	IT	UK
CZ	80	25	69	74	68	84
DE	82	27	71	80	66	67
EL	21	71	72	54	68	37
ES	75	34	45	68	58	70
FR	84	45	71	64	67	76
IT	67	30	59	53	57	69
PL	78	43	76	76	69	83
UK	72	48	74	64	67	78

Source: Pew Research Center (2012), p. 35 and pp. 48-51.

Question: Please tell me if you have a very favourable, somewhat favourable, somewhat unfavourable or very unfavourable opinion of COUNTRY.

Against this backdrop, it should be considered that “Europe’s history demonstrates how economic depression can tragically lead to increasing social exclusion and persecution. We are concerned that in times of crisis, migrants, minorities and other vulnerable groups become ‘scapegoats,’” as FRA, the OSCE’s Office for Democratic Institutions and Human Rights (ODIHR) and the Council of Europe’s European Commission against Racism and Intolerance (ECRI) noted.⁹⁰

Although not a new phenomenon, elements of extremist ideology – particularly as regards views on migration and Islam – have gained a greater foothold in some EU Member States,⁹¹ with some elements of the political rhetoric and policy positions advocated by parties and groups adhering to such ideologies⁹² gaining more widespread acceptance. In what is known as a contagion effect, some of these parties and groups succeeded

in getting some traditional parties to focus on aspects of their agendas, which resulted in a degree of policy overlap between ideologically different party families.⁹³

To counter the rise of parties with anti-immigrant, anti-foreigner and anti-Islam stances, some traditional parties (from across the spectrum of political families) began adopting ‘tougher’ stances on issues pertaining to security, migration, integration, social welfare or the accommodation of religious practices.⁹⁴ They generally called for barriers to be erected, often in relation to protecting national identity or in the name of national security, meaning that those concerned would face higher hurdles to achieve, for example, family reunification, access to social services or freedom to manifest religion or belief.⁹⁵

In addition to the economic crisis, a number of other factors contributed to creating a favourable climate for the mainstreaming of elements of extremist ideology in the public sphere. These factors include perceptions that: foreigners take jobs and resources away from nationals; the pressure of migration on EU Member States is too great; the burden of migration is not shared equitably among Member States; migrants are responsible for criminality; ethnic and religious minorities pose a threat to national identity; or, that the religious practices and identity of minority groups are incompatible with ‘modern’ societies.⁹⁶

Concerns such as these were aired more openly – sometimes violently – in the public sphere, especially by individuals and groups with anti-immigrant, anti-Islam or anti-foreigner feelings. To name but a few examples, in the last few years, the EU witnessed anti-Roma demonstrations in Bulgaria, the Czech Republic, Hungary and Slovakia; violent attacks against Roma in Greece, Hungary, Italy and Slovakia; violent attacks against migrants in Germany, Greece and Italy; murders motivated by racism and xenophobia in Germany, Greece and Italy; anti-Muslim attacks in several EU Member States; and continued manifestations of antisemitism.⁹⁷ All of these examples illustrate how changes in the

88 See: *Österreichische Presserat* (2011).

89 See: European Commission, Directorate-General for Economic and Financial Affairs (2012); International Monetary Fund (2013); High-level Expert Group on reforming the structure of the EU banking sector (2012); Olivares-Caminal, R. (2011).

90 FRA, ECRI, ODIHR (2009).

91 See, for example: Jesse, E. and Thieme, T. (2011); Hainsworth, P. (2008).

92 See, for example: Fox, J.E., Moroşanu, L. and Szilassy, E. (2012), pp. 680–695.

93 See, for example: van Spanje, J. (2010), pp. 563–586; Yilmaz, F. (2012), pp. 368–381.

94 See, for example: Çetin, E. (2012); de Koster, W., Achterberg, P. and van der Waal, J. (2013), pp. 3–20; Emery, M. (2010), pp. 115–129; Mavelli, L. (2013), pp. 159–181; Flood, C., Hutchings, S., Miazhevich, G. and Nickels, H.C. (2012).

95 See, for example: Centre for Equal Opportunities and Opposition to Racism (2011), pp. 128–131; Chakraborti, N. and Zempi, I. (2012), pp. 269–284.

96 See, for example: Given, T.E. (2005); Ceobanu, A.M. (2011), pp. 114–131; Mawby, R.C. and Gisby, W. (2009), pp. 37–51; Lucassen, G. and Lubbers, M. (2011), pp. 547–574; Nickels, H.C., Thomas, L., Hickman, M.J. and Silvestri, S. (2012), pp. 135–151; Hervik, P. (2012), pp. 211–225.

97 See, for example: FRA (2012d); FRA (2012e); FRA (2012f); FRA (2012g); see also Chapter 6 on ‘Racism and ethnic discrimination’.

political discourse can spill over into criminal behaviour targeting certain groups in society.

2.2.2. What role for the European Community of values?

Where extremist movements lead to the erosion of social cohesion and finally result in violent attacks, they are violating fundamental rights. But softer imitation of such movements by traditional parties may also come into conflict with commonly agreed European values. The aforementioned example of higher hurdles to achieve family reunification, access to social services or freedom to manifest religion or belief represent barriers that may challenge principles and values upon which the EU is founded, such as the free movement of persons, goods and services; economic and social solidarity; and the maintenance of societies in which pluralism, non-discrimination, tolerance, justice and solidarity prevail.

Moreover, the political situation in the different EU Member States can no longer be seen as decoupled from that of their neighbouring states and the EU as a whole. Member States and the EU consist of an interdependent, semi-constitutional construction. In a system where judgments are handed down in one Member State but can automatically be executed in another, where asylum seekers are sent from state A to have their asylum procedure done in state B, or where persons are arrested in one Member State on the basis of an arrest warrant issued in another, the need for a shared set of core values is crucial in allowing all these mechanisms of exchange to be trustworthy.⁹⁸ Against this backdrop, major challenges to the principles of democracy or the rule of law in one or more Member States are thus likely to have repercussions on the functioning of the EU as a whole.

Considering these interdependencies, the EU is operating on the presumption that the values of Article 2 of the TEU are “common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”. The implementation of a European Arrest Warrant, for example, “may be suspended only in the event of a serious and persistent breach by one of the Member States” of the principles set out in Article 2 of the TEU and only if the Council of the European Union has identified such a breach.⁹⁹

⁹⁸ See, for example, in the area of criminal law: Mitsilega, V. (2006), pp. 1277–1331.

⁹⁹ See Consideration No. 10 in Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L 190, pp. 1–18.

The CJEU recently underlined the limits of such a presumption of compliance in the context of the Dublin regime, which regulates the transfer of asylum seekers from one EU Member State to another, and of the creation of an area of freedom, security and justice. A system truly based on fundamental rights must construe mutual recognition in a way that the presumption of full compliance with the relevant core standards can be challenged.¹⁰⁰

It is not only the right to an effective remedy and a fair trial or the right to a good administration, under Articles 47 and 41 of the Charter of Fundamental Rights, respectively, that create cross-cutting guarantees in areas beyond which the EU has legislated. Any major flaws in the electoral laws and processes at national level – including restrictions on media pluralism and media freedom – can, for example, have implications for elections to the European Parliament, since these are defined by national procedures and based on national political realities. This is even truer considering that extremist parties will tend to profit from the fact that the European elections are frequently misunderstood as being “second-order national contests” suitable for delivering a protest vote.¹⁰¹ A change of the European Parliament’s composition, however, will have repercussions on other Member States where extremist parties do not play a role.

Where a political development is threatening not only the rather abstract values as listed in Article 2 TEU but risks violating a concrete provision of EU secondary law, the normal machinery designed for upholding respect for EU law kicks in. An example was the Roma crisis (*affaire des Roms*), which took place in France in 2010 and exemplifies how EU law plays into events that prompt major political discussions within EU Member States. The French government sparked the affair by announcing a package of measures calling for the removal from France of Roma and other *gens du voyage* (Travellers) – mainly EU citizens from Bulgaria and Romania. As a result of the package, French authorities dismantled 128 irregular settlements and expelled some 979 individuals by the end of August 2010,¹⁰² returning them to their countries of origin.

The case involved a clearly applicable norm of EU secondary law, the Free Movement Directive.¹⁰³

¹⁰⁰ CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P. and E.H. v. Refugee Applications*, 21 December 2011, especially para. 83.

¹⁰¹ Hix, S. (2005), p. 193.

¹⁰² Carrera, S. and Atger, A. F. (2010).

¹⁰³ 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.



The European Commission therefore announced that it would open a formal infringement procedure against France concerning its obligations under this directive. This pressure led France to amend legislation and make other commitments.¹⁰⁴

The European Commission's intervention thus succeeded in toning down a policy measure that many believed infringed EU fundamental rights standards.¹⁰⁵ Nevertheless, the way in which this 'political crisis' played out – particularly the retroactive nature of the EU's intervention – proved to a certain extent the limitations of EU enforcement mechanisms to provide "a swift and depoliticized response to national measures whose compliance with EU law and fundamental rights remains questionable".¹⁰⁶

2.3. Constitutional crises

When an EU Member State changes its constitutional order, it is in principle acting autonomously, which is beyond any influence from the EU. According to the principle of conferral, the Union may act only within the limits of the competences conferred upon it by the Member States in the treaties to attain the objectives set out therein, as in paragraph 2 of Article 5 of the TFEU. The EU has to respect the national identities of its Member States, "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government". It shall respect their essential state functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security (Article 4 (2) of the TEU).

It is also well established that Member States have to exercise those competencies reserved to them in a way that does not result in a violation of EU law. Constitutional "engineering" – that is, the changing of constitutional balances through a formal amendment of the national constitution – or a *de facto* shift in power structures can indeed under certain conditions threaten EU law. Such a constitutional change, which may generate a crisis, can call into question the EU's fundamental values laid down in Article 2 of the TEU, even when it does not involve an alleged violation of a concrete part of the EU *acquis*. In 2012, two EU Member States, Hungary and Romania, confronted calls for the EU to initiate the sanctioning procedure under Article 7 in order to safeguard core European values.

2.3.1. The situation on the ground

Hungary – the former leading market reformer, which then became the hardest-hit economy in central Europe¹⁰⁷ – was at the epicentre of a debate over whether or not the new government risked pushing the country beyond the pale of what was acceptable within the EU community of values.

The *Fidesz* party won the 2010 elections with a two-thirds majority. This majority was instrumental in preparing a new constitution that took effect at the beginning of 2012 and drew strong criticism both at home and abroad. These criticisms concerned issues both of and beyond EU legislative competence, including transparency and legitimacy concerning the adoption of the new constitution; the use of 'cardinal laws', which require a two-thirds, rather than the typical simple majority, for passage in parliament; the limitation of the independence of three ombuds institutions; the protection of Hungarians living abroad; the exercise of government control over the media; and the free exercise of religion.

In a synergetic and complementary relationship with EU institutions, the Council of Europe's Venice Commission delivered 11 different opinions on the situation in Hungary. One of the issues examined was judiciary independence, where the Venice Commission concluded that essential elements of the reform contravened European standards (see [Chapter 8](#)).¹⁰⁸

With regard to the law on religions, the Venice Commission criticised the selection procedure of organisations that can be officially recognised as churches. The process is political in nature and selects the officially recognised churches through a vote in Parliament, requiring a two-thirds majority, with legal redress against a negative decision provided. The Venice Commission found the range of requirements excessive and based on arbitrary criteria. It also commented that the act has "led to a deregistration process of hundreds of previously lawfully recognised churches, that can hardly be considered in line with international standards".¹⁰⁹

¹⁰⁴ European Commission (2010b).

¹⁰⁵ See, for example: Caitlin T. G. (2012), pp. 209–225.

¹⁰⁶ Carrera, S. and Atger, A. F. (2010), p. 3.

¹⁰⁷ European Economic Advisory Group (2012), pp. 115–130.

¹⁰⁸ Council of Europe, Venice Commission (2012a); Council of Europe, Venice Commission (2012b). See also Chapter 5 on 'Equality and non-discrimination'.

¹⁰⁹ Council of Europe, Venice Commission (2012c).

“The significant number of matters relegated, for detailed regulation, to cardinal laws requiring a two-thirds majority, including issues which should be left to the ordinary political process and which are usually decided by simple majority, raises concerns. Cultural, religious, moral, socio-economic and financial policies should not be cemented in a cardinal law.”

Council of Europe, Venice Commission (2011), Opinion CDL-AD(2011)016, 20 June 2011, paragraph 145

Within the EU, the European Parliament discussed the situation in Hungary, with the Committee on Civil Liberties, Justice and Home Affairs (LIBE) holding a special hearing dedicated to Hungary. The plenary adopted a resolution on the situation in Hungary, calling for consideration of “whether to activate necessary measures”, including the initiation of the sanctioning procedure as laid down in Article 7 of the TEU.¹¹⁰

The EU did not, however, engage with the wider constitutional issues, even though they could have fundamental rights implications. In January 2012, when addressing the European Parliament on the matter, the President of the European Commission stressed that the Commission would treat the situation in Hungary at this stage “mainly as an issue of application of European Union law”; he recognised, however, that the issues at stake may go beyond the EU law matters that have been raised and referred to the ongoing analysis of the Council of Europe and the Venice Commission.¹¹¹ Indeed, in January 2012 the European Commission focused on more specific aspects that have direct relevance for EU law.¹¹² However, following the presentation of the draft Fourth Amendment to the Hungarian Fundamental Law, in the beginning of 2013, the European Commission also expressed its concerns with respect to the principle of the rule of law.¹¹³

In January 2012, it launched infringement procedures against Hungary on three different grounds. The first concerned the independence of the national central bank, where the European Commission was concerned that the rules governing the dismissal of the governor and the members of the monetary council might be prone to political interference and misuse.

The second concerned the independence of the judiciary. The European Commission criticised that the retirement age for judges, prosecutors and notaries would be lowered radically and rapidly to 62 from 70 years of age. The Commission could find no objective justification for treating judges, prosecutors and notaries differently from other professional groups, especially at a time

when retirement ages across Europe are rising not falling. These concerns could not be resolved at informal level and were thus brought before the CJEU; other justice-related issues were addressed at administrative level, including the newly established National Judicial Office, which was set up to take on significant powers to manage the courts’ operations, human resources, budget and allocation of cases.

Finally, the European Commission identified a lack of independence of the data protection supervisory authority. The newly established National Agency for Data Protection replaced the former Data Protection Commissioner’s Office at the beginning 2012. This meant that the term of the Data Protection Commissioner was put to a premature end.¹¹⁴

Whereas the procedure with regard to the independence of the central bank was dropped due to changes announced in the law, the procedure on the judiciary ended with a judgment of 6 November 2012, when the CJEU found that the radical and rapid lowering of the retirement age infringed the EU Employment Directive.¹¹⁵ The case regarding the Data Protection Commissioner and the premature removal from office was still pending at the time of writing.¹¹⁶

“When assessing whether or not a Member State is at a clear risk of seriously breaching core values, it is important to look not only at one single development. For instance, it would not be sufficient to look in isolation at the appointment of judges. Other developments such as the introduction of new majorities to elect public officials, or new standard terms of public officials, or new electoral laws should be included in the assessment. Hence, we have to look at the combined effects of many developments. In this sense, the whole is greater than the sum of its parts.”

Morten Kjaerum, Director of the FRA (2012), Speech given at the LIBE meeting on the situation in Hungary, 9 February 2012, available at: <http://fra.europa.eu/en/speech/2012/situation-hungary>

The second constitutional crisis that prompted a Europe-wide debate took place in Romania. The Romanian government, under Prime Minister Victor Ponta came into open conflict with President Traian Băsescu, which negatively affected the constitutional position of other state institutions, most prominently the Constitutional Court and the Ombudsman. The power struggle that erupted threatened the independence and competence of the Constitutional Court and concerned issues of constitutional relevance, including the question of whether the prime minister or the president

¹¹⁰ European Parliament (2012a).

¹¹¹ Barroso, J.M. (2012), pp. 7 and 8.

¹¹² For a detailed analysis of the events, see: Hoffmeister, F. (2013).

¹¹³ European Commission (2013d). For more information, see: European Commission (2013e).

¹¹⁴ European Commission (2012d).

¹¹⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, pp. 16–22; CJEU, C-286/12, *Commission v. Hungary*, 6 November 2012.

¹¹⁶ CJEU, C-288/12, *European Commission v. Hungary*, Action brought on 8 June 2012, pending.

represents the country in the European Council; the dismissal of the ombudsman; what the rules for the appointment of the general prosecutor or the chief prosecutor of the National Anti-Corruption Department were; and, whether the Official Journal could be placed under government oversight.¹¹⁷

A referendum on whether or not to remove President Băsescu from office was held on 29 July 2012. The Constitutional Court declared the result invalid, because the turnout at 46 % did not meet the 50+1 quorum (87.5 % of the participants voted in favour of removing President Băsescu from office and 11.2 % against).

The Secretary General of the Council of Europe and the Prime Minister of Romania asked the Council of Europe's Venice Commission to express its views on the situation in Romania. In its opinion published at the end of 2012, the Venice Commission stressed that any constitution must work as a framework enabling "a smooth functioning of the institutions based on their loyal co-operation".¹¹⁸

The President of the European Commission addressed concerns about the role of the Constitutional Court and the necessity of checks and balances in a democratic system. He said that Romania "must restore the powers of the Constitutional Court and ensure that its decisions are observed, appoint an Ombudsman enjoying cross-party support, ensure a new open and transparent procedure for appointing a General Prosecutor and Director of the Anti-Corruption Directorate and make integrity a political priority".¹¹⁹

The European Commission in the report under the Cooperation and Verification Mechanism detailed recommendations covering seven areas: respect for the rule of law and the independence of the judiciary; reform of the judicial system; accountability of the judicial system; consistency and transparency of the judicial process; effectiveness of judicial action; integrity; fight against corruption.¹²⁰ The Council of the European Union endorsed these recommendations, making reference to the fundamental values on which the EU is founded in "light of recent events in Romania".¹²¹

"In the run-up to the elections, there has also been a discussion about possible Constitutional change. What is important is that the process of constitutional reform progresses in full respect of fundamental values such as respect for the rule of law and the separation of powers. This includes continued respect for the Constitutional Court as the guarantor of the supremacy of the Constitution, as well as the independence and stability of judicial institutions including the prosecution. It is also important that the debate about possible reform allows enough time and openness to secure through the appropriate constitutional procedure the widest possible consensus. It is also essential in this context to reassure judicial institutions that their independence is secured, and to avoid speculation creating a climate of instability."

European Commission (2013f), Report on Progress in Romania under the Co-operation and Verification mechanism, COM(2013) 47 final, 30 January 2013, pp. 3 and 4

The European Commission revisited the situation and published new recommendations at the beginning of 2013. It acknowledged that "the respect for the Constitution and the decisions of the Constitutional Court has been restored". It underlined, however, that the lack of respect for the independence of the judiciary and the instability faced by judicial institutions remained a source of concern. The new recommendations also "underline the responsibility of Ministers and parliamentarians to set an example in terms of respect for integrity".¹²² Comparing the two instances of constitutional crises, one may conclude that – due to the availability of the specific forum of the Cooperation and Verification Mechanism (CVM) – the European Commission was more outspoken in the Romanian than in the Hungarian crisis on issues that remain in the domestic sphere of the EU Member State concerned.¹²³

2.3.2. Which role for the European Community of values?

In Article 7 of the TEU, the EU has a sanctioning procedure should an EU Member State be seen to violate Article 2 values. The application of that procedure, which is the result of an Austrian-Italian initiative in the negotiations leading to the Amsterdam Treaty,¹²⁴ was discussed but not applied in 2012. In fact, the limitations of the Article 7 procedure had already become apparent in 2000 (*vis-à-vis* Austria) and in 2004 (*vis-à-vis* Italy). The 2012 events built on these earlier experiences.

In the context of what could be termed the 'Austrian crisis' of 2000, Article 7 of the TEU was not applied. Fourteen EU Member States instead imposed sanctions on Austria based on the view that the participation of the right-wing Freedom party (*Freiheitliche*

¹¹⁷ Nicolescu, A. (2012).

¹¹⁸ Council of Europe, Venice Commission (2012d).

¹¹⁹ European Commission (2012f).

¹²⁰ European Commission (2012g), pp. 20–23.

¹²¹ Council of the European Union (2012).

¹²² European Commission (2013f).

¹²³ Compare Hoffmeister, F. (2013).

¹²⁴ The initial proposal underwent various changes, see: CONF 3940/96, 3 October 1996.

Partei Österreichs, FPÖ) in the government could lead Austria to violate European values as listed in Article 2 of the TEU in future.¹²⁵ Imposing bilateral, albeit coordinated, sanctions proved to be problematic under EU constitutional law and contradictory to the spirit of the treaties.¹²⁶

Four years later, it was Italy's turn to become a potential target of sanctions under Article 7 of the TEU. In contrast to the Austrian crisis, the allegations against then Prime Minister Silvio Berlusconi were not speculative and pre-emptive in nature; they referred to matters that had already occurred, including issues of media pluralism and interference with individual media.

Here, the European Parliament stressed "its deep concern in relation to the non-application of the law and the non-implementation of judgments of the Constitutional Court, in violation of the principle of legality and the rule of law, and at the incapacity to reform the audiovisual sector, as a result of which the right of its citizens to pluralist information has been considerably weakened for decades; a right which is also recognised in the Charter of Fundamental Rights".¹²⁷ However, neither Article 7 was applied, nor did the EU adopt a directive to safeguard media pluralism as the European Parliament proposed (the role of the Union *vis-à-vis* media surfaced again in 2012).¹²⁸

"On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure."

Article 7 Paragraph 1 of the Treaty on European Union, OJ C 326, 26 October 2012, pp. 13–47

In conclusion, the year 2012 reinforced the impression that the Article 7 procedure as such may not be enough to guarantee a regular and rational dialogue that is evidence based and solution oriented on the EU's basic values that are both constituent and constitutional in nature. Both cases, the one of Hungary as well as that of Romania, generated a dialogue about constitutional issues. This dialogue was, however, crisis-driven. In the case of Hungary, in 2012, the EU intervention consisted mainly in launching infringement procedures, namely dealing with fundamental rights such as the prohibition to discriminate on the basis of age and the protection of personal data. In the case of Romania, EU reaction was more encompassing as it also addressed issues of a more constitutional nature, including general rule of law issues like judicial independence.

The EU's outspoken approach to the Romanian crisis took place on a particular platform – a platform that was not available in the case of Hungary or any other Member State apart from Bulgaria and Romania – namely the Cooperation and Verification Mechanism (CVM). This mechanism, which was agreed upon in the run-up to the accession of Romania and Bulgaria to the EU in 2007,¹²⁹ establishes benchmarks in the areas of judicial reform, integrity, the fight against high-level corruption, and the prevention and fight against corruption in the public sector. The CVM allows the European Commission to report regularly on these objectives until they are satisfactorily fulfilled. There might be a need to establish a platform for the discussion of broader constitutional issues, that is open to all EU Member States to the same extent.

125 See, for example: Happold, M. (2000), pp. 953–963.

126 Toggenburg, G.N. (2001), pp. 735–756.

127 European Parliament (2004), para. 66.

128 See, for example: High Level Group on Media Freedom and Pluralism (2013).

129 European Commission (2006a) and (2006b).



3

Safeguarding European values: current developments and discussions



Where an EU Member State is criticised for violating shared European values outside areas covered by EU law, the room for manoeuvre is reduced. This is true even in cases where there is a clear risk of a substantial breach of the Article 2 values, such as was the case – according to some politicians¹³⁰ and expert observers¹³¹ – in the ‘Hungarian crisis’.

“In recent months we have seen threats to the legal and democratic fabric in some of our European states. The European Parliament and the Commission were the first to raise the alarm and played the decisive role in seeing these worrying developments brought into check. But these situations also revealed limits of our institutional arrangements. We need a better developed set of instruments – not just the alternative between the “soft power” of political persuasion and the “nuclear option” of article 7 of the Treaty.”

President of the European Commission, State of the Union 2012 address, Plenary session of the European Parliament, Strasbourg, 12 September 2012

The Vice-President of the European Commission, Viviane Reding, responsible for justice, fundamental rights and citizenship therefore raised the ‘Copenhagen dilemma’ facing the EU: “We are very strict on the Copenhagen criteria, notably on the rule of law in the accession process of a new Member State but, once this Member State has joined the European Union, we appear not to have any instrument to see whether the rule of law and the independence of the judiciary still command respect.”¹³²

To broaden its scope of analysis of EU Member States’ justice systems, the European Commission presented in March 2013 the ‘EU Justice Scoreboard’.¹³³ It is a new com-

parative and non-binding tool presenting trends in the area of justice. The scoreboard is not a new rule of law mechanism that would as such address the Copenhagen dilemma.¹³⁴ It is rather part of the ‘European semester’, the yearly cycle of economic policy coordination, one of whose priorities is to improve the quality, independence and efficiency of judicial systems. This coordination provides a detailed analysis of EU Member States’ programmes of economic and structural reforms and respective recommendations for the next 12 to 18 months.

The Scoreboard provides information on the functioning of all national justice systems, in particular in civil, commercial and administrative cases. It builds on data that are mainly but not exclusively provided by the Council of Europe’s Commission for the Evaluation of the Efficiency of Justice (CEPEJ). The new tool allows for a comparison of all EU Member States on particular indicators relative to their justice systems. The indicators include the length of proceedings (days needed to resolve a case in court), the ‘disposition time’ (the number of unresolved cases divided by the number of resolved cases at the end of a year multiplied by 365 days), the clearance rate (the ratio of the number of resolved cases over the number of incoming cases) or the number of pending cases. The scoreboard also looks into whether monitoring mechanism exist at national level or whether information and communication technology (ICT) systems, alternative dispute resolution methods, training of judges or financial resources are available to the judicial systems. The scoreboard also provides data on the perceived independence of justice systems, based on findings of the World Economic Forum and the World Justice Project. Even though several Member states are among the top 10 worldwide leaders in terms of the perception of judicial independence, the figures show a rather low level

¹³⁰ See, for example, the speech of the leader of the ALDE group in the European Parliament Plenary on 13 March 2013.

¹³¹ Hoffmeister, F. (2013).

¹³² Reding, V. (2012b).

¹³³ European Commission (2013g).

¹³⁴ See European Commission (2013h).

of perception of judicial independence by business end-users of the justice system in certain Member States.

Indeed, the findings of the first EU Justice Scoreboard reveal remarkable disparities across the different indicators, in particular as regards the length of proceedings. The justice systems in certain EU Member States combine unfavourable factors such as lengthy first instance proceedings and low clearance rates and/or a large number of pending cases. The European Commission finds that such situations “merit special attention and a thorough analysis as they could be indicative of more systemic shortcomings for which remedial action should be taken.” The reduction of excessive length of procedure is identified as a priority “in order to improve the business environment and attractiveness for investment.”¹³⁵

The European Commission presented the EU Justice Scoreboard as a tool for economic growth, based on the assumption that solid justice systems are key to returning to competitiveness, trust, stability, restored confidence and growth. An efficient and independent justice system is seen as an important structural component “of an attractive business environment” since it maintains “the confidence for starting a business, enforcing a contract, settling private debt or protecting property and other rights.”¹³⁶

At the same time, the European Commission underlines the developing aspect of the EU Justice Scoreboard, characterising it as an “evolving tool that will gradually expand in the areas covered, the indicators and the methodology, with the objective of identifying the essential parameters of an effective justice system. In dialogue with Member States, the Scoreboard could progressively cover other areas of the justice systems and other elements in the ‘justice chain’.”¹³⁷

Looking at the EU Justice Scoreboard from the angle of fundamental rights, the whole area of criminal justice seems to be a field where future extension appears desirable. In this field, fundamental rights concerns are affected in the most immediate manner. And even if criminal justice were to be covered by the scoreboard, it would still be limited to justice and not cover the rule of law and the ‘Copenhagen dilemma’ in a more general way.

Recent enlargement experiences show that there is a growing perception that accession treaties should make sure that enlargement instruments include “appropriate measures” in those cases where “commitments undertaken in the context of the accession

negotiations” are not upheld by the new Member States.¹³⁸ As was stated above, the availability of an additional CVM allowed the EU to address the shared Article 2 values *vis-à-vis* Romania in 2012. Arguably, the expansion of such a mechanism to all EU Member States would require an amendment of the treaties. Moreover, some argue that, “in some of the older member states where populations are more ambivalent about the desirability of EU interference in their domestic affairs, a mechanism with such a politically high profile as the CVM may undermine rather than boost public confidence in the EU area of freedom, security and justice by confirming suspicions that the ‘tentacles’ of Brussels are reaching right into the heart of national sovereignty.”¹³⁹

Indeed, a prominent role for the EU is to safeguard the rule of law; however, to do so, it faces a “limited normative basis” and a “certain political reluctance.”¹⁴⁰ At the same time, developments in 2012 point in a different direction. The perception seems to be growing that what is missing at EU level is “a set of instruments allowing the direct and explicit ‘cultivation’ of the EU’s most fundamental values beyond fundamental rights and judicial independence.”¹⁴¹ Expert circles discussed different possible approaches: some of these discussions addressed the role of the European Commission, some the role of independent expert bodies and others the role of national courts or civil society.

With regard to the European Commission, it was stressed that whatever future tool might be available, “[s]peaking softly will not be enough to dissuade governments from undermining the rule of law unless they know that the Commission is carrying a big stick that it is not afraid to use.”¹⁴²

Article 7 of the TEU would become more operational if its activation were not made dependent on the necessary political majorities in the European Parliament or the Council of the European Union. In fact, the European Commission can also initiate an Article 7 procedure. This led some to argue that the Commission could act as “a political force in Europe”, pointing to safeguards against any politically one-sided action, namely “the cross-party composition of the European Commission College and its practice to decide by consensus.”¹⁴³

If the European Commission were to become more outspoken and assume the role of a “political force” in

¹³⁵ European Commission (2013a), p. 11.

¹³⁶ *Ibid.*, p. 2.

¹³⁷ *Ibid.*, p. 3.

¹³⁸ See Art. 38 of the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community, OJ 2012 L 112, pp. 21–34.

¹³⁹ Alegre, S., Ivanova, I., Denis-Smith, D. (2009), p. 5.

¹⁴⁰ Hillion, C. (2012), pp. 481–488.

¹⁴¹ Dawson, M. and Muir, E. (2012), pp. 469–476.

¹⁴² Butler, I. (2012).

¹⁴³ Hoffmeister, F. (2013).



the context of Article 7 of the TEU, there would be an increased need for it to base any related moves on solid evidence. An independent body that is not perceived as being part of the political institutions of the EU machinery needs to provide this evidence. In this context, many experts pointed to the FRA and called for using FRA data, findings and services on a regular basis.¹⁴⁴ Some experts thought that the agency's current mandate would not be sufficient for it to play an efficient role under the Articles 2 and 7 of the TEU and thus called for a new body similar to the Venice Commission of the Council of Europe.¹⁴⁵ The European Parliament proposed at the end of 2012 that FRA's mandate "should be enhanced to include regular monitoring of Member States' compliance with Article 2 of the TEU, the publishing of annual reports on its findings and presentation of such reports in the European Parliament".¹⁴⁶

In addition to the role of the European Commission and the need for regular and independent expert input, experts also discussed the role of courts in the context of Article 2 values. With Article 7 of the TEU, a non-judicial procedure that political institutions – the European Parliament, the European Commission or the Council of the European Union – initiate ensures the defence of the EU's foundational values in the area outside the scope of EU law.¹⁴⁷ Against this background, a group of experts proposed allowing individuals – in an Article 7 scenario – to bring EU Member States before the CJEU even in areas that fall outside the scope of EU law, such as media freedom, an area that stood at the centre of the debate *vis-à-vis* Hungary. This avenue – so the academics argued – could be grounded in EU citizenship and would open up only when an EU Member State was violating Article 2 values.¹⁴⁸

Others discussed access to justice in more general terms. To encourage more filings of fundamental rights relevant cases in areas falling in the scope of EU law, some proposed enabling more people to access courts, known as widening the forms of legal standing. FRA, for example, called for the new upcoming EU framework for data protection to relax legal standing rules to enable organisations acting in the public interest to lodge a complaint.¹⁴⁹ FRA made similar proposals in the context of EU equality law.¹⁵⁰

Finally, 2012 also saw calls for stronger civil society involvement when it comes to upholding European values. Some experts proposed complementing existing mechanisms of 'vigilance' within the EU with an intermediary dimension relying "neither on the affected individuals themselves nor on general political institutions, but instead on non-governmental bodies".¹⁵¹

Others underlined that: "[n]o judiciary can protect and uphold rights indefinitely in the absence of a healthy political culture where civil liberties and independent checks on executive power are uncontested" and therefore proposed the establishment of a European Civil Liberties Union taking inspiration from the American Civil Liberties Union and providing "a mix of grassroots activism, litigation, educational initiatives and public awareness-raising".¹⁵²

¹⁴⁴ See, for example: Pinelli, C. (2012).

¹⁴⁵ See: Müller, J.-W. (2013), p. 25. On FRA's role *vis-à-vis* upholding EU Charter rights, see: Toggenburg, G.N. (2013).

¹⁴⁶ European Parliament (2012b), para. 44.

¹⁴⁷ Antpöhler, C., Bogdandy, A.v., Dickschen, J., Hentrei, S., Kottmann, M. and Smrkolj, M. (2012), pp. 489–519.

¹⁴⁸ The "Reverse Solange doctrine", see *Ibid.*

¹⁴⁹ FRA (2012h).

¹⁵⁰ FRA (2013).

¹⁵¹ Dawson, M. and Muir, E. (2011), pp. 751–775, 766.

¹⁵² Brady, H. (2012). For the role of the civil society in the Fundamental Rights Platform, see Kjaerum, M. and Toggenburg, G.N. (2012), pp. 147–160.

Conclusion

The year 2012 saw the EU awarded the Nobel Peace Prize. The award recognised the EU's role in "the advancement of peace and reconciliation, democracy and human rights in Europe".¹⁵³ In this sense, 2012 was a moment of major pride for the project of European integration. The year, however, also witnessed major socio-economic, political and constitutional situations of crisis. The way in which these situations of crisis played out on the ground had serious implications as regards ensuring that the fundamental rights of all are fully respected and protected.

The most encompassing crisis continued to be socio-economic in nature. It led to high unemployment rates and to an increasing share of the population living in poverty or at risk of poverty. International organisations, the EU and its Member States all took measures to address the excessive debts that characterised many economies in the EU.

Some EU Member State policy responses to the economic crisis, however, had an adverse effect on the level of social protection for people in the EU. The EU is a community also of social rights, to which the Charter of Fundamental Rights of the European Union testifies most eloquently. Whereas EU Member States retain the competence to legislate in the area of social protection, the Charter arguably invites Member States, as well as the EU itself, to keep social rights – as well as fundamental rights more generally – in mind when addressing the crisis. So far, however, the impact of the Charter appears limited in this regard.

Nevertheless, EU Member States should provide clear and transparent explanations as regards the degree of social protection provided during the economic crisis, underpinned by supporting evidence, thereby building consensus and ensuring social cohesion.¹⁵⁴ Moreover, the way this socio-economic crisis is handled cannot be seen in isolation from the overall political system: social cohesion within the societies at national level, as well as the political legitimacy of the EU as a whole, have to be taken into account when addressing the crisis.¹⁵⁵

Political discourse in 2012 witnessed a variety of different elements of crisis above and beyond the economic crisis. In various EU Member States and transnationally a 'crisis jargon' evolved into potentially divisive rhetoric, especially *vis-à-vis* vulnerable economies, labelling them with a derogatory shorthand.¹⁵⁶

At national level, 2012 witnessed further social polarisation, more open manifestations of discourses tinged with extremism, and to further erosion of trust within and between European societies. Anti-immigrant positions in political discourse have the potential to violate EU anti-discrimination law; actions directed against EU migrants run the risk of infringing upon the right to free movement as laid down in the Treaties and the Charter. A decrease in trust between societies, and in governments in a more general sense, is likely to have negative repercussions for the Common Market and the common Area of Freedom, Security and Justice that are both based on mutual recognition and hence depend on sufficient levels of trust. Vigilance and due scrutiny of developments in this field are essential.

The constitutional crisis that has unfolded in some EU Member States raised the question of what sort of vigilance the EU should exercise. The EU's scope for action hinges upon whether the situation is regulated by EU secondary law or whether it forms part of the 'non-EU-influenced' areas – the "domestic life of Member States"¹⁵⁷ that nevertheless risks affecting the EU as a whole. In the former case, the EU disposes over its day-to-day machinery, including infringement procedures. In the latter case, the EU means are more limited. In this regard, the EU witnessed in 2012 challenges similar to those seen in 2000 and 2004 where the EU's 'constitutional homogeneity' was challenged by single Member States: some observers perceived Hungary and Romania as being at risk of breaching the common values laid down in Article 2 of the TEU.

The experience in 2012 showed that a platform of regular and formalised exchange, such as the CVM, is a helpful tool to address such concerns. This mechanism is only available for Bulgaria and Romania.

The fact that other EU Member States face far less scrutiny of their adherence to Article 2 values made the 'Copenhagen Dilemma' a 2012 catchphrase: European values, including the rule of law and democracy, play a key role in the accession process but appear to move off stage once countries join the EU. Without any form of regular transnational exchange on how best to respect and promote EU values, European debates on single countries appear to be crisis-driven and ad hoc in nature; these discussions therefore run the risk of failing to rely sufficiently on comparative evidence.

In the area of justice, the first EU Justice Scoreboard presented in March 2013 provides comparable information on specific aspects of justice systems across all

¹⁵³ The Nobel Peace Prize (2012); Jagland, T. (2012).

¹⁵⁴ FRA (2010), p. 26.

¹⁵⁵ Caritas Europa (2013), p. 5.

¹⁵⁶ For example: "Portugal, Ireland, Italy, Greece and Spain", by some referred to as 'PIIGS'.

¹⁵⁷ Wojciech, S. (2010).

EU Member States. Whereas this instrument is as such not meant to address the 'Copenhagen Dilemma', it can be seen as a first step in providing a comparison on the functioning of the justice systems in EU Member States at regular intervals.

To gain a fuller picture of the rule of law in the EU, including dimensions like criminal justice and others, a regular exchange of information and discussion would be needed. The aspiration of those who drafted the wording in Article 2 of the TEU may give guidance. Their ambition was a shared understanding among EU Member States of the "clear non-controversial legal basis" of Article 2 TEU and "the obligations resulting therefrom".¹⁵⁸ Such a common understanding is an aspiration that should guide the Union and its Member States alike. A regular dialogue would raise awareness about the shared European values and fine-tune both their concrete content as well as their scope in the national systems. The basis for such a dialogue is, on the one hand, an independent expert body providing objective and reliable data and analysis and, on the other hand, a solid set of indicators across the different areas listed in Article 2 of the TEU to ensure a comparative and regular assessment.¹⁵⁹

Stormy times might not be the best moment to introduce new procedures and new institutions. They are, however, an ideal moment to take founding values seriously and use them as a normative backbone to provide guidance and security. And, indeed, there is no need to reinvent the wheel: existing mechanisms and standards (see [Chapter 10](#) on 'EU Member States and international obligations') could be pooled to access and use data and analysis through an efficient 'one stop shop'. If this function is exercised by an independent body, the political EU institutions could guarantee that values enshrined in Article 2 of the TEU are addressed in a procedure that is based on evidence and applies to all EU Member States alike.

¹⁵⁸ Presidium of the European Convention (2003), p. 11.

¹⁵⁹ See in this regard, for example: The Hague Institute for Global Justice (2012); FRA (2011).



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HELPING TO MAKE FUNDAMENTAL RIGHTS A REALITY FOR EVERYONE IN THE EUROPEAN UNION

Rising unemployment rates, fiscal consolidation and austerity measures across the European Union (EU), as well as public protest and constitutional conflicts in some EU Member States, all captured headlines in 2012. The crisis that the EU has been facing over the course of the past five years transcends issues of finance. It has implications for democratic legitimacy and the rule of law, and therefore also for the respect of fundamental rights. The seriousness of the situation prompted discussions about the nature, scope and future of the EU. The crisis and its consequences called for action from institutional and policy actors at all levels of governance, civil society organisations and the general public to ensure that the EU and its Member States uphold their fundamental rights obligations.

The Focus of this FRA Annual report is not limited to the socio-economic crisis, nor does it aim to explore its origins. Instead, it looks at the different crisis situations, including the constitutional crisis that unfolded in single EU Member States. It emphasises responses taken at EU and Member State level to safeguard the values 'common' to both Member States and the EU.



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